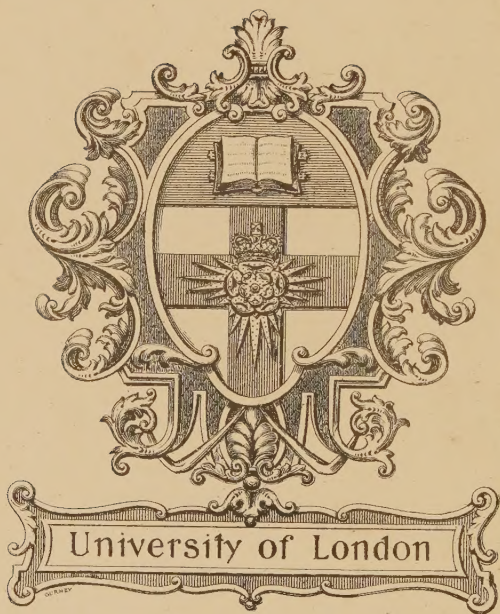
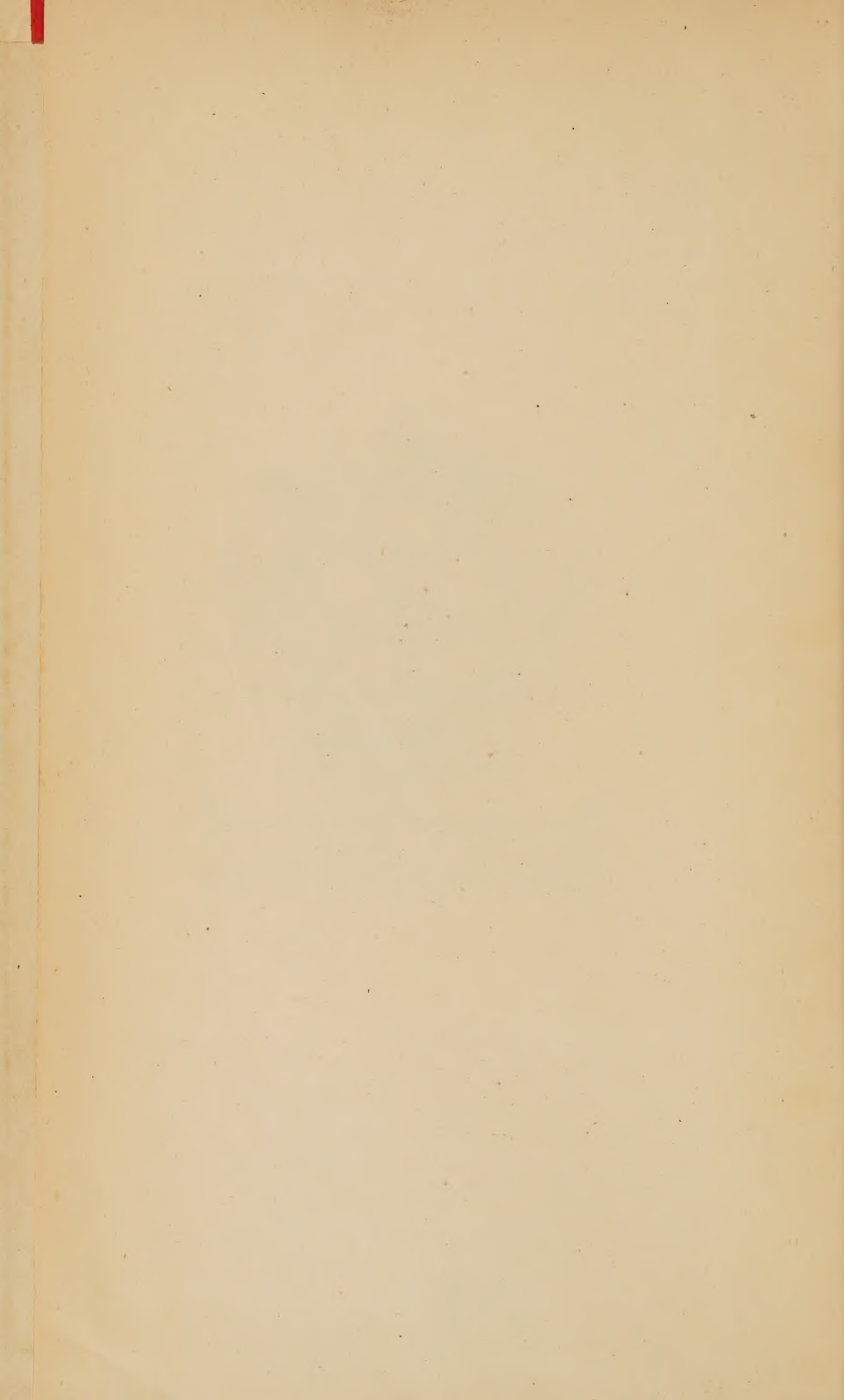


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OF CASES DECIDED IN

THE HOUSE OF LORDS.

THE PRIVY COUNCIL.

ALL DIVISIONS OF THE SUPREME COURT

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CORRIGENDA.

- p. 104. Reference to Halsbury, 1st edn. should be Vol. 23, Practice.
- p. 129. *Ellis & Fairbairn* were solicitors for the respondents and *H. G. Greenwood* for the appellants.
- p. 348. The reference in the R.P.C. to *Werner Motors, Ltd. v. Gamage (A. W.), Ltd.*, is 21 R.P.C. 621.
- p. 560. *Vezey v. Rashleigh*, [1904] Ch. D. 634 should read [1904] 1 Ch. 634.
- p. 600. *Geen v. St. Mary, Newington, Vestry*. The Digest reference should read: 41 Digest 14, 99.
- p. 710. *British United Shoe Machinery Co., Ltd. v. Fussell (A.), & Sons, Ltd.* The Digest reference is 36 Digest 628, 969.

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THE ALL ENGLAND LAW REPORTS ANNOTATED

R. v. GOVERNOR OF BRIXTON PRISON, *Ex parte* BIDWELL.

[KING'S BENCH DIVISION (Swift, Branson and MacKinnon, JJ.),
August 13, 1936.]

*Extradition—Fugitive offender—Warrant—Indorsement—By magistrate alone
—Validity—Fugitive Offenders Act, 1881 (c. 69), s. 3.*

A person, for whose arrest warrants had been issued in Canada, was arrested in England and taken before a magistrate at Bow Street Police Court to be dealt with under the Fugitive Offenders Act, 1881. The magistrate heard the application to commit the accused to be sent back to Canada and, after hearing evidence and a statement from the accused, decided to commit him. The accused applied to the Divisional Court for a writ of *habeas corpus* and obtained a rule *nisi* calling upon the Governor of Brixton Prison to show cause why a writ should not issue on the grounds: (i) that the order of committal was decided upon before hearing any statement by the accused; (ii) that the warrant should have been indorsed by a Secretary of State as well as by the magistrate as required by the Fugitive Offenders Act, 1881, s. 3; and (iii) that the evidence did not disclose a strong and probable case that the accused was guilty of the offence mentioned in the warrant. In reply to the affidavit made by the accused, an affidavit was made by the Chief Clerk at Bow Street Police Court that the magistrate did not decide to commit the accused before the accused was given an opportunity to make a statement on his own behalf:—

HELD: (i) upon a consideration of the affidavits, there was no ground for the statement that the order of committal was decided upon before hearing any statement by the accused.

(ii) upon a proper construction of the Fugitive Offenders Act, 1881, s. 3, a magistrate at Bow Street Police Court is an authority empowered to issue or indorse warrants alone under that section, and there was no need for the warrant to have been indorsed by a Secretary of State.

(iii) there was a strong and probable case that the accused was guilty, and the rule should be discharged.

[EDITORIAL NOTE. This case construes for the first time the Fugitive Offenders Act, 1881, s. 3, which requires indorsement of the warrant by certain officials and in reference to warrants indorsed in the United Kingdom speaks of "a secretary of state and one of the magistrates of the Metropolitan Police Court in Bow Street." The question for decision was, having regard to the whole section, whether, having regard to the word "and," both these officials were required to indorse the warrant or whether the indorsement of one was sufficient. The court favoured the latter view. The other points raised were not new.

AS TO INDORSEMENT OF WARRANTS UNDER THE FUGITIVE OFFENDERS ACT,

1881, see HALSBURY, Hailsham Edn., Vol. 14, p. 544, para. 1046; and FOR CASES, see DIGEST, Vol. 24, pp. 890-893, Nos. 150-161.]

Case referred to:

(1) *R. v. Vyner* (1903), 68 J.P. 142; 24 Digest 891, 153.

APPLICATION for a writ of *habeas corpus* addressed to the Governor of Brixton Prison, by Mervyn Wolford Bidwell, who had been committed to that prison by the Chief Metropolitan Magistrate with a view to his extradition to Canada. The facts are set out in the judgment of SWIFT, J.

Eustace Fulton appeared to show cause against the rule.

P. Malcolm Wright in support of the rule.

SWIFT, J.: In the year 1931 Mervyn Wolford Bidwell was accused in Toronto in Canada of unlawfully obtaining from a Miss Edna Port a number of valuable securities by false pretences with intent to defraud, and he was also accused of stealing a number of valuable securities, with the result that in 1932 warrants were issued in Canada for his arrest. He was not found there to answer the charges, but in May of 1936 he was arrested in this country. He was taken before a magistrate at Bow Street to be dealt with under the Fugitive Offenders Act of 1881. The magistrate heard the application to commit him to be sent back to Canada upon July 7 and 15. Ultimately, on July 15, having heard the evidence which was given vocally in his court, and having perused the depositions which had been brought over from Canada, and having heard a very lengthy statement from the accused person, the magistrate decided to commit him. At the same time he gave him the information or instruction which the Act of Parliament requires that he should, explaining to him that he had a right to come to this court if he questioned the magistrate's decision, to apply for a writ of *habeas corpus*. He did come to this court, and he applied through the Official Solicitor and learned counsel—both of whom are supplied to him for his assistance by this country—in order that this court might inquire before he was sent back, to ascertain that everything had been done properly and in order, and that nobody is being sent away from this country unless the law comprised in the statutes and the treaties relating to fugitive offenders demands that it should be done.

Now he came before this court and, making an affidavit, obtained the leave of the court to issue an order giving until to-day for the governor of His Majesty's prison to show cause why it should not issue on the grounds: first, that the order of committal was decided upon before hearing any statement by the accused. Now that ground was based upon a statement in his affidavit, which was before the court, in which he said:

On July 15 the learned magistrate announced his intention to commit me for

return to Canada before I was given an opportunity to make a statement on my own behalf, and before considering the statement which I, in fact, made subsequently, and, therefore, acted in contravention of the provision of the Criminal Justice Act, 1925, s. 12 (8), and of the Fugitive Offenders Act, 1881, s. 5.

The Criminal Justice Act, 1925, s. 12 (8), provides that :

The examining justices shall . . . before determining whether they will or will not commit an accused person for trial, take into consideration his statement or any such evidence as is given in pursuance of this section by him or his witnesses.

That section applies to proceedings under the Fugitive Offenders Act of 1881, and the magistrate was bound by that section to take into account any statement which he made, and any evidence which he called. He said in his affidavit that the magistrate had not done so, and, therefore, the court granted this rule. It becomes obvious now that that statement is without foundation in fact. It seemed to be highly improbable when it was uncontradicted on his affidavit, because while he was saying, "The magistrate would not listen to my statement, or did not listen to my statement," the whole of an extremely long statement made by him was taken down in the presence of the magistrate. But now the Chief Clerk of the Bow Street Police Court has made an affidavit in which he says : "The Chief Magistrate did not announce his decision to commit the accused for return to Canada before the accused was given an opportunity to make a statement on his own behalf." I cannot think on that, that there is the slightest ground for supposing that the Chief Magistrate at Bow Street Police Court did not regard the ordinary procedure of our daily practice in our courts in regard to this matter ; I cannot, and I do not believe it. In my view, there is no ground whatever for the statement that the order of committal was decided upon before hearing any statement by the accused.

Now the second ground is the highly technical one, but no less effective, if it be a valid contention, based upon the wording of the Fugitive Offenders Act, 1881, s. 3. It is contended on behalf of the applicant that the warrant should have been indorsed, not only by one of the magistrates of the Metropolitan Police Court at Bow Street, but it should also have been indorsed by the Secretary of State. That contention is based entirely, as I understand it, upon the word "and" which is to be found in the second category of the authorities who are empowered to issue or indorse warrants. The section runs :

Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be ; (that is to say), (1) A judge of a superior court in such part ; and (2) In the United Kingdom a secretary of state and one of the magistrates

of the Metropolitan Police Court in Bow Street ; and (3) In a British possession the governor of that possession.

In order to support the contention of the applicant, Mr. Wright has been forced to contend that in the United Kingdom the secretary of state and a magistrate of the Metropolitan Police Court are neither of them an authority of themselves, but that the two of them have got to be combined in order to make an authority within the meaning of this section. I do not agree with that contention. It seems to me that what is meant by this section is that the authorities, any of whom may indorse the warrant, are a judge in any part in which the accused may be, or may be going to, and in the United Kingdom a secretary of state and one of the magistrates, and in a British possession the governor of the possession ; this is a list of the authorities, and a magistrate is as much an authority for the purposes of this section as a judge or a governor of a possession or a secretary of state in the United Kingdom. I think the contention which is based upon the second ground in this case fails.

Then finally it is said : Before there can be a committal under sect. 5 the magistrate must find that the evidence which is given raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, but here the evidence did not disclose a strong or probable case that the accused was guilty. The language of sect. 5 was not new in 1881 ; it was the same language under which our courts had been accustomed to act, when they had committed persons for trial, for many years ; at any rate since the Indictable Offences Act, 1848, s. 25. What it means, I think, is that there must be such evidence that, if uncontradicted at the trial, a reasonable minded jury could convict upon it. If it is contradicted at the trial and the jury believes the contradiction, then, of course, they will not convict. The magistrate is not trying the case ; he is only determining whether there is such a case that a man ought to be sent to take his trial before a jury, or some other tribunal, in the place where the allegations are made against him. Whether or no there is in a particular case a strong or probable case that the accused was guilty must be a question for the magistrate ; but it has been sought to be argued in this court before to-day, and again to-day, that it is for this court to decide whether or no there is such a strong or probable case. Now in the case of *R. v. Vyner* (1), LORD ALVERSTONE, L.C.J., said, at p. 143 :

For the purpose of this case I am going to assume that this court can consider whether there was in the evidence before the magistrate such a strong or probable presumption. The question may arise on some future occasion as to whether this court has such a power to review the exercise of the magistrate's discretion. Speaking for myself, I think the court has such a power, though it is not now necessary to decide the point, as assuming that the court has such a power, after

the most careful consideration of all the facts in this case, I am of opinion that there is a grave case to be answered by Lieutenant Vyner.

KENNEDY, J., said :

I also think the question as to the power of the court to try whether there was or was not a strong or probable presumption of the prisoner having committed the offence, should be left open.

I do not want to say anything to-day which may lead anybody to suppose that this court to-day solves the problem which LORD ALVERSTONE, L.C.J., and KENNEDY, J., in that case left open. I agree with LORD ALVERSTONE, L.C.J., in that I think it is open to this court. I have been much impressed by the very excellent argument, if I may say so, of Mr. Wright to that effect, but, in my opinion, it is not necessary to decide that to-day because here, as in *Vyner's* case (1) there is, in my view, a very grave case for Mr. Bidwell to answer. There is a strong and probable case that the accused was guilty. He is not being tried here, neither by the magistrate nor by us. When he gets back to Canada he may be able to satisfy the tribunal which has to deal with his case that he is perfectly innocent of the charges which are made against him, and that there is no foundation for them. That I do not know, but on the material before us it seems to me the magistrate was perfectly right in the conclusion to which he came, and I think that this rule should be discharged.

BRANSON, J. : I agree, and I have nothing to add.

MACKINNON, J. : I agree.

Solicitors : *The Director of Public Prosecutions* (for the Crown) ;
The Official Solicitor (for the accused).

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

HOLLAND v. GERMAN PROPERTY ADMINISTRATOR.

[CHANCERY DIVISION (Clauson, J.), June 26, 29, July 9, 1936.]

Choses in Action—Assignment—Statutory order to pay—Notice—Treaty of Peace Order, 1919 (S.R. & O. 1919, No. 1517 (as amended)), s. 1 (17).

Subject to a life interest for B., trustees held part of a trust fund in trust for D. for life with remainder to her children. D., an Englishwoman married to an Englishman, at all material times lived with her family in Germany. B. died in 1917 and thereafter there was no communication between D. and her relatives in England, some of whom were the trustees, until 1927, when the trustees were informed that D. and her family had adopted German nationality during the war. D.'s income from the trust fund had been paid regularly since the end of the war into a bank in England at which D. kept an account, and continued to be so paid until D. died in 1934. The fact of D.'s German nationality was then communicated to the Administrator of German Property, who claimed against the trustees the amount of the income received by D. from 1927, when the trustees first heard of D.'s change of nationality, to Aug. 31, 1929, when all German-owned property which had been under the control of the administrator was released. Other claims had been made, but were abandoned during the hearing. The administrator claimed that the Treaty of Peace Order, 1919 (as amended), s. 1 (17) (ccc) and (e), effected a statutory assignment to the administrator of D.'s life interest, that after 1927 it became the duty of the trustees to pay the income thereafter accruing to the administrator, and that in paying such income to D., the trustees committed a breach of trust and that they were accordingly accountable to the administrator as the rightful beneficiary for the income thus wrongly paid to D. The trustees, in addition to denying that there was a statutory assignment, pleaded that they acted honestly and reasonably within the Trustee Act, 1925, s. 61, and ought fairly to be excused:—

HELD: (i) the Treaty of Peace Order, 1919, as amended, did not effect a statutory assignment of D.'s life interest.

(ii) if there were such a statutory assignment, the trustees ought, in the circumstances of the case and notwithstanding that they ought to have known the illegality of paying income to a German national, fairly to be excused for their breach of trust.

[EDITORIAL NOTE.] An attempt is here made to create an equitable assignment out of the provisions of an order in council. Even if there was no real difficulty in showing an order to pay the suggested assignee, *i.e.*, the Custodian of Enemy Property; it was clear that there was no evidence that he had ever given any notice to the persons who had to make the payment. It was sought to show that a clause in an order requiring a person having a suspicion that a payee was an enemy person to report to the custodian was equivalent to notice to the person making the payment. This argument was not accepted by the court, and it was therefore held that there was no assignment.

AS TO ESSENTIAL OF ASSIGNMENTS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 440-444, paras. 810, 811; and FOR CASES, see DIGEST, Vol. 8, pp. 466-468, Nos. 371-392.]

Cases referred to:

- (1) *German Property Administrator v. Knoop*, [1933] Ch. 439; Digest Supp.
- (2) *Re Schiff, Henderson v. Schiff*, [1921] 1 Ch. 149; 44 Digest 453, 2751.
- (3) *Josef Inwald Act. v. Pfeiffer* (1928), 44 T.L.R. 352; Digest Supp.

(4) *Re Kay, Mosley v. Kay*, [1897] 2 Ch. 518; 43 Digest 994, 4353.

(5) *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1; 43 Digest 996, 4370.

ACTION for a declaration (a) that certain claims made by the Administrator of German Property against the trustees of a will were unfounded, (b) in the alternative that if they were valid claims, then the trustees ought to be granted relief under Trustee Act, 1925, s. 61.

The facts may be summarised thus: A lady entitled to a life interest was, during the war and until her death in 1934, living in Germany and had during the war adopted German nationality in order to avoid internment. This did not come to the knowledge of the trustees until 1927, when these facts were made known to one trustee and communicated to one other trustee. Payments, however, continued to be made to the life tenant in Germany. The administrator, upon learning these facts, claimed the sums paid to the life tenant upon the footing that the Treaty of Peace Order, 1919, effected a statutory assignment of the income payable to the life tenant to the Custodian of Enemy Property. The trustees denied the claim and further contended that they ought fairly to be excused for the imputed breach of trust.

Gavin Simonds, K.C., and *J. W. Scobell Armstrong* for the plaintiffs.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *J. H. Stamp* for the administrator.

CLAUSON, J.: At the outbreak of the war the trustees of Mr. John Blacker, who had died in the year 1896, held a very considerable fund representing the residuary estate in trust for his widow, Mrs. Blacker, who was living in Paris, for life. Subject to the widow's life interest, one fourth of the fund was settled upon one of the four children of the marriage, Mrs. Devaux, for her life, with remainder to her children. Mrs. Devaux was an Englishwoman married to an Englishman. For financial and educational reasons Mr. and Mrs. Devaux had lived in Germany for many years, but they had not lost their British nationality. One of their sons wished to be a soldier. Financial considerations had, so it is suggested, prevented his joining the English army, and he had, about the year 1902, become an officer in the German army, and was understood in the family to have adopted German nationality on doing so. The trustees of Mr. Blacker's will, at the outbreak of war, were Mrs. Holland, another daughter, and accordingly a sister of Mrs. Devaux, and two gentlemen, one of whom died in 1915, while the other retired from the trust in 1919.

Anticipating matters for the moment, it is convenient to mention here that on Feb. 20, 1919, Mrs. Holland's son, Kenneth Holland, and her brother-in-law, Percy Holland, were appointed to be trustees of the will with Mrs. Holland, and those three are now the trustees of the will. During the early part of the war, Mrs. Blacker, from Paris, seems to have

been in communication in some way with Mrs. Devaux. But Mrs. Blacker died in 1917, and from that time for the rest of the duration of the war there seems to have been no communication between Mrs. Devaux and her relatives in England or France. Three days before the armistice Mrs. Holland's youngest son was killed. While the war continued Mrs. Holland was in France doing war work. Mr. Kenneth Holland, though appointed a trustee in Feb., 1919, was not in fact demobilised until July, 1919. The affairs of the trust were in fact conducted by a well known firm of London solicitors. The details of the administration are not now entirely ascertainable, in view of the deaths of the gentlemen who in fact conducted the business. It appears, however, that returns were made under the Trading with the Enemy Acts in regard to the income which, in the circumstances, belonged, after Mrs. Blacker's death, to Mrs. Devaux, who was resident in enemy territory. A time came, after the armistice, when, after obtaining information from the Treasury that a licence was no longer required for remittances to British subjects abroad, the trustees made remittances to Mrs. Devaux in Germany, she being, it would seem, in dire need. In Feb., 1919, the trust had, as I have already stated, been reconstituted by the appointment of new trustees, and in due course arrangements were made under which Mrs. Devaux's income from the trust funds was paid into a bank in London at which she kept an account, and in this way the income continued to be paid to her down to her death, which did not occur until Apr. 19, 1934.

In view of the facts that I have stated as to the service of one of Mrs. Devaux's sons in the German army, and the death in the war of Mrs. Holland's son, it is not surprising that there seems to have been practically no communication between the sisters until 1927. In 1927, Mrs. Devaux came to England, and the sisters met. Mrs. Holland heard about this time some talk about the Devaux family having all become Germans. She felt a natural repugnance to talking about the matter to her sister; but Mr. Kenneth Holland had a conversation with his aunt from which he gathered that during the war, in order to escape internment, Mr. and Mrs. Devaux and their children had adopted German nationality.

As I have already stated, Mrs. Devaux died on Apr. 19, 1934, and it then became necessary to distribute her one fourth share between her children. The trustees' solicitors took the matter in hand and ascertained from the trustees that the Devaux children were German and were also told that Mrs. Devaux had become German. In due course the solicitors communicated these facts to the Administrator of German Property.

Until the death of Mrs. Devaux, Mr. Percy Holland did not know the facts as to Mrs. Devaux's nationality. Mrs. Holland and Mr. Kenneth

Holland had ascertained these facts, as I have stated, for the first time in 1927. I have seen them in the witness box, and I am quite satisfied that until after the death of Mrs. Devaux it never occurred to either of them that the fact that Mrs. Devaux had become German in any way affected her right to the income which had been and was being paid to her bank under the arrangement made when the war came to an end. Counsel for the Administrator of German Property, as I understood it, accepted this view of the facts.

The Administrator of German Property, having thus ascertained the facts as to Mrs. Devaux's change of nationality, put forward in Dec., 1934, a claim against the three trustees of the will personally to pay over again to him the whole of the income, namely, £4,863 0s. 11d. received by Mrs. Devaux between the date of the peace and Aug. 31, 1929, and also to pay a fee of 2 per cent. on the income received by Mrs. Devaux between Sept. 1, 1929, and the date of her death.

Now, in order to explain the significance of the distinction between income to Aug. 31, 1929, and subsequent income, I must state that under an agreement with the German Government operating as from Sept. 1, 1929, the British Government have undertaken to release all German-owned property which, under the Peace Treaty and the consequent legislation, was placed under the control of the Administrator of German Property. It has been held in this court that no German national can base any claim against the administrator on the terms of the agreement (see *Administrator of German Property v. Knoop* (1)), and no argument was founded on that agreement in the present action. However, when the evidence was concluded it was explained to me that even this £4,863 is not now claimed by the administrator. All that he now claims is the amount of the income paid to Mrs. Devaux from Apr., 1927 (when Mrs. Holland and Mr. Kenneth Holland first knew of Mrs. Devaux's German nationality) to Aug. 31, 1929, and a fee of 2 per cent. on income paid to her as from Sept. 1, 1929, to her death in 1934. Further, this claim is now made only against Mrs. Holland and Mr. Kenneth Holland. The claim against Mr. Percy Holland was abandoned at the bar.

On behalf of the administrator the claim is put thus. It is said that the operation of the Treaty of Peace Order, 1919, with various amendments, in and after the year 1920, is to effect a statutory assignment to the administrator of the life interest of Mrs. Devaux, she being at the date of the peace a German subject; that on ascertaining in Apr., 1927, the fact that Mrs. Devaux was a German subject, it became the duty of Mrs. Holland and Mr. Kenneth Holland to pay the income thereafter accruing to the administrator and not to Mrs. Devaux, and that in paying such income (as they in fact did) to Mrs. Devaux, they committed a breach of trust, and they are accordingly accountable to the administrator as the rightful beneficiary for the income thus wrongly paid to

Mrs. Devaux. The administrator recognises that as from Sept. 1, 1929 (when the agreement came to with the German Government, which I have already mentioned, is to be treated as operative), the imputed breach of trust has operated to deprive him only of the 2 per cent. release fee on the income, and accordingly in regard to income from Sept. 1, 1929, to Mrs. Devaux's death he confines his claim to the release fee of 2 per cent.

To this Mrs. Holland and Mr. Kenneth Holland reply, first, that there is, in the true construction of the Peace Order, no such statutory assignment, and that whatever liability, whether to a penalty or to some other criminal or *quasi*-criminal proceeding, they may have incurred by failure to communicate to the administrator a fact, namely, Mrs. Devaux's nationality, which they ascertained in Apr., 1927, but of which they did not appreciate the significance until 1934, there is nothing in the Peace Order which entitles the administrator to treat them as trustees of the income for him and make them accountable to him for it. Further, they say that if there is such a statutory assignment as is suggested, and there is accordingly the relation of trustee and *cestui que trust* between them and the administrator, and there has been a breach of trust, they ought not to be held accountable to him, as they (within the terms of the Trustee Act, 1925, s. 61) acted honestly and reasonably and ought fairly to be excused for the breach of trust.

The first point to be observed on the Treaty of Peace Order is that it cannot now be successfully argued in this court that it creates any charge on the property of a German in favour of the administrator in the sense in which the word "charge" is used in English law. This appears quite clearly from the decision of MAUGHAM, J., in the case of *Administrator of German Property v. Knoop* (1), following the judgment of RUSSELL, J., in *Re Schiff* (2), and the opinion of LORD SUMNER in a case (3) in the House of Lords mentioned by MAUGHAM, J., in his judgment in *Knoop's* case (1).

It was, however, argued that the order operated as a statutory assignment, to the administrator, of Mrs. Devaux's life interest. There is, of course, a well known method of effecting a statutory assignment of property exemplified in the Bankruptcy Act, 1914, s. 53, where the legislature produces this result by declaring that the property of the bankrupt is to vest in the trustee in bankruptcy. The Treaty of Peace Order itself by sect. 1 (17) (d) provides by reference to a section in the Trading with the Enemy Amendment Act, 1916, for a statutory assignment operating by virtue of an order of the Board of Trade. There was not in this case (and in the circumstances there could not very well be) a statutory assignment under the clause to which I have just referred.

I was told, however, that I ought to find such a statutory assignment

in sec. 1 (17) of the order by reading together clauses (ccc) and (e). The argument as put to me by counsel for the administrator was this. It was suggested that under clause (ccc) the right to sue for the income passed from Mrs. Devaux to the administrator, but it was admitted that this of itself would not affect the trustees. The effect would be just as if there had been an assignment behind the trustees' backs and without notice to them. I was then referred to clause (e), and it was argued that on the true construction of clause (e) it is enacted that if the trustee has reason to suspect the foreign nationality of his *cestui que trust*, he is thereupon affected with notice of the statutory assignment and thereafter makes any payment to the original *cestui que trust* at his peril.

A careful consideration of the original order of 1919, and of the amendments made in 1920, seems to me to negative this ingenious argument. As the order was originally made in 1919, subsect. (17) consisted of clauses (a), (b), (c), (d) and (e) only. On the order as it then stood the theory that subsect. (17) effected a statutory assignment seems to me to be quite unsustainable. Clause (a) makes it a statutory offence, punishable as there stated, to part with or otherwise deal in the enemy property. No one has argued, or can, I should think, argue that this can operate to effect a statutory assignment. Clause (b) provides for certain returns; clause (c) deals with making good title to certain securities on sale; clause (d) enables a vesting order to be made by the Board of Trade; clause (e) requires any person who suspects the *cestui que trust's* nationality to obtain the custodian's directions. It seems quite plain that no statutory assignment is contemplated at all, except in so far as it is operated by a vesting order made by the Board of Trade. Clause (ccc) was added in 1920, and in the context, read with clause (cccc), which was added at the same time, its purpose is plain. There is no question of any statutory assignment. The meaning of the words "it shall become payable to the custodian" becomes in the context clear. A trustee is to be free to pay the custodian and not the *cestui que trust*, and if he does he is to get from the custodian a receipt which will be good against the *cestui que trust*. If the custodian asks the trustee for payment and the trustee refuses, the custodian is to have the same right of suing the trustee as if he were the creditor. It seems to follow that he cannot claim against the trustee anything that the creditor cannot claim.

Now, when this action commenced Mrs. Devaux had in fact been paid all that she was entitled to and could not claim a penny more. When one realises that clause (e) existed in the order before clauses (ccc) and (cccc) were inserted, it seems to me quite impossible to adopt the view that clause (ccc) operated as a statutory assignment which was to become binding on the trustee when he had such "reason to suspect" as made

it his duty under the old clause (e) to report to the custodian. I ought to add that the administrator is now admittedly in the position in which the custodian stood under the order.

I need not pause to consider the very serious practical consequences in the way of destruction to business which would have ensued if the course had been taken of vesting all property by way of statutory assignment in the custodian. On the wording of the Peace Order I find it impossible, as I have said, to hold that any statutory assignment was effected by the order.

I will, however, assume that I am wrong, and that I must treat the administrator as a statutory assignee of Mrs. Devaux. It was admitted by counsel for the administrator that Mrs. Holland and Mr. Kenneth Holland acted honestly, but it was said that they had not acted reasonably, and ought not fairly to be excused for the imputed breach of trust. It was argued that *ignorantia legis non excusat*, and that in Apr., 1927, when they ascertained Mrs. Devaux's nationality, they ought to have known the illegality of paying income to a German national. In view of the decisions in *Re Kay* (4) and *Re Allsop* (5), I am not prepared to hold that in applying sect. 61 the eyes of the court are to be bandaged by the application of the maxim as to *ignorantia legis*. Those cases seem to me to justify me in holding the contrary. I am satisfied on the evidence that in Apr., 1927, and until Mrs. Devaux's death, Mrs. Holland and Mr. Kenneth Holland were in fact entirely ignorant of the law on the subject. I am not prepared to hold that in Apr., 1927, seven years after the Treaty of Peace, and eight-and-a-half years after the armistice, this lady and gentleman were unreasonable in failing to appreciate that the acquisition of German nationality some years before by the sister of the one, and the aunt of the other, had operated (if, indeed, it had operated) to make it wrong for them, as from the time when they discovered the facts, to continue to pay her income over to her. In my view, Mrs. Holland and Mr. Kenneth Holland acted honestly and reasonably, and their breach of trust (if any) ought fairly to be excused.

The administrator's counterclaim to make the plaintiffs responsible for income paid to Mrs. Devaux to Sept. 1, 1929, and for the percentage fee of subsequent income, accordingly fails and must be dismissed with costs.

The action was started by the three trustees for a declaration that the claims which the administrator was then making against all three of them were unfounded, and in particular, a claim which he was then making, and which was at the bar admitted to have been made without any justification, to hold the shares of Mrs. Devaux's children, notwithstanding the agreement with the German government, as a lever to enforce his claim against the plaintiffs.

In view of the counterclaim the only question which remains in the

action is the question of costs. It was admitted at the bar that the total claim originally made against the plaintiffs was unsustainable, and even if I had found that so much of the administrator's claim as remained was sustainable, I should nevertheless have ordered him to pay the plaintiffs' costs of the action, as the action was necessitated by the administrator's unjustified claim, to which I have already referred.

As it is, the plaintiffs will, in the action, recover their costs of the action without any further relief by way of declaration or otherwise. The counterclaim will be dismissed with costs.

Solicitors : *Johnson, Jecks & Colclough* (for the plaintiffs) ; *Solicitor to the Clearing Office* (for the Administrator of German Property).

[*Reported by* W. K. SCRIVENER, Esq., *Barrister-at-Law.*]

IN THE ESTATE OF HOLLAND.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **August 26, 1936.**]

Executors and Administrators—Probate—Will—Appointment of executors—Four general executors and one literary executor—Number to whom grant may issue—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 160 (1).

A testator by his will appointed four persons as executors and trustees of his will, and after certain bequests appointed a fifth person literary executor in respect of certain papers. The usual executors' oath was sworn by the four general executors for the purpose of a grant to them of the estate save and except the papers in respect of which the fifth person was appointed literary executor. The oath was refused by the Registry on the ground that by reason of the Judicature Act, 1925, s. 160, one of the five executors must renounce. The executors applied to the court asking that the oath tendered by them might be received :—

HELD : as the oath asked in effect for grants to five executors it contravened the Judicature Act, 1925, s. 160, and ought not to be received.

[EDITORIAL NOTE.] This case turns upon the meaning to be given to the word "property" in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 160 (1), and the opposing contentions are that it means (i) the particular property of which probate or administration is granted to any particular personal representatives or (ii) the whole estate of the deceased. If the first contention were correct one could have more than four personal representatives altogether, though not more than four in respect of any one particular property. Under the second contention, which has here been upheld and approved, it is impossible in any event to have more than four personal representatives in respect of the deceased's estate.

As to NUMBER OF EXECUTORS, see HALSBURY, Hailsham Edn., Vol. 14, p. 167, para. 254 ; and FOR THE JUDICATURE ACT, 1925, s. 160 (1), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 371.]

EX PARTE APPLICATION to the Vacation Court for removal of queries raised on executor's oath. The Hon. Lionel Raleigh Holland, who died

on May 25, 1936, by his will dated Apr. 27, 1936, appointed four persons as executors and trustees of his will, and, following a special bequest to his cousin, Francis Caldwell Holland, of "all my letters and papers of every description (with the exception of the Macaulay papers)," appointed him "my literary executor. Advising him to destroy my private papers and letters without troubling to examine them with any care, but bequeathing them to him to deal with absolutely at his discretion."

The usual executor's oath was sworn by the four general executors appointed by the will for the purpose of a grant to them of the estate save and except the papers in respect of which Francis Caldwell Holland was appointed literary executor. The oath was refused in the Registry on the ground that by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 160, one of the five executors must renounce, subject possibly to power being reserved to apply in the event of a vacancy arising, under Probate Rules (Non-Contentious), r. 114. The application was made *ex parte* and came before the vacation judge as one of urgency by reason of certain matters to be done in connection with the estate which should not be delayed any longer. Interest was being paid on loans and there were a number of legatees waiting to receive their legacies.

Sir Gerald Hurst, K.C. (*William Latey* with him), for the executors : The late Mr. Holland owned some valuable literary documents, known as the Holland manuscripts. By his will four executors of the general estate were appointed and Mr. F. C. Holland, a cousin of the testator, was appointed literary executor, and the Holland manuscripts were bequeathed to him. When the executors tendered the usual oath the Probate Registry refused to accept it on the ground that the total number of executors was five. It is quite clear that down to 1926 a testator might appoint more than four executors for general or limited purposes. There was no limit save that prescribed by reason, and all the executors named could take a grant or limited grants according to the powers given them in the will. By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 160 (1), it is provided that probate shall not be granted to more than four persons in respect of the same property. The registrar has taken the view that that section makes it illegal for probate to be granted to four general executors and one literary executor, but that was the wrong construction of the section. What the section means is that there cannot be more than four executors of any one piece of property. It does not mean that there may not be more than four executors in respect of the whole estate, for it is clear that different executors may be appointed of different parts of an estate. See HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 14, p. 163, para. 247. Sect. 103 of the Act saves former procedure which is not inconsistent with the Act. If the statute had been intended rigidly to limit a grant

of probate to no more than four executors under a will, the words used in sect. 160 would not have been in "respect of the same property," but "in respect of the same estate." I therefore ask your Lordship to direct that the oath of the four executors be accepted without any of the five executors being called upon to renounce.

BUCKNILL, J. : In my view the registrar was right in his interpretation of the section, and an oath asking in effect for grants to five executors contravenes sect. 160.

Application refused.

Solicitors : *Preston, Lane-Claypon & O'Kelly.*

[*Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.*]

HUGH CRAWFORD MAGEE, a Lunatic by MAUDE LOUISE MAGEE, his Committee *v.* CHARLES W. MAGEE
AND OTHERS.

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Sir Lyman Poore Duff, Sir Michael Myers), **July 7, 27, 1936.**]

Privy Council—British Columbia—Will—Construction—Discretion to make payment to such children as "shall appear to be most in need"—Discretionary power to divide the corpus—Time when such power may be exercised—Construction against intestacy.

Testator, by his will, devised his residuary real estate to his executors upon trust to pay the income subject to a life interest in part for the testator's widow: "To such of my children from time to time as to my executors shall appear to be most in need the payments to be at the absolute discretion of my executors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit." The wife and eleven children survived the testator, and the wife and four children died subsequently. One of the children applied to have various questions of construction arising under the will determined by the court, and in particular the question whether the trustees were not bound to make an immediate division and distribution of the corpus of the estate :—

HELD : (i) the trustees were at liberty to distribute the estate among the children living at the time of such distribution, but only if and when it should appear to them that none of the children were in need of assistance, and all were unembarrassed financially.

(ii) until the time for such distribution should have arrived the trustees should pay the income from the estate from time to time to such of the children of the testator as to them appeared most in need.

[**EDITORIAL NOTE.** Uncertainty to be fatal to the provisions of a will must be such as to make the provision or provisions incapable of any clear or definite meaning. Where matters are vested in the discretion of trustees there will be uncertainty, but such uncertainty is not fatal to the will. Thus the time of distribution and shares in which distribution shall be made are here vested wholly in the

discretion of the trustees; but it is held that this is not such uncertainty as will make the will void in this respect. An indefinite gift of income, too, has often been construed as a gift of the corpus, but that doctrine does not apply when the trustees have a discretion to pay all the income to children in such shares as they may determine and to pay to the children whose circumstances show the most need for it. The will here is perhaps unusual, but it is in a form which meets the wishes of many testators and which practitioners would have hesitated to use as being likely to be defeated on the above grounds.

FOR THE POINTS OF CONSTRUCTION HERE DISCUSSED, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 678, 679, paras. 1293, 1294, and pp. 697, 698, para. 1315; and FOR CASES, see DIGEST, Vol. 44, pp. 609-613, Nos. 4366-4400; and pp. 664-669, Nos. 5037-5094.]

Cases referred to:

- (1) *Grimond v. Grimond*, [1905] A.C. 124; 8 Digest 296, 734.
- (2) *Re Hughes, Hughes v. Footner*, [1921] 2 Ch. 208; 44 Digest 785, 6421.
- (3) *Re Weekes' Settlement*, [1897] 1 Ch. 289; 44 Digest 530, 3468.
- (4) *Mitchell's Trustees v. Fraser*, [1915] S.C. 350; 8 Digest 329, case m.

APPEAL by Hugh Crawford Magee, by his Committee Maude Louise Magee, from a majority judgment of the Court of Appeal of British Columbia (ARCHER MARTIN, M. A. MACDONALD and MCQUARRIE, JJ.A., MACDONALD, C.J.A., dissenting in part, and MCPHILLIPS, J.A., dissenting), dated Jan. 8, 1935, reversing a judgment of FISHER, J., of the Supreme Court of British Columbia dated Aug. 22, 1934.

The facts of the case, relevant to the appeal appear in the judgment of their Lordships delivered by LORD RUSSELL OF KILLOWEN.

C. R. R. Romer and *Hon. Charles Russell* for the appellant referred to: *Grimond v. Grimond* (1), *Re Hughes, Hughes v. Footner* (2), *Re Weekes' Settlement* (3), *Mitchell's Trustees v. Fraser* (4)

J. W. de B. Farris, K.C., and *Wilfrid Barton*, for the respondents other than Alfred Bull and Reginald H. Tupper.

Theobald Mathew for the respondents, Alfred Bull and Reginald H. Tupper.

LORD RUSSELL OF KILLOWEN: This is an appeal from a judgment of the Court of Appeal of British Columbia which declared the true intent and meaning of the will of one Hugh Magee, who died on Mar. 9, 1909. The testator devised certain lands and bequeathed all his personal property to his wife. No question arises in regard thereto. It is only in relation to his residuary real estate that controversy has arisen. This he devised to trustees upon trusts declared in the following words:

Upon trust to retain manage lease sell or otherwise dispose of the whole or any part thereof as to them may seem fit with the discretion of absolute owners and after paying my funeral and testamentary expenses and debts to invest the proceeds of the said monies of my real estate in or upon any public stocks funds shares or securities of whatsoever nature or kind as to them may seem fit.

Upon trust to pay the income of the trust premises first thereout discharging all liabilities in respect to my estate as follows: One-half thereof to my wife during

her life in manner hereinafter described and the rest as follows :—To such of my children including the said George E. Magee from time to time as to my executors shall appear to be most in need the payments to be at the absolute discretion of my executors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit my desire being that as far as possible the division shall be made so as to give the larger shares to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion hereby vested in my trustees. The money hereinbefore directed to be paid to my wife shall be paid by my executors only and when they are satisfied the money is required for her maintenance and support and I give them absolute discretion as to the times when payments shall be made and these payments may be made direct to her or to the others for her support or for necessities of life supplied or to be supplied to her as to my trustees shall seem fit.

The testator was survived by his wife and eleven children of whom one, George E. Magee, died on Aug. 8, 1912. The widow died on Sept. 7, 1927. Since her death three of the testator's children have died, viz., Eliza Jane Carson, Walter E. Magee and James D. Magee. At the date of the testator's will his eldest child was aged 51 years and his youngest child was aged 22 years.

After the death of the testator's widow the trustees of the will acted on the view that the income from the estate should be kept available for distribution amongst the children of the testator, until the time arrived when none of them was in need of assistance and all were unembarrassed financially; and that meanwhile the corpus of the estate should not be divided. In accordance with this view, and since it has not at any time appeared to the trustees that none of the children was in need of assistance or that all were unembarrassed financially, the corpus of the estate has not been divided, but the income has been divided, among such of the children as appeared to the trustees most in need, and in such amounts as the trustees in their discretion thought proper.

By an originating summons issued on Oct. 13, 1933, one of the children applied to have various questions of construction arising under the will determined by the court, and in particular the question whether the trustees were not bound to make an immediate division and distribution of the corpus of the estate. By an order dated Aug. 22, 1934, FISHER, J., ordered and adjudged that the children of the testator who survived the widow were entitled share and share alike to the distribution of the estate remaining undistributed, except such income as had accrued up to the date of the judgment, which income was distributable in accordance with the discretion of the trustees pursuant to the will; and he further ordered the estate to be distributed in equal shares among the children who survived the widow and were still living, and the legal personal representatives of those children who survived the widow but

had since died. On appeal, this order was set aside, and by order dated Jan. 8, 1935, the Court of Appeal of British Columbia declared the true intent and meaning of the will to be as follows :

(1) The trustees of the estate of the said Hugh Magee may distribute the said estate among the children of the said Hugh Magee living at the time of such distribution, but only if and when it appears to the said trustees that none of the said children are in need of assistance, but all are unembarrassed financially.

(2) That until the time for such distribution shall have arrived the said trustees shall pay the income from the said estate from time to time to such of the children of the said Hugh Magee as to the said trustees shall appear most in need.

It was contended on behalf of the appellant, on appeal to His Majesty in Council, that the power to pay the income to such of the children as should appear most in need came to an end with the death of the widow ; that the will contained an implied gift or trust of the residuary real estate to or for such of the children as survived the widow ; that the power conferred on the trustees to divide the corpus among those children was merely a power to determine the proportions in which those children should take ; that this power was void owing to the uncertainty of the event or events upon which its existence depended ; and that accordingly the implied gift or trust took effect in favour of those children in equal shares freed from any power in the trustees to determine proportions. It was also contended that the power had ceased to be exerciseable on the death of any child who had survived the widow, with the same consequence, viz., that the implied gift or trust took effect freed from any exercise of the power. In their Lordships' opinion none of these contentions can succeed. The decision of the Court of Appeal appears to them to be plainly right. Read according to their literal and natural meaning, the words used by the testator seem free from ambiguity. He has declared trusts of the income of his residuary real estate which continue operative during the lives of his children unless and until the event happens which brings the power into existence, and the trustees in fact exercise the power. While the widow was alive part of the income (not exceeding one half) was payable to her or for her benefit ; but since her death the whole income is available for such of the children from time to time as to the trustees shall appear most in need. The only express disposition of corpus is such disposition as will result from the exercise (if any) by the trustees of their power of dividing the estate, and their Lordships find themselves unable on the language of this will to imply any other gift or trust of corpus. Neither can they say that any uncertainty exists in relation to the event or events which give rise to the power. The trustees have experienced no difficulty during the widow's survivorship (a period of over 18 years) and down to the present time in estimating the varying needs of the different children, and their Lordships see no reason to suppose that they will

experience any difficulty in appreciating the fact, if it ever comes about, that no child is in need of assistance with the resulting corollary that all are unembarrassed financially.

Nor can their Lordships accept the view that the power of dividing corpus ceased on the death of George E. Magee. In their opinion it is a power which the trustees can exercise if at any time after the widow's death it appears to them that none of the children then living are in need of assistance but are all financially unembarrassed.

As M. A. MACDONALD, J.A., in his careful and lucid judgment points out the power to divide corpus may never become exerciseable, or (even if it becomes exerciseable) may never be exercised, with the result that intestacy may ensue. But though a court may of two possible constructions prefer that one which avoids an intestacy, there is here no room for such a consideration in view of the clear language used by the testator ; nor indeed would such an ultimate disposition of the testator's property appear in this case to be of necessity unreasonable.

Their Lordships are of opinion that the order of the Court of Appeal of British Columbia was right and that this appeal should be dismissed. They will humbly advise His Majesty accordingly. They think, however, that it is a proper case in which they should order that the costs of all parties of this appeal should be taxed as between solicitor and client and paid out of the testator's residuary estate.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the testator's residuary estate.

Solicitors : *White & Wasbrough* (for the appellant) ; *Gard, Lyell & Co.*, *White & Wasbrough, Chas. Russell & Co.* (for the respondents).

[*Reported by T. A. DILLON, ESQ., Barrister-at-Law.*]

LAMBERT v. LAMBERT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), July 23, 1936.]

Divorce—Maintenance—Order by consent—Term barring liberty to apply to vary—Change of circumstances—Petition for reduction of maintenance—Whether petition will lie.

A husband and wife, after divorce, carried in an order by consent to resolve the questions between them upon a petition for permanent maintenance. The consent order provided *inter alia* : "Neither party to be at liberty to apply to vary the terms of this order as to maintenance." In view of a change in the wife's circumstances, the husband petitioned for a reduction of maintenance. The wife objected that no such petition lay in view of the provisions of the consent order. A summons was taken out to determine whether the petition could lie :—

HELD : inasmuch as the consent order was based upon an agreement fully and freely entered into by the parties with the intention of putting an end to any further controversy upon the subject of maintenance, the petition ought not to lie.

[EDITORIAL NOTE.] The decision here is not concerned with the common form addition to an order "Liberty to apply." The basis of the decision here is that the parties consented to a term in the order that neither party was to be at liberty to apply to vary the terms of the order as to maintenance. The addition of these words were approved by the court. From this it was argued, and the argument was accepted by the court, that in so far as this ousted the jurisdiction of the court to entertain a subsequent petition for reduction of maintenance, such ouster of jurisdiction had received the approval of the court and was binding upon it. The basis and foundation of the decision is that the bar to the subsequent petition is with the consent of the parties and the approval of the court and the decision in *Stephen v. Stephen* (1) that "liberty to apply" has no meaning outside procedure and does not operate to vary any statutory right or power still stands, and is not affected by this decision.

AS TO PETITION TO VARY MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 797-800, paras. 1267-1273 ; and FOR CASES, see DIGEST, Vol. 27, pp. 505, 506, Nos. 5404-5418.]

Cases referred to :

- (1) *Stephen v. Stephen*, [1931] P. 197 ; Digest Supp.
- (2) *Hyman v. Hyman*, [1929] A.C. 601 ; Digest Supp.
- (3) *Gandy v. Gandy* (1882), 7 P.D. 168 ; 27 Digest 498, 5332.

SUMMONS adjourned into Court.

This was a summons to determine whether a petition for reduction of maintenance would stand by reason of a term contained in the original order by consent for the maintenance of the wife as follows : "Neither party to be at liberty to apply to vary the terms of this order as to maintenance."

F. L. C. Hodson for the wife.

S. E. Karminski for the husband.

LANGTON, J. : This summons, which has been very well argued before me, raises a point of great importance to the parties, and not, I

think, a point of any very great general interest, since the form of order upon which it arises is neither one which has been common in the past, nor, I hope, likely to be common in the future.

The position of affairs is that on Nov. 28, 1927, the parties, after divorce, carried in an order by consent to resolve the questions between them upon a petition for permanent maintenance. One of the terms in that consent order is in these words: "Neither party to be at liberty to apply to vary the terms of this order as to maintenance." The consent order, which is of a very voluminous character, has been acted upon without protest by both parties since the date on which it was agreed, but it is now desired by the husband to have the order varied upon the ground that his wife, the other party to the order, is now living as the mistress of another man, who is in comfortable circumstances. The actual facts of her present circumstances are not perhaps in any way relevant to this summons, which deals with, and is concerned with, what is in truth and in fact a point of law only; but lest any superior tribunal should think that I have been in any way swayed by the facts of this case, I will say that, in so far as I know them, the prejudice on both sides seems to me to be about equal. The husband says: "I am raising this point because I do not desire to be financially responsible for the mistress of another man;" the wife was in a position of being able to retort: "If I am bad, it is you who made me so," and, for my part, I do not pretend to see that there is any preponderance of virtue upon one side or the other. It is, therefore, possible to approach this matter, I think, without any regard to the actual circumstances. The husband has brought the matter before the registrar upon a petition for reduction of maintenance, and he does not seek, nor did Mr. Karminski here seek, to make capital out of the fact that the lady is living either in adultery or fornication, as the case may be. The point is that the circumstances have been varied from a financial point of view, in that the lady now receives support from a man in a good financial position.

A number of matters are raised by way of defence to this petition for reduction of maintenance and the matter comes before me by way of a preliminary objection that no petition for reduction of maintenance lies, in view of the words that I have read from the consent order. In the defence to the petition the matter is pleaded by way of estoppel, but it was not argued upon that ground before me. Mr. Hodson argued it upon the simple ground that the words mean what they say, and that, because those words are there, the present petitioner cannot resuscitate this question of maintenance.

The words, as they stand, certainly at first sight seem to me to be intended to secure finality. The words are not simply "No liberty to apply"; they are: "Neither party to be at liberty to apply to vary the terms of this order as to maintenance." It is, of course, at best, a

very cumbrous method of securing finality. It would be easy to devise a much shorter form of words to secure finality, if that were what was desired; but the argument is none the less forcible that it would not be necessary to put in all those words if what was intended was merely to prevent this particular summons from being revived by "liberty to apply." Mr. Karminski based his argument, upon this branch of the matter, upon a decision in *Stephen v. Stephen* (1), and no one, I think, is concerned now to deny that the decision in *Stephen v. Stephen* (1) came as a considerable surprise to practitioners generally and has been of value in delimiting the use of what up to that time had been a somewhat loose phrase appearing with a variety of meanings in many orders—"liberty to apply."

The argument was framed in this way: "liberty to apply" has no meaning outside of procedure. It does not operate, and could not operate, and could not be meant to operate, to vary or to constrict any statutory right. Attention was drawn to the power of the court and the rights of the parties under the Judicature Act, 1925, s. 190. Incidentally it may be observed that even if the husband were successful in getting this matter by way of a new petition before the registrar, there might be formidable difficulties in his way on the ground of the section, since there is no particular portion of the section dealing with increase in the wife's means; but that is not a matter which is before me to-day. I have only to concern myself for the moment with the question whether this form of words secures finality in the sense that the matter cannot be reopened on the question of maintenance, or whether the words are procedural only and only prevent the husband from raising the question of maintenance again upon this summons, without, that is to say, a fresh petition.

The matter was dealt with by LORD HANWORTH, M.R., in the case of *Stephen v. Stephen* (1), more especially at p. 203. It is material, of course, to observe how it arose in that case. In that case there had been no agreed order at all, but it was a case in which the husband was not in a position, at the time of the petition for maintenance, to make any provision at all, and it was attempted by those words to secure that, if his circumstances changed for the better, the wife should not be shut out from obtaining a share of his improved finance. It was in those circumstances that the Court of Appeal were dealing with the expression "liberty to apply," and it is with those facts in mind that one must remember and construe what LORD HANWORTH, M.R., then said. It was merely a question of whether they were apt to keep open a petition which would otherwise have been final. LORD HANWORTH, M.R., said .

When the matter came before the President the question which arose was whether the words "liberty to apply" which had been inserted in the registrar's order ought to be expunged. The President directed that those words should be deleted

from the order, and it appears to us that he was right in so doing. Those words meant that the summons could be restored for consideration afresh by the tribunal seised of the matter without the taking of fresh proceedings, and perhaps thereby saving time, expense, and trouble. But where a party has a right to apply to the court that right is not lost or diminished by the failure to add the words "liberty to apply," which only refer to procedure. The order of the President was not at first appealed from, but we have allowed a special extension of time.

Then he goes into this particular case with which he is for the moment concerned. Similarly, LAWRENCE, L.J., at p. 208, says :

Obviously the court cannot by inserting in its order the words "liberty to apply" reserve to itself a jurisdiction which the Act does not confer upon it.

That is really the matter which the Court of Appeal, as I see it, were considering in that case : can the words "liberty to apply" have a special meaning which would enable the court to reserve to itself a power which it otherwise would not have ? Clearly they have not, and LORD HANWORTH, M.R., was no doubt right in saying that, appearing as they do in orders of the court, they do refer to a question of procedure, but that is taking the expression "liberty to apply" as it stands.

I think that here I have to look, not only at the words "liberty to apply," but at the whole of the sentence in which they appear : "Neither party to be at liberty to apply to vary the terms of this order as to maintenance." It seems to me that the parties must have had in mind, when they introduced those words, the power of the court to vary the maintenance, and they were not merely considering whether it could be done by this summons or by fresh proceedings ; they were considering the whole matter of subsequent variations. Therefore, to my mind, it is clear that what the parties intended to do, and what they have secured by these words, is the finality which they were seeking.

But the argument does not stop there. Mr. Karminski goes further. He says : "Even if I am wrong about that—if I am wrong that this somewhat natural interpretation of the words can be given effect to by the court, the court had no power to do it, the order was, so to speak, *ultra vires* ; just as the court had no power by putting in the words 'liberty to apply,' to give itself a power which it never had, so it cannot, by allowing this expression to be used in an order by consent, constrict its own power and prevent itself from hereafter hearing a petition which the parties would otherwise have power to bring." I am afraid, after due consideration, that argument seems to me to be fallacious. All that the parties, as I see it, were seeking in this case was finality, and it may well be that each side had an interest in finality. It may well be that, at the time, the husband, who was probably the person then most interested in finality, was willing to give somewhat better terms than he would otherwise have given, in order to secure the finality that he desired ; but, however that may be, it seems to me well within the

ambit of contract in matters of this kind for the parties to agree, if they so desire, to finality. Whether it is wise so to do, and whether the court in future will be disposed to approve orders of that kind, are matters into which I need not enter to-day. Speaking for myself, I think these attempts to secure finality are generally ill-advised, and I myself would hesitate long before approving even an order which was reached by consent, in which such an attempt was to be found. But I am not concerned to-day with any matter of what is ideally right or ideally wrong. I am only concerned with the question whether this order, standing as it does, is an order which (i) was *ultra vires*, and (ii) if it was *ultra vires*, I have any power to alter now. I have grave doubts about the second point. Whether it be right or whether it be wrong, I do not think I am in a position to say to-day that it is a wrong order, or to vary it. I think, if it is wrong, a higher court would have to vary it. However that may be, I do not think it was wrong. It seems to me that this is within the power of the parties, and if the court approves it, it takes it out of the court's power to say afterwards that it was a wrong order. Whether right or wrong, it seems to me that the court and the parties are in this case *pari passu*. They have both made the same mistake, if it is wrong; but again, as I say, I do not believe it is. I see no reason why, when parties come to the court, they cannot say, as they must be taken to have done here: "We know quite well that we have a further remedy, but as part of our agreement we wish to exclude that further remedy. Do you, the court, approve of such an action?" Coming in that way openly to the court and asking, both of them, to be allowed to exclude a further remedy as part of their bargain, I cannot see that the court has no power to approve that particular article of agreement.

But the tenacious argument on behalf of the husband did not even rest there, because Mr. Karminski took it further still. He said if you turn to the judgment in *Hyman v. Hyman* (2), you will see that an agreement of this kind stands in very evil case, caused by a dilemma—perhaps it would be more correct to say, a dichotomy—that LORD SHAW OF DUNFERMLINE presented in that case of *Hyman v. Hyman* (2), by which you will see that this agreement stands in this perilous position: either it was an agreement which contemplated future adultery, in which case it is bad for reasons of public policy, or, if it did not contemplate adultery at all, and adultery or fornication having now admittedly entered into the picture, the agreement is frustrated because a new element has entered into the matter which was not in the contemplation of the parties at the moment at which they made the agreement, and the agreement must therefore be treated as having failed, the basis of the whole agreement having been swept away.

I have had an opportunity, as I listened to the argument, of reading

the whole of the judgments in *Hyman v. Hyman* (2), and the further I read, the more I was impressed by Mr. Karminski's discretion in the excerpts which he pressed upon me. I hope this will not be taken as implying that he argued the case in anything but the fairest possible way. One is entitled, dealing with the opinions of the highest court in the land, more especially when they are not in any way minority opinions, to select one's own passages and base any fair argument that can be based upon what has fallen from the highest tribunal in the country; but when one examines *Hyman v. Hyman* (2) thoroughly, it is not uninteresting to observe that, although LORD SHAW's opinion is in result the opinion of a unanimous court, the details of his opinion, and the reasons for his opinion, are by no means a matter of unanimity amongst their Lordships. Both LORD HAILSHAM, L.C., and LORD ATKIN stress the fact that the power granted to the courts by this section of the Judicature Act was in the public interest. It was to prevent a wife from suffering destitution and being driven to claim public relief. They do not, of course, base the whole of their judgment upon that, or say that that was the only object of the section, but both of them stress that feature, which they claim was underlying the action of the legislature in putting this power into the hands of the Divorce Court. Nothing, surely, could be further from the present case than any consideration of that kind. The husband is not here seeking to reopen the matter upon any such consideration. He is seeking to reopen it because the lady is well off, not because she is in worse case. Similarly, LORD BUCKMASTER and LORD ATKIN are neither of them in agreement, as I read their opinions, with LORD SHAW OF DUNFERMLINE, upon the question of public policy. LORD ATKIN evidently feels, as I have always felt, upon this question of public policy, that it is one of the most difficult things in the world to determine and one on which one should be very slow to base one's view or to make any extension of what has already been the fashion. I read LORD ATKIN as being equally cautious upon the question of frustration. I think LORD ATKIN, in common with most of the commercial lawyers of the day, felt doubts about a good many of the cases which were argued, and successfully argued, in favour of frustration after the war, and he is at pains to say, in this case, that he thinks one should hesitate long before extending that doctrine. Therefore, in spite of the clear language of LORD SHAW in the matter, I cannot read the opinions of the House of Lords as being really based upon this dilemma that LORD SHAW has presented. I think the others of their Lordships put their opinions upon broader grounds and really very different grounds from this matter raised by LORD SHAW. Mr. Karminski, therefore, was quite justified in putting his case upon something which fell from LORD SHAW in the course of deciding *Hyman v. Hyman* (2), but I cannot read *Hyman v. Hyman* (2) as being an authoritative judgment to the effect

that this dilemma really exists. I do not think that there is really the warrant of the House of Lords for saying that the parties in this case are in such a difficulty.

I do not think it is necessary for me to revive controversy with what LORD SHAW calls "the spade of the legal resurrectionist," in discussing this case, in which he belabours with such good will *Gandy v. Gandy* (3), a case still alive, or, as he hopes, dead; but I think it is sufficient for this purpose to say that I do not read *Hyman v. Hyman* (2) as being an authority in favour of LORD SHAW'S dilemma. I do not think any such dilemma really exists. I think this agreement was an agreement fully and freely entered into by the parties with the intention of putting an end to any further controversy upon the subject of maintenance, either upon the summons or upon any fresh proceedings.

I think, therefore, that I must answer the question that is put to me, by saying that this petition now presented ought not to lie, in view of the words that occur in that consent order: "Neither party to be at liberty to apply to vary the terms of this order as to maintenance."

Summons dismissed, and by consent the petition to decreaseal so dismissed.

Solicitors: *Freke Palmer, Romain & Romain* (for the wife); *Warren & Warren* (for the husband).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

SURRIDGE'S PATENTS, LTD. v. TRICO-FOLBERTH, LTD.

[CHANCERY DIVISION (Clauson, J.), July 14, 15, 16, 1936.]

Patent—Action to restrain threats—What constitutes a threat—Patents and Designs Acts (1907-1932), s. 36.

The defendants had obtained injunctions against two firms to restrain them from infringing their letters patent. They issued a leaflet to this effect to their travellers, and it was stated that the latter had used this leaflet to suggest to customers that there was an action going on and had told them that they would find a difficulty in obtaining supplies:—

HELD: this did not amount to a threat.

[EDITORIAL NOTE.] This case is concerned with threats within the Patent and Designs Acts (1907-1932), s. 36, and is concerned with the question of how far a threat may be implied from the words and actions of travellers calling upon traders. In such a case much must depend upon the actual circumstances of the case, and this case can be very usefully compared with *Luna Advertising Co., Ltd. v. Burnham & Co.* (1), where the opposite conclusion was reached.

AS TO THREATS ACTIONS, see HALSBURY, 1st Edn., Vol. 22, Patents, pp. 227, 228, para. 463; and FOR CASES, see DIGEST, Vol. 36, pp. 847-849, Nos. 3334-3351.]

Cases referred to:

(1) *Luna Advertising Co., Ltd. v. Burnham & Co.* (1928), 45 R.P.C. 258; Digest Supp.

(2) *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. 413; 10 R.P.C. 1; 36 Digest 848, 3343.

ACTION to restrain threats. The defendants were the licensees of an American company who owned letters patent covering the manufacture of five-ply windscreen-wiper blades for motor cars. In Mar., 1935, the defendants brought an action against Romac, Ltd., under this patent and obtained an injunction against them. They also obtained an injunction against Staines, Ltd. They then issued to their travellers, for distribution to dealers, a leaflet which contained a statement that they had obtained these injunctions. The plaintiffs alleged that threats had been made to five of their customers.

R. Moritz, K.C., and Lionel Heald for the plaintiffs.

W. Trevor Watson, K.C., and Geoffrey Tookey for the defendants.

Moritz, K.C.: The only question here is: Were these threats in fact uttered? It is submitted that the defendants' travellers were actually told to threaten, and that they availed themselves of their opportunities.

Watson, K.C.: Under the new Act, the court must find that representatives of the defendants actually threatened the plaintiffs with legal proceedings. It is admitted that the atmosphere was consistent with threats being issued by the travellers; there was motive and opportunity. But the court must be satisfied that words were spoken which amounted to a definite threat under sect. 36. No witness has said that he feared an action against himself. The fact that a witness was told that he would not get a further supply because proceedings were pending is not a threat. You cannot threaten to do what you have already done. That is emphasised by the omission of the word "liability" from the new sect. 36. It is a threat to say: "We are about to start an action." It is not a threat to say: "We have started an action": *Luna Advertising Co., Ltd. v. Burnham & Co.* (1). Where the threat is not made against the person to whom the words are spoken, the purport of the words must be that action is about to be taken against a third-named person: *Skinner & Co. v. Shew & Co.* (2). No witness has said that as a result of what was said, he ceased to order the plaintiffs' goods.

Heald, in reply: If a statement is made that a definite article is an infringement, that is a threat. It is not necessary that precise legal words should be used, provided that witnesses think that proceedings are going to be taken. [He referred to *Luna Advertising Co., Ltd. v. Burnham & Co.* (1).] What inference must be drawn when a traveller armed with this leaflet points to the plaintiffs' blades and says "Those cannot be sold"? That must amount to a threat. Sect. 36 covers the case where a person uses an action as intimidation, whether in fact an action has been started or not. The fact that his statement is untrue cannot put him in any better position. The words of the section are not "threaten to institute," but "threaten with an action."

CLAUSON, J. : Sect. 36 of the Patents and Designs Act was amended in 1932 in these terms :

Where any person, by circulars, advertisements or otherwise, threatens any person with an action for infringement of patent or other like proceedings, then, whether the person making the threats is or is not entitled to or interested in a patent or an application for a patent, any person aggrieved thereby may bring an action against him, and may obtain a declaration to the effect that such threats are unjustifiable and an injunction against the continuance of such threats and may recover such damage, if any, as he has sustained thereby, unless the person making the threats proves that the acts in respect of which the proceedings are threatened constitute or, if done, would constitute an infringement of a patent in respect of a claim in the specification which is not shown by the plaintiff to be invalid or an infringement of rights arising from the acceptance of a complete specification in respect of a claim therein which is not shown by the plaintiff to be capable of being successfully opposed.

This section and the section which preceded it create, as we all know, very great difficulties indeed. In what may be called a simple and straightforward case the section works no doubt reasonably well and is a protection against the improper use of a patent ; but when the section is sought to be applied, as no doubt it does apply, to the conversations which take place in hundreds and thousands all over the Kingdom day by day between travellers who are pushing an article and customers who may be tempted by the offers of rivals to the traveller, the practical as well as the theoretical difficulties which arise in the application of the section are to my mind very great. In this particular case the defendants own a patent for what it is convenient to speak of as a five-ply wiper blade for wiping the windscreens of motor cars. The plaintiffs had on the market a similar wiper with five-ply blades. There were many other, or several other, similar blades upon the market, and some of those blades have, by reason of actions by the defendants to which the owners of those blades were parties, been established to be infringements of the defendants' patent. The particular five-ply blade which the plaintiffs have on the market, as far as I can make out from the evidence, was at one time believed by the defendants to be an infringement of the defendants' patent, but there is no doubt now that the defendants are not in a position to establish that the plaintiffs' blade is an infringement. In these proceedings they have made it quite clear that they do not propose, at all events in this action, to suggest that the plaintiffs' blade is an infringement. The action is brought by the plaintiffs against the defendants to establish that on at least one occasion, in conversation between travellers who were pushing, with the authority of the defendants, the defendants' goods and customers, the traveller threatened either the customer to whom the traveller was attempting to sell the defendants' goods or, through his conversation with the customer, the plaintiffs, with (in the words of the Act) " an action for

infringement of patent or other like proceedings." It becomes my duty, therefore, to investigate exactly what occurred on the occasions of conversations between the travellers and the customers which has been given in evidence before me and to form a conclusion as to whether or not these conversations amounted to threats, within the meaning of sect. 36.

Before dealing with the evidence in detail I want to make one or two observations of a character which, had I been sitting with a jury, it would have been my duty to make to the jury, to caution them as to the manner in which evidence of this kind must be dealt with; and I state what I am going to say, in order that I may quite fairly show the general considerations which I think it my duty to deal with in considering the evidence in the case. The first observation I have to make is this. I do not think it can be disputed that in some circumstances a conversation between a traveller and a customer may amount to a threat of proceedings against some person from whom the customer is proposing to purchase or has purchased the rival article. *Prima facie* in the ordinary conversation between the traveller and the customer one would hardly expect to find a threat addressed to such a person as I have mentioned. The Act, of course, applies to a threat, addressed by the traveller to the customer, of proceedings against the customer himself. It really comes to this, that it is obviously much easier to prove a threat of the latter type than a threat of the former type. The other observation is one of a general character and it is this, that when the fact which has to be established is sought to be established from the recollection of parties some three or four months after the event as to what occurred at a business conversation of such a character as each party, the traveller on the one side and the customer on the other, are likely to have many times a day with different persons, one has to be very careful that the person who seeks to establish a legal right on the strength of what occurred during such a conversation has made out quite clearly what the conversation amounted to. There is what has always seemed to me to be a most unfortunate defect in our procedure, and that is this: that in many cases coming before this court (and the case of threats actions is a peculiar instance of it) there is very often the preliminary procedure on motion when an affidavit is prepared (I am assuming with perfect honesty and, I am glad to think in almost all cases, with perfect honesty) in which an attempt is made to put down the recollection of a man as to a conversation of this sort which has occurred three or four months before. That, of course, tends, so to speak, to crystallise in his mind the particular version which seems to him to be the correct one about four months afterwards. Then the action comes on for trial, probably another six months later and ten months away from the original event; and the unfortunate man finds himself in the

box asked to choose between an account that he gave six months before and his recollection at the moment of something which happened ten months before, after the whole thing has been clouded over probably by a good deal of discussion as to exactly what had occurred—because these things do get talked about and discussed by the traveller concerned and other travellers in the same line. Accordingly, the difficulties in the way of ascertaining exactly what did occur are great, and they are not diminished in the case where a section like this has to be applied, a section which uses the term “threats,” a term which is capable of various meanings.

With those preliminary observations I turn to the actual evidence as to the various instances in which it is said that there were threats. The first one that I have was deposed to by a gentleman named Purkiss. Everybody agrees that Purkiss’ evidence came to nothing. Mr. Purkiss I strike out and I shall not refer to him further.

The next one I come to is Mr. Bennett’s. This happens to be the order in which they were mentioned, I think, in Mr. Watson’s speech. I first take Mr. Bennett’s version. I ought to have mentioned that the writ in the action was issued on Oct. 12, 1935; and in Mr. Bennett’s case there was, at all events, this to be said: that the event to which he deposed in his affidavit on the motion and to which he deposed during the trial occurred not very long before the starting of the present action, and it was in connection with this particular event with which Mr. Bennett is concerned that the action was started. He is a buyer and storekeeper in the employment of a firm at Rickmansworth who are motor engineers. They have dealt with the defendants’ product for some time and they have also dealt with the plaintiffs. He was visited by Mr. Panzetta; in September Mr. Panzetta called. Mr. Bennett was asked in chief: “Do you remember any conversation, and, if so, tell his Lordship what the effect of it was, as regards a patent in connection with Mr. Panzetta’s visit.” This was his answer: “Mr. Panzetta called on me at the latter end of Sept., 1935, with a view to selling ‘Trico’ products generally. During the course of the conversation the matter of wiper blades came up. I told him that I had sufficient in stock. He said: ‘What have you got; have you got ours?’ I said ‘Yes.’ I said ‘We cannot sell yours so quickly because they are more expensive.’ He said ‘What do you sell?’ I said ‘I sell “Holdtite” blades at roughly half the price.’” “Holdtite” blades are the plaintiffs.’ As, of course, is always the case in these actions, the point is that one man’s blades are priced at 2s. 6d. and the other man’s at 1s. 6d. “He said ‘Let me see them.’ I had mentioned they were a five-ply blade. Being similar to the ‘Trico,’ and much cheaper, obviously they sold better. When I showed him the blade he said they were an infringement of ‘Trico,’ because they were five-ply. I said ‘Does that refer to everybody’s?’ and he said ‘Yes.’

Then he produced a white paper similar to the one on the desk, my Lord.” There is no doubt what he produced ; he produced the defendants’ price list which has a very prominent announcement of the success of their action against the Romac Company, under which they obtained an injunction from BENNETT, J., with a certificate of validity. He produced that document. Then he produced something else, but there was a mystery about that something else which no one succeeded in probing, so I will say no more about it. “ (A.) He held them up and he said ‘ These two firms have been restrained from selling five-ply blades, because that is our patent.’ He said, therefore it followed that others were an infringement. So I said ‘ Well, I am ordering afresh to-night, so I must make inquiries. I do not want to have an unsaleable article on my shelves.’ (Q.) When you said you were ordering some more, from whom did you expect to order them ? (A.) Surridge’s Patents. (Q.) Was anything more said by Mr. Panzetta ? (A.) He said ‘ Well, I do not know if you will get them or not. If it is an infringed article, perhaps you will not,’ or something similar to that. I cannot tell you word for word. (Q.) As a result of that conversation did you do anything ? (A.) I ordered my blades as I required for stock ; I did not refrain from ordering the ‘ Holdtite ’ blade.” On that one thing seems to me quite clear, that in the conversations Mr. Panzetta did not threaten Mr. Bennett that he (Bennett) was going to be sued. I cannot get that out of it at all. Can I get out of it that the upshot of this conversation was that Mr. Panzetta through Mr. Bennett, if I may use that phrase, was threatening to sue the plaintiffs ? The first observation to be made about that is that Mr. Bennett did not grasp that that was the effect of the conversation. Is it possible for me to hold that what occurred was other than this : that Mr. Panzetta said he had got the patent, spoke of the patent as covering five-ply blades and expressed to Mr. Bennett in some shape or form, or may have expressed to Mr. Bennett, that that was his view. But can I out of this conversation alone spell a threat against the plaintiffs ? In my view I cannot. As I have stated, I can imagine that a conversation between A. and B. might in some circumstances—they would seem to me to be rather special circumstances—amount to a threat within this section against C., but I cannot get such a threat out of this incident.

I shall have to come back in a moment to the next case, Langhorn’s, but it is convenient that I should next take the case of a man named Broadley. There again the commercial traveller with whom the conversation took place was Mr. Panzetta. Mr. Broadley’s evidence in chief was this. He said he was carrying on business as a motor engineer and agent in July, 1935, both at Margate and at Westgate and that he had known Mr. Panzetta for some time and that he had an interview with Mr. Panzetta about “ Trico ” blades. “ (A.) Mr. Panzetta called

to see me in his usual round of business, and I should imagine he saw some 'Holdtite' blades hanging up in the showroom. I had previously bought some 'Trico' blades from him, and in the course of conversation he pointed out to me that the 'Holdtite' blade being a five-ply was an infringement of the 'Trico' patent, and that Trico, Limited, were going to take proceedings to stop this blade as they had done in the case of 'Romac.' (Q.) Did that conversation have any effect on your mind? (A.) Well, the effect was, naturally, that I should stock no more until such action had been taken or until I had consulted Surridge's." Then he was cross-examined. I really cannot act upon that evidence of Mr. Broadley. He was very confused about what took place. He seems to have pictured in his mind that it all arose from the fact that there were some "Holdtite" blades hanging up, but when we get to the bottom of it and find that the probability is that the interview was at the place where the cars were kept and not at the stores where there were likely to be "Holdtite" blades the thing begins to vanish into thin air. I cannot act upon the Broadley incident, and I must cut that out. It seems to me that to rely upon that as sufficient evidence for the purpose of proving a threat is quite impossible.

Page is the next one. He is an employee of Richards' Garage, Nottingham, and it was Mr. Tutte, another traveller, whom he saw. "(A.) I had a very short conversation with him. He simply called in and saw that we were displaying some 'Holdtite' blades. He said an action had been taken against 'Romac' to stop them infringing their patent and an action was pending against the 'Holdtite' people for the same thing. (CLAUSON, J.): For the same thing? (A.) Yes, for infringing their patent. (Mr. Moritz): You have no doubt about that? (A.) I am certain. (Q.) Did you take any step? (A.) I simply ordered nothing from him, or at least I cannot remember doing so, and when the 'Holdtite' representative called I just reported —" and then he was interrupted. Let me take that and that alone. I cannot spell out of that very short conversation a threat against Mr. Page. It is not suggested that I can spell out of it a threat against Mr. Page. A mere statement which happened not to be true, if it was made, that an action was pending I can hardly construe as being in any reasonable sense a threat intended to be addressed to the plaintiffs through Mr. Page. There is very little to be said about the Page case and I strike that out.

That leaves me with two, and I will take the last first. That is the case of a man named Severn. I ought to say that this case was not pleaded; but Mr. Severn was put into the box and I thought it convenient as he was there that the matter should be dealt with and that he should tell us what he knew. But there is this to be said about it. It must be borne in mind when one reads Mr. Trevor Watson's cross-examination that this was, so to speak, a bolt out of the blue. Mr.

Severn is a garage proprietor at Nottingham who dealt with the plaintiffs and also the defendants. “(Q.) Do you remember the defendants’ traveller coming in to see you last summer? (A.) Yes. (Q.) What month would it be? (A.) I should think it would be round about October. (Q.) What is the name of the traveller? (A.) Mr. Tutte. (Q.) Do you see him at the back of the court? (A.) Yes. (Q.) What did he come for? (A.) He called to see if I had anything for him for ‘Trico’ windscreen wipers and blades. He said he was not now travelling for oil. (Q.) He tried to sell you blades? (A.) Yes. (Q.) What did you say? (A.) I said: ‘I have some in stock.’ (Q.) What had you in stock? (A.) I think I had a few ‘Romacs’ and ‘Holdtite.’ (Q.) Did you show him at all? (A.) No. (Q.) Did you tell him what they were? (A.) I told him I had ‘Holdtite’ and ‘Romac.’ (Q.) What did he say? (A.) He said: ‘Well, you know, you are liable for selling these; they are a deliberate infringement.’ He said: ‘You are liable to have your stock confiscated and liable for selling them.’” I will pause there to say this, that there is no doubt at all that Mr. Tutte called on Mr. Severn on a date in July; it was not October at all, because we know that Mr. Tutte wrote and reported to his principals that at Mr. Severn’s shop he had come across a recent delivery of five-ply blades; that resulted in some correspondence between Mr. Tutte and his principals as to whether or not all five-ply blades were an infringement of the principals’ patent. So one thing is quite clear, that Mr. Severn has got the date wrong. I cannot gather from his evidence that he treated it as an interview at which he was being threatened; I cannot hold that to be the result of it. Can I spell out of that interview a threat against the plaintiffs? I think it is quite clear that this cannot be said to be a threat against the plaintiffs. It looks to me, even accepting Mr. Severn’s account of the interview as textually accurate, to have been really nothing more than a warning. I do not think it can be suggested that Mr. Severn when the interview came to an end thought they had been threatened. Accordingly, on that ground, I cannot possibly regard the Severn case as a threat to the plaintiffs.

Now I come to Langhorn. The Langhorn case, from some points of view, is possibly the strongest case for the plaintiffs. Mr. Langhorn was employed by a firm named Dove of Croydon, who are motor engineers. He was employed as a storekeeper. He had a visit from Mr. Panzetta in the month of June last year. “He came in the ordinary course of business and asked if I wanted any wiper blades. I informed him that I was well stocked. He pointed out two ‘Holdtite’ blades which were hanging at the back of my place where I was standing and asked me whether they were a five-ply blade. I said ‘Yes,’ and that they were quite satisfactory and that I did not want to order any more blades at the time. So he informed me that they were an infringement of their

patent and that 'Trico-Folberth' had already taken action against 'Romac' and that they were going to take action against 'Holdtite' for infringement of their patent. (Q.) Was anything said about any other make of wiper blade? (A.) No, just 'Holdtite' and 'Romac' were mentioned at the time, besides 'Trico' blades, of course. When he made that statement about an infringement of their patent I pointed out to him that Lucas were also making a two-ply blade." Then there was some conversation about Lucas's. It seems to me, I confess, quite clear that on that evidence I could not hold that there was a threat of proceedings against Mr. Langhorn. There is a statement that the defendants were going to take action against the plaintiffs; and Mr. Watson, as I understood, was prepared to admit that it could be properly held on that evidence, if uncontradicted, that there was a threat, within the meaning of the section, against the plaintiffs. I propose to deal with the case upon that footing, but I do want to say this—although I say it, I need not say, with very great hesitation having regard to Mr. Watson's great experience in these matters—that I am not satisfied myself that I should do right in holding that this conversation constituted a threat against the plaintiffs—or shall I put it in this way, constituted a threat against the plaintiffs for which the defendants are responsible. The difficulty I feel about that matter is this. Travellers, of course, may very often behave improperly in regard to statements about a patent. I do not question that cases occur where travellers for principals who have patents do make statements which may amount to threats of action against a rival manufacturer; but I think the greatest caution ought to be exercised in spelling such a threat out of an interview of this kind. However, there it is. I say that, so to speak, by way of protest, because I think it is most important that this section, valuable as it is in certain actions, should not be stretched too far; but I propose to treat this case as being a case in which this conversation as it stands, although to my mind quite clearly not any threat against Mr. Langhorn, may be said to amount to a threat against the plaintiffs. The cross-examining counsel put to the witness what he had said: "'I certainly did not know at that time whether any action was either pending or threatened in respect of the 'Holdtite' blade or in respect of any other particular blades.' You had had the letter of Apr. 13, which said in definite terms, 'We have already instituted legal proceedings against the various infringing manufacturers.''" He goes on to say "I did not know at the time that any action was actually contemplated in respect of 'Holdtite.'" It will be observed on this part of the case that Mr. Langhorn's evidence of what he was told was that an action was going to be brought against "Holdtite," while Mr. Panzetta's account of the matter is that he then himself referred to a pending action. I have heard a very interesting argument as to exactly what is the position as regards a pending action,

and whether or not a statement that there is a pending action amounts to a threat within this section. I do not propose to make any general pronouncement on the subject; I think it would be most unfortunate if I did. I propose to confine myself to this consideration: As a result of comparing Mr. Langhorn's evidence with Mr. Panzetta's, have the plaintiffs established that at that interview Mr. Panzetta was, through Mr. Langhorn, threatening the plaintiffs with an action? I do not see my way to come to that conclusion, and on this ground, that it seems to me that on an account given so many months afterwards of an interview in the month of June, and when the action was started in October, I could not safely decide in favour of the plaintiffs on this one interview, where the decision may turn upon whether the man spoke of an action as a pending action or of his people as intending to take action. All sorts of confusion might arise. If what he said was, "There is an action going on"—and this slightly supports the probability that he did say it, that there had been a circular containing written instructions (which it has not been necessary for me to go into) which had been given by the sales manager of the defendants to their travellers, which upon one construction of it would seem to indicate that actions were being taken against people who were alleged to be infringing—if all he did say was, "There is an action going on," and then he referred in some way or other to difficulties which he would find in getting these blades, I am not prepared to hold, as that is possibly the purport of the conversation, that the plaintiffs have made out their case.

The conclusion I have come to is that in the case of none of these interviews, five or six in all, have the plaintiffs made out their case. In those circumstances, the action fails and must be dismissed with costs.

Solicitors: *Henry Boustred & Sons* (for the plaintiffs); *Bristows, Cooke & Carpmael* (for the defendants).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

SENEVIRATNE v. R.

[PRIVY COUNCIL (Lord Maugham, Lord Roche, Sir George Rankin),
July 13, 14, 16, 17, 20, 29, 1936.]

Privy Council—Ceylon—Criminal law—Murder—Eye-witnesses to be called by prosecution—Onus of proof—View by jury—Direction as to unanimity—Ceylon Evidence Ordinance (No. 14 of 1895), ss. 106, 157, 165—Criminal Procedure Code (No. 15 of 1898), s. 238.

The appellant was charged in Ceylon with having murdered his wife. The evidence of the appellant's servants, if believed, established that the appellant was not in his wife's room immediately before her death, and there was no evidence that the appellant was in his wife's room at any material time. There was strong evidence, both in letters written by the deceased and of conversations, pointing to a tendency or inclination on the part of the deceased to commit suicide. Although there had been quarrels, the appellant had never been seen to threaten his wife with any form of physical violence. Evidence was given by a number of medical witnesses, which established that chloroform was the cause of death, but the medical evidence was completely ambiguous in its effect, with no preponderance of opinion among the doctors that the physical conditions of the deceased apparent at the post-mortem were such as to be consistent only with the hypothesis of homicide. The doctors were divided in their opinions as to whether death was due to asphyxia or syncope, whether certain marks on the face of the deceased were such as would be caused by burns from chloroform, whether pressure on the face would be necessary to cause such burns and as to the behaviour of persons during the administration of chloroform. At the trial, the prosecution called all available eye-witnesses, even though their names appeared in the list of defence witnesses, and witnesses who gave evidence favourable to the appellant were extensively cross-examined as to other and previous oral statements, such procedure being permissible with the leave of the judge under the Ordinance (Law of Evidence) 14 of 1895, ss. 154 and 155. In other cases evidence of what a witness had said was given apparently without previous cross-examination of the witness as to such statements. After the evidence of all the witnesses had been taken, the judge and jury with the appellant and counsel went to the appellant's house where the servant witnesses were questioned further and certain experiments were conducted. The jurors were not all together, but were divided up for the purpose of the experiments, each being asked his impressions. The judge in the course of his summing up, after discussing the medical evidence intimated that if the jury could not make up their minds from the doctors' evidence, it was still their duty to come to a conclusion on their own observations. The judge in giving his direction as to the facts generally said: "He (the appellant) has got to explain. . . In the absence of explanation, the only inference is that he is guilty" and finally the judge said: "the verdict, whether it is a conviction or an acquittal, I hope it will be unanimous, . . . but if you cannot agree please remember that I have got the full power to ask you to reconsider your verdict, but four to three means an unacceptable verdict. That means you have to go through the trial again. I hope you will not have this misfortune." The jury convicted by five to two, one of the five recommending the appellant to mercy. The appellant appealed:—

HELD: (i) there being points both for and against the appellant but the greater number merely ambiguous and no medical or other circumstantial evidence justifying a conviction, no tribunal as a matter

of legitimate inference could arrive at the conclusion that the appellant was guilty.

(ii) it is not incumbent upon the prosecution in a murder case to call every available eye-witness, and while witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, it is undesirable that the prosecution should call witnesses and at once proceed to cross-examine them.

(iii) in a criminal prosecution the onus of proof is upon the prosecution and there is no obligation upon the prisoner of proving facts especially within his own knowledge.

(iv) where a view by the jury is necessary the statutory procedure under the Criminal Procedure Code, s. 238 must be strictly followed, and any serious departure therefrom tends "to divert the due and orderly administration of the law." The procedure here followed was altogether irregular.

(v) references in a summing up to the necessity for a unanimous verdict in order to prevent a new trial are apt to be misconstrued by the jury and are to be avoided.

[EDITORIAL NOTE.] Upon the second point this case follows the recent decision in *Attygalle v. R.* (8) where the suggested onus on the prisoner is fully discussed. Upon the point of bringing undue pressure upon the jury the case should be compared with the judgments in the Court of Appeal in England in the case of *In the Estate of Wright, Lambert v. Woodham*, [1936] 1 All E.R. 877; Digest Supp. A view by the jury is not a very usual procedure in a criminal case, and it is clear that precautions must be taken to secure that everything done upon such a view being had must be absolutely fair and impartial. No questions must be asked and answered in the absence of the other party, and the jury must as far as possible be kept together and not be given the opportunity of discussing the matter in groups or making separate experiments in the matter of sounds, etc. The remarks in the judgment as to the duty of the prosecution to call every eye-witness and the undesirability of calling witnesses who must prove hostile, will be of value both in England and overseas.

AS TO WHAT WITNESSES SHOULD BE CALLED, see HALSBURY, Hailsham Edn., Vol. 9, p. 164, para. 232; and FOR CASES, see DIGEST, Vol. 14, pp. 274-276, Nos. 2841-2877.

AS TO VIEW BY JURY, see HALSBURY, Hailsham Edn., Vol. 9, p. 172, para. 249; and FOR CASES, see DIGEST, Vol. 14, p. 304, Nos. 3196-3201.]

Cases referred to :

- (1) *Ibrahim v. R.*, [1914] A.C. 599; 14 Digest 411, 4308.
- (2) *Riel v. R.* (1885), 10 App. Cas. 675; 17 Digest 490, 541.
- (3) *Re Dillet* (1887), 12 App. Cas. 459; 17 Digest 490, 542.
- (4) *Ex p. Deeming*, [1892] A.C. 422; 17 Digest 490, 545.
- (5) *Ex p. Macrea*, [1893] A.C. 346; 17 Digest 490, 551.
- (6) *R. v. Bertrand* (1867), L.R. 1 P.C. 520; 17 Digest 477, 402.
- (7) *Ram Ranjan Roy v. R.* (1914), I.L.R. 42 Calc. 422; 14 Digest 273, 2816 (ii).
- (8) *Attygalle v. R.*, [1936] 2 All E.R. 116; Digest Supp.
- (9) *R. v. True* (1922), 127 L.T. 561; 14 Digest 58, 239.
- (10) *Sodeman v. R.*, [1936] 2 All E.R. 1138; Digest Supp.
- (11) *Arnold v. King-Emperor*, [1914] A.C. 644; 17 Digest 490; 549.
- (12) *Lawrence v. R.*, [1933] A.C. 699; Digest Supp.

APPEAL by special leave from a verdict and sentence given and passed in the Supreme Court of the Island of Ceylon (AKBAR, J.), on June 14,

1934, whereby the appellant was convicted of murder and sentenced to death. The facts of the case are fully set out in the judgment of their Lordships delivered by LORD ROCHE.

H. I. P. Hallett, K.C. (with him *Stephen Chapman*), for the appellant, referred to : *Attygalle v. R.* (8), *Re Dillet* (3), *R. v. True* (9), *Sodeman v. R.* (10).

The Attorney-General (Sir Donald Somervell, K.C.), *Kenelm Preedy* and *L. M. D. de Silva*, for the respondent, referred to : *Re Dillet* (3), *Ibrahim v. R.* (1), *Arnold v. King-Emperor* (11), *Lawrence v. R.* (12).

LORD ROCHE : This is an appeal by special leave from a verdict and sentence given and passed in the Supreme Court of the Island of Ceylon on June 14, 1934. The appellant was charged with having murdered his wife on Oct. 15, 1933, and after a trial lasting 21 days he was found guilty by a majority of five to two of the jury, one of the five in the majority recommending him to mercy. Sentence of death was passed, but this sentence was commuted to one of rigorous imprisonment for life.

The main ground of the appeal is that on the evidence a verdict of guilty could not properly or safely be found and that the jury ought to have been so directed and that in these circumstances such grave injustice had been done as to require the interference of His Majesty. The appellant also complained of certain specific matters in the conduct of the trial as causing or contributing to the miscarriage of justice. Such matters were : that a very large amount of hearsay evidence was admitted and was used as evidence of fact ; that the learned judge misconstrued the Ceylon Ordinance No. 14 of 1895, s. 106, relating to the law of evidence and in consequence gave an erroneous direction to the jury as to the onus of proof ; that the learned judge used language to the jury in his charge which was calculated to put undue pressure upon them and to prejudice the accused. Complaint was also made, though this was not one of the specific reasons assigned for the allowance of the appeal, that after the evidence was concluded the hearing was reopened and further heard at the appellant's house, where the death of his wife occurred, in a manner that was entirely irregular and was not permitted by law.

There is no uncertainty as to the principle upon which this Board acts in the matter of the review of a criminal case. The statement of the principle most useful for the purpose of this case appears in the judgment delivered by LORD SUMNER in the case of *Ibrahim v. R.* (1), at pp. 614 and 615, and is as follows :

Leave to appeal is not granted " except where some clear departure from the requirements of justice " exists : *Riel v. R.* (2) ; nor unless " by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done " : *Dillet's Case* (3). It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly

treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's Case* (2); *Ex p. Deeming* (4). The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex p. Macrea* (5). There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *R. v. Bertrand* (6).

Whether mischiefs within the scope of the above description have occurred in the present case is a question which depends for its solution upon an examination of the facts and evidence in the case and upon the course of the trial. The facts and their Lordships' observations thereon are as follows. The appellant is a Cambridge graduate who was called to the Bar in 1919. His wife in 1933 was about 38 years old. She was a cousin of the appellant and they had been married in 1923. They had one child, a boy aged 9, called Terence, another child having died soon after birth. The deceased, though short in stature (5 feet 3 inches) is described as huge. For some years husband and wife had not got on well together, constant quarrels arising out of various questions, including questions as to property, whether they should live in a rented house, and minor matters. A number of letters found after the death of the deceased amongst her belongings and purporting to be written to the appellant in 1932 show that the deceased was making accusations against the appellant in respect of a discharged servant girl, and of marital neglect and indicate that the deceased had become somewhat abnormally unhappy and was putting into writing expressions of unhappiness and of hope that she would not live long, with more than one threat of ending her own life. When she was angry with her husband she was in the habit of shutting herself up in her room and at times of taking no food. On the other hand it was in evidence that the appellant, though not infrequently quarrelling with his wife and not attentive to her wishes, had never been seen by anyone to threaten his wife with any form of physical violence. Further, there was a substantial body of oral evidence to the effect that the deceased had been threatening suicide, and it is stated by two witnesses that some six weeks before her death she had discussed suicide by chloroform with a relation, Mr. Charles Seneviratne. On the day before her death a Mr. and Mrs. de Saram had come to dinner, and the deceased was said to have become angry when she was told that the appellant had taken the boy Terence with him to the house of a Mrs. Francis Seneviratne. According to the statement of the appellant before the police magistrate, he had a conversation with his wife after the visitors had left in the course of which she said that he would repent his action.

The arrangements at Duff House, the appellant's residence, relevant to the night of Oct. 14-15, 1933, are not in dispute. The house was one-storied and in it the deceased slept in a room together with her personal servant maid Alpina, and in a room, which opened off this room, Terence slept and his nurse Mabel Joseph. A bathroom and lavatory opened off each of these two rooms. Both in front and behind and also on the east side of the bungalow were verandahs and a number of poultry runs surrounded the house on all sides. The deceased's bed lay lengthwise along a wall and in her room were a couple of teapots, an almirah, an iron safe and a wash-stand. The evidence is that these rooms made a self-contained suite and that at night the doors giving access to these two rooms from other parts of the house were locked so that no one could have access thereto. The appellant had his bedroom apart in a suite of rooms at the back of the bungalow on the other side, and he would proceed most directly by the back verandah if he was minded to go from his own rooms to those of his wife. There was the evidence of a male servant called Banda to the effect that when on Sunday, Oct. 15, he got up at 6.0 a.m. he found the doors closed as he had left them on the previous night. The evidence of Alpina as to what happened during the night was that the deceased wakened her twice, once to close the shutters because it was raining and another time when the deceased was seen to be drinking some water. As to Sunday, Oct. 15, Alpina's evidence was that she woke at 6.0 a.m., saw the deceased sleeping, went to the bathroom, and when she came back, found that the lady had turned over on her side, with her head on one pillow and another pillow at her side near to the wall; that the lady was awake but neither of them spoke; that Alpina, leaving the door ajar and having dressed, went to do some cooking in a kitchen at the back of the house towards the western side; that fifteen or twenty minutes from the time when she had got up, Seelas, a servant boy of 15, came to her and told her that her mistress wanted her. The chauffeur Perera came into the kitchen at the same time and said the same. Alpina said she then washed her hands and went without hurry to her mistress's room, followed by Seelas, who was going to his pantry; that she then saw her lady lying across the bed, that is to say not in a recumbent or sleeping position but out of bed in the sense that she was lying across it with her head towards the wall and legs and feet hanging over the outer edge of the bed; that as she entered the room, she saw the appellant coming in from the child's nursery; that she noticed a smell which she describes as poisonous and oily; that the accused went to the bed, commenced fanning his wife with a book and sent her (Alpina) for brandy and afterwards on repeated errands for hot bottles, which he applied to his wife; also that he attempted artificial respiration. She also said that there was a handkerchief on the bed, about a foot square in size, near to the lady's right

hand. This handkerchief she said she put with some soiled linen on to the dressing-table after the doctor had come and she knew her mistress was dead. It appears to have gone to the laundry and nothing further is known about it. A small green smelling salts bottle, marked P.4, was on the teapoy upon which the deceased had kept her books. The stopper was out and it was empty. Alpina first saw it on Oct. 16, when she had to clear the teapoy for some purpose, and put the books aside. She does not remember seeing such a bottle on the dressing-table. On Oct. 16 she took the bottle and put it on a chair, on which she put the books. This is the bottle which, it was suggested, might have been filled with chloroform from some other container, and which the deceased might have used if she administered chloroform to herself.

The evidence of the nurse, Mabel Joseph, aged 21, was that she got up at 6.0 and left for church about 6.30, having seen the lady lying in her bed with her hand to her head. Seelas, the boy of 15 who spoke to Alpina about her mistress wanting her, said that he got up at 6.0 and that he saw the appellant and the servant Martin feeding the fowls on the back verandah and heard them talking about the fowls. When in the pantry he says he heard some noise, not very loud, other noises from the fowls occurring at the same time, which seemed to him to come from the direction of the deceased's room. He says he went to Alpina and told her of this in the kitchen, and that the chauffeur Perera was there at the time, that he went back with Alpina to go to his pantry, and that later he assisted Alpina to bring hot water bottles to the lady. He says it was not possible for the appellant to go to the lady's room without his being seen by the witness. Banda, aged 18, who is Alpina's brother, says he was sweeping the outer verandah when the appellant came out and told him to take two Sunday papers that morning, that the appellant went to the front verandah and came through the hall to the back verandah to feed the fowls. Banda was occupied with sweeping the verandahs until the car went off to fetch Mrs. Bandaranayake and if his evidence is true he must have seen the appellant if the appellant went to his wife's room at the material time. Perera, aged 38, the driver, says he got up about 6.30 and was washing himself in his room when he heard a noise and that he went to tell Alpina and then went back to his room. Afterwards Simon the cook told him to fetch Mrs. Bandaranayake, that he went with Simon in the car to bring this lady, that Simon did not tell him to fetch Dr. Paul also until they were on the return journey. He went back with the lady to fetch Dr. Paul and brought him about 7.30. Simon, the cook, aged 26, says that he was in the kitchen, and that he had washed when he heard a noise and saw Alpina going to the lady's room, that he followed and saw the appellant fanning his wife and was told first to go on a cycle and then afterwards with the motor car to fetch Mrs. Bandaranayake and the doctor. Martin, aged 14,

was giving food to the fowls. He says the appellant came from his room along the back verandah, that the witness went to the kitchen and went back and the appellant had reached the back verandah. The appellant was finding fault with the witness for giving rice and water to the chickens, as distinct from the ducklings, and was engaged in picking out certain of the chickens. Martin speaks to seeing the appellant on the back verandah just before Alpina and Seelas went to the lady's room.

It is plain that this evidence, if believed, makes it impossible to suppose that the appellant was with the deceased in the room at the time she uttered the cry, and the learned judge treated it as obvious that if the evidence of these witnesses were believed, the appellant must be acquitted as having established an alibi. The story of the appellant himself in a statement made at an early stage of the proceedings was that he was on the verandah where the chickens were when he heard a groan, that he thought the noise was made by Terence so went to the child's room first. The explanation which he is said to have given at the time for going to the child's room first is that he thought Terence might have got his head stuck fast between the rails of his cot, and he thought the noise which he heard might have been due to this.

The case for the prosecution thus depended upon the Crown being able to displace the evidence of the servants. To this end in addition to the suggestion that the servants would be easily induced to try to exonerate the appellant there was adduced the evidence of relatives who had gone to the house on the day of the death and afterwards, and had had conversations with the servants about the occurrences of the morning of Oct. 15. By Ceylon Ordinance No. 14 of 1895, s. 145 (2), proof of previous statements to contradict witnesses is provided for. A very considerable body of evidence of this kind was given that is to say of oral statements said to have been made by servants in contradiction of evidence given by them in so far as it assisted the appellant. Much of this evidence of previous statements was uncertain and varying and in no case does any servant seem to have made admissions so as to bring the evidence given in court into accord with their supposed statements. Therefore at most the evidence of alibi would be weakened or destroyed. There would still remain proved by the evidence circumstances of improbability, tending to cast doubt on the suggestion that with the child sleeping in the next room, a number of servants going about their ordinary work in adjacent rooms and verandahs, the appellant, almost immediately after the nurse had left for church, had gone into his wife's room and proceeded to administer chloroform in such a manner as to permit of her so completely altering her position in bed and of uttering a cry and dying immediately afterwards. If he did this and at the same time managed to leave the room and to come back again

before Alpina reached the lady's room, his movements were extraordinary.

Dr. S. C. Paul's evidence was that he arrived at 7.30 and that when he arrived, the appellant left the room. Dr. Paul found that the woman was dead and had probably been dead since about 6.30. He appears thereafter to have examined the room and finding a bottle of aspirin tablets, asked the accused about them. In addition to telling the doctor how he had heard the noise from his wife's room and how he thought that the boy had put his head between the rails of his cot, the appellant, in answer to the doctor's question, said that his wife had the night before complained of headache, and he had given her the bottle of aspirin nearly full. It appears that the bottle if full, would have contained 25 aspirins, and in the bottle there actually were nine remaining. Accordingly Dr. Paul thought that death was probably due to an overdose of aspirin, and that the marks which he had noticed on the face of the deceased were caused by rubbing of brandy and application of hot water bottles to the face. Dr. Paul was not content to certify death in the ordinary course but telephoned to the coroner and gave information to the police and to Mr. Leo de Alwis, the brother of the deceased. On learning from the police and coroner that they did not suspect foul play or propose to take any proceedings, he gave a certificate that afternoon according to which death was due to syncope or heart failure.

Comment was made by the Crown upon the suspicious conduct of the appellant in that though there must have been some smell of chloroform if he entered the room immediately after the cry, and although it would appear that his wife had died very soon afterwards, the appellant at no time mentioned the smell of chloroform to Dr. S. C. Paul on his arrival.

Dr. Paul's son, Dr. Milroy Paul, in the afternoon injected formalin into the body by way of embalming or preserving it, and on Oct. 16 the funeral took place. On the evening, however, of Oct. 15, while Dr. Milroy Paul was talking to his father, the question of the marks on the face of the deceased was discussed by them. Dr. Milroy Paul stated his opinion that the marks must be due to chloroform. The deceased's brother, Mr. de Alwis, not being satisfied that his sister had died from natural causes and apparently at first adopting the view that she had been driven to suicide took steps after a day or two to instigate the authorities to action, with the result that the body was exhumed and a post-mortem was held upon it on Nov. 7. The salient features of the post-mortem findings were much discussed in the medical evidence. It may be taken to be common ground that aspirin was not found in the body, that the face marks were most probably attributable to chloroform and that except on the face there were no marks whatever on the body of any significance. A slight bruising on the insides of the arms

might have been caused in the course of the movements made to attempt artificial respiration.

It is now necessary to examine the medical evidence. It should be observed that the doctors could not properly state their opinions as to whether the death was due to murder, suicide or accident ; that was a question for the jury. Apart from evidence as to what they saw on an examination of the body, the function of the doctors was confined to giving expert opinions as to the effects of chloroform on a human body, including the marks of burning which chloroform may occasion, and as to the immediate cause of death and other matters of that nature. Dr. S. C. Paul was in a special position for he was the family doctor and had attended the deceased on two confinements, and he as already stated saw the deceased at 7.30 a.m. at Duff House and interviewed the appellant. The main points on which expert evidence was given were, first, whether the death was due to aspirin poisoning or to chloroform, secondly, whether it was due to asphyxia or syncope, thirdly, whether the marks on the face were such as would be caused by burns from chloroform, fourthly, whether pressure on the face would be necessary to cause such burns, fifthly, as to the behaviour of persons during the administration of chloroform, e.g., as regards struggling, shouts or other cries and so forth. It may be mentioned here that evidence of a very inconclusive character was given on this last point, inconclusive because not one of these witnesses had heard any of the sounds coming from the room of the deceased, and all they had to guide them were the very different descriptions of these sounds given by the Cingalese witnesses who heard them. In these circumstances their Lordships do not think it necessary to summarise the expert evidence as to these sounds ; but they must observe that any theory as to the cause of death must take into account the fact that cries or sounds apparently coming from the deceased were heard an extremely short time before Alpina entered her room and found her lying insensible. The conclusion that the death was due to homicide must therefore involve the idea that the murderer had discontinued the means which he must obviously have employed to prevent calls for assistance and had done this just before causing insensibility ; and the cries or sounds must have emanated (on the footing of homicide) from a partially suffocated woman.

The expert evidence was taken as conclusively establishing that the death was not due to aspirin. Further it is reasonably clear that the direct cause of death might be the same if due to the administration of chloroform vapour either by the deceased or by another person, and the contest of conflicting opinions as to whether the signs observable on the post-mortem examination pointed to asphyxia or to cardiac syncope or to asphyxia with secondary syncope was not of first importance. It was apparently supposed that asphyxia would take longer to

produce, and be more likely to require an agent external to the deceased to bring it about ; but the supposition itself was not at all clearly established. It must also be remembered that none of the doctors had any experience of the changes which might take place in a formalin injected body buried underground for 24 days in the climate of Ceylon.

[His Lordship summarised the material expert evidence.]

Such being the nature and effect of the evidence the further course of the trial may be shortly stated. All the witnesses were called by the prosecution. Fifty-four witnesses having been mentioned on the back of the indictment, 52 witnesses were called and two tendered but not examined. The statement of the appellant in the police court on Feb. 10, 1934, was put in in accordance with the law but the appellant did not elect to give evidence in his own defence. Evidence having been taken from May 14 to June 8, the judge and jury with the accused and counsel on both sides went on the latter date to the scene of the occurrence, namely, Duff House. The servant witnesses were there and were questioned further and at length presumably by the judge and by nobody else. A certain Dr. Peiris was also present and took some part in the proceedings. He does not seem to have been at any time called as a witness or sworn. Experiments were conducted by pouring chloroform on a handkerchief to see how long the smell would remain, and by making noises at one place to discover how loud they would sound at another place.

The learned judge summed up on June 13 and 14, in a very long and careful charge, and the jury were absent for five hours. They brought in a verdict by the minimum majority of five to two, one of the five recommending the appellant to mercy. The learned judge, in the course of his summing up, when dealing with the question whether the death was due to homicide or suicide, told the jury that they should view the evidence under the four heads of : motive, opportunity, means and conduct. He laid before them the fact that the letters show a motive for suicide or a motive for taking an overdose of chloroform to frighten the appellant. He also said that the case would be the first of its kind, apparently, in the British Empire, where murder had been attempted by chloroform, and that the appellant would have taken a great risk of the victim screaming.

As regards opportunity, he told them that if they believed Martin, Banda and Seelas, opportunity was absent. On the other hand the accused had opportunity in the sense that he was up and that he was in the same house. As regards means, the only evidence in the case was supplied by the appellant himself who had stated that some 2½ months before he had bought an ampoule of chloroform in connection with an operation on the leg of a buffalo at his estate in Chillaw : that it had not been used for this purpose and had been brought home and

had been handed to his wife. Under the head of conduct, the learned judge invited the jury to consider the conduct of the appellant during "the faint," and after "the faint," when Dr. Paul came, and later, including such matters as whether the accused did not guess that his wife had died, whether he did not think it necessary to make a fuss about it or whether he really was attempting to revive his wife, and whether his leaving the room could be reasonably explained. He put to them also whether the conduct of the accused in telling the doctor about the aspirin was not suspicious in view of the fact that the medical evidence had disclosed that the lady could not have taken any aspirin, the view of the learned judge on this point being that unless the deceased had thrown away a number of tablets it cannot have been true that the bottle was full as the appellant had said it was.

As regards the medical evidence, he told the jury that all the doctors were agreed that chloroform was the cause of death, but that the doctors were divided into two groups, those who thought that the death was caused by syncope and those who thought that it was caused by asphyxia and syncope, or simply by smothering as Dr. Nair had suggested. He told them that except for Dr. S. C. Paul and Dr. de Silva, the other doctors were of the opinion that death was due to secondary syncope with which there were concurrent asphyxial signs and he put it to them whether or not they would accept the proposition that there were asphyxial signs which must have taken some minutes to produce. He put the evidence about the burns on the face to the jury and the controversy between the doctors as to whether they must have been caused by pressure. After discussing the medical evidence he said :

These problems are set by doctors. If you cannot make up your own mind from the doctor's evidence, it is still your duty to come to a conclusion on your own observations in this case. Could the burns of that kind be caused by a mere handkerchief by putting it in that position, or must pressure have been used ? If pressure was used, could not the lady herself have used pressure when she wanted to go off. Accused says in his statement that she was in the habit of inducing sleep by chloroform. . . . Make up your mind one way or the other and see whether it corroborates the prosecution story or the case for the defence, whether it was suicide or death by misadventure.

Upon a review of the charge of the learned judge as a whole, their Lordships do not find that it was calculated to bring before the minds of the jury the essentials of the case in respect of these circumstances : (i) that the only evidence as to where the accused was at or before the time of the death was in his favour or if the evidence were disbelieved and disregarded there was no evidence of his presence in his wife's room at the material time ; (ii) that there was particularly strong evidence pointing to a tendency or inclination on the part of the lady to commit suicide. This point was mentioned more than once, but as no more than balancing the motive for murder. This is unsatisfactory because assum-

ing that there was such a balance as regards motives for suicide and murder yet more than motive was disclosed by the evidence. There was disclosed, as has been said above, a tendency towards suicide in the deceased. No tendency towards violence or murder in the accused was even suggested. (iii) That the medical evidence was completely ambiguous in its effect, and did not show any preponderance of opinion among the doctors that the physical conditions apparent at the post-mortem were such as to be consistent only with the hypothesis of homicide or to point clearly in that direction. In considering the weight which a jury could properly attach to this medical evidence it is important to observe that the question was not whether they were justified in preferring the opinions of those doctors who thought that the appearance of the body pointed to the application of external force rather than to the application by a suicide of a handkerchief soaked with chloroform, but rather whether the evidence of the medical experts as a whole pointed so clearly in the direction of homicide that the evidence of the three servants that the appellant was elsewhere than in the room of the deceased, must be rejected as untrue. Expert evidence to have that effect must be clear and decisive. Their Lordships are unable to take the view that the jury was properly directed on this important aspect of the case; they were left to infer that they were at liberty to accept either of the views put forward by the medical witnesses conflicting as they were, and even to put aside all the medical evidence and to form their own opinion from the facts as to whether they pointed to homicide rather than to suicide. In the opinion of their Lordships the expert evidence was so conflicting, where it was not hesitating and doubtful, that the learned judge should not have invited the jury on matters involving medical knowledge and skill to come to a conclusion for themselves to which the medical men could not point the way either with certainty or with even an approach to agreement amongst themselves.

It is apparent that this general tendency of the summing up was to lead the jury to think that in effect they might convict the accused mainly if not entirely on the view they formed of his conduct. Many of the matters discussed under this head seem to their Lordships to be most uncertain in their effect and unreliable as a guide to a conclusion. There were points against the appellant. There were others in his favour. The greater number were merely ambiguous. It has always to be remembered that as the evidence showed the appellant was in danger, even if suicide were found to be the cause of death, of incurring at least moral blame, and it was quite consistent with innocence of murder that he should prefer misadventure to be deemed to be the cause of death. Still if there had been other evidence of weight their Lordships do not doubt that a jury might properly have taken into account these matters of conduct. But in this case at the end of the evidence the result was

that there was no direct evidence justifying a conviction and for reasons already given there was no medical or other circumstantial evidence justifying a conviction; and to arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused was, their Lordships think, to act upon the merest scintilla of evidence and to be impermissible.

On these facts the advice proper to be tendered to His Majesty seems to their Lordships to be no doubtful matter. The submission of the Attorney-General was well founded, that it is not for this Board to interfere because its conclusion as to guilt or innocence might differ from that of the jury. But in the view of their Lordships, there are here no grounds on the evidence taken as a whole, upon which any tribunal could properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty, and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not, in law or justice, permissible grounds on which to base a verdict. The only proper direction to the jury in these circumstances was that they must return a verdict of not guilty or that they could not safely or properly find any other verdict. The direction was, as has been seen, quite other than this, and the verdict, in the opinion of their Lordships, cannot stand.

Having regard to this conclusion on the main issue in the appeal, it is strictly unnecessary to consider the other points raised, but in the circumstances of the case, and having regard to the general importance of some of the matters debated at the bar, their Lordships propose to deal shortly with these points also.

As to the matter of hearsay evidence: it has been already observed that witnesses who gave evidence favourable to the appellant were extensively cross-examined as to other and previous oral statements. Such procedure is with the leave of the judge permissible under the Ordinance (Law of Evidence) 14 of 1895, ss. 154 and 155, and it is to be presumed that such leave was obtained. In other cases, as for example in the case of the maid Alpina whose good faith does not seem to have been questioned by the Crown, evidence of what she had said was given apparently without previous cross-examination of the witness as to such statements. This is both undesirable and not permitted by the above sections and it could not be and was not suggested that sect. 157 of the same Ordinance applied to make the further hearsay evidence admissible as corroboration. It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Roy v. R.* (7) to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not

desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution. whether in the result the effect of their testimony is for or against the case for the prosecution. Thus, in the present case, the maid Alpina and Dr. S. C. Paul were indispensable Crown witnesses. As to some of the other witnesses, there might have been both less confusion and a fairer trial if, though their names were on the indictment, they had been put into the box to be questioned as to other than formal matters by the defending counsel. As the trial was conducted the result was unhappy. The jury was warned more than once in the judge's charge that evidence of previous statements of a witness not admitted by the witness to have been made and not adopted by him in his evidence in court was not evidence of fact. But how ineffective is such a warning when there is present a very extensive mass of hearsay evidence, is shown by what happened here. Not only did medical and other witnesses assume to be facts matters of which there was merely such hearsay evidence and then proceed to found conclusions upon them, but the learned judge himself in his charge, through forgetfulness, more than once fell into the same error. In these circumstances the appellant's complaint under this head, seems to their Lordships to be established in fact.

As to the Evidence Ordinance No. 14 of 1895, s. 106: that section provides as follows:

When any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

The learned judge, who tried the present case, held a view as to that section which led him to give directions to juries, one of which is in question here, and another of which has been already considered and disapproved by this Board in a reported judgment: see *Attygalle v. R.* (8). That judgment had not, of course, been delivered when the charge was given to the jury in the present case, and the material passages of the charges in *Attygalle's* case (8), and this case, though not in identical language, are substantially of the same tenour. Accordingly the direction given in this case is open to the objection which their Lordships explained in the



judgment in *Attygalle's* case (8). That explanation need not be repeated. It is quite right to say that the learned judge in the present case in the course of his very able charge to the jury explained generally that the onus was on the Crown to establish guilt. But the passage in the charge under examination seems nevertheless to be open to very serious objection. It is not primarily or at all a general comment, which would be and was quite admissible, on the fact that the appellant was not called to give evidence. Nor was it a direction that any specific named fact was one which fell within the section with the result that the onus of proving that fact was upon the appellant. It was a direction as to facts generally, and therefore it was particularly unfortunate that the relevant passage in the charge should have been expressed thus: "He has got to explain. . . . In the absence of explanation, the only inference is that he is guilty." Its tendency would be to lead the jury to suppose that if anything was unexplained which they thought the appellant could explain, they not only might but must find him guilty. In a very difficult and quite exceptionally mysterious case such as this, the area of the unexplained was extensive, and how much the appellant himself could explain depended on where he was at material times, and indeed, on the very matter at issue in the trial, namely, his guilt or innocence. One thing is quite clear, that this case and *Attygalle's* case (8) are wide apart in one respect. In *Attygalle's* case (8) this Board did not interfere because, owing to clear evidence of guilt free from all connection with the irregularity complained of, the irregularity caused no injustice. Here the case even as left to the jury admittedly hung suspended in a wavering balance, and no one can say what tipped the scale against the appellant.

The matter of undue pressure on the jury can be shortly dealt with. In the course of his charge the learned judge is reported to have said this :

the verdict, whether it is a conviction or an acquittal, I hope it will be unanimous, owing to the serious and grave nature of the case, but if you cannot agree, please remember that I have got the full power to ask you to reconsider your verdict, but four to three means an unacceptable verdict. That means you have to go through the trial again. I hope you will not have this misfortune.

It was said that this meant and the jury would understand, that if they did not agree, they would have to try the case afresh. Their Lordships are satisfied that the learned judge can have had no intention of threatening the jury with such a fate and must, as the Attorney-General said, have been referring to a possible necessity for a further direction from him and for a new and prolonged deliberation. Their Lordships also recognise that in this case, as often, the shorthand note is not in all respects either complete or accurate ; but the form the note takes in this passage seems to indicate that the shorthand writer understood the language in the sense complained of and the jury may unfortunately have done the same.

There remains the matter of the proceedings at Duff House on June 8, 1934. The Criminal Procedure Code (No. 15 of 1898), s. 238, provides for a view by the jury and lays down definite and strict conditions for its conduct. The Evidence Ordinance, s. 165, provides for the judge asking questions at any time of any witness. The proceedings on June 8, 1934, seem to have been a combination of a view and a further hearing with the introduction of some features permitted by neither procedure, such as the performance of an experiment with chloroform by a Dr. Pieris, who does not appear to have been sworn as a witness, the judge and the foreman of the jury being present with Dr. Pieris in a room and the rest of the jury being somewhere else. The jurors seem also to have been divided for the purpose of other experiments in sight and sound and to have been asked questions as to the impressions produced on their senses. Their Lordships have no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sounds or smells; but they feel bound to record their view that there were features in the proceedings of June 8 which were irregular in themselves and unnecessary for the administration of justice. Their Lordships do not find it necessary to consider whether any injustice resulted in this particular case, but they regard proceedings so conducted as tending, in the words used in *Ibrahim's* case (1), at p. 615 "to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future."

In these circumstances even had their Lordships taken a different view on the main point in the case, and had thought that there was evidence which justified the learned judge in leaving the whole case to the jury as one where they might, if they thought fit, properly find a verdict of guilty, their Lordships would feel impelled to say that, particularly in respect of the mistaken use made of the hearsay evidence, and in respect of the error arising upon the Evidence Ordinance, s. 106, such mischiefs attended this hearing as to bring the case into the category where the interference of His Majesty on the advice of this Board is necessary.

For these reasons their Lordships have humbly advised His Majesty that the appeal should be allowed and the conviction and sentence quashed.

Solicitors: *Freeman & Cooke* (for the appellant); *Burchells* (for the respondent).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

CROSS v. GATINEAU POWER COMPANY.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Maugham, Lord Roche),
June 18, 19, 22, 23, 25, 26, 29, 30, July 2, 3, 6, 29, 1936.]

Privy Council—Canada—Compulsory expropriation of land—Hydro-electric power company—Statutory powers—Whether all affected property to be vested in power company.

The appellant owned property on the Gatineau River, including a saw mill used for his timber business and a plant for the production and distribution of electricity, both worked by water power. The respondents were attempting to expropriate for the purposes of a scheme for development of hydro-electric power on the river, and had erected a dam with the result that much of his property was submerged and other seriously affected. An action in respect of this damage had proceeded to trial, and judgment had been reserved, when a special Act was passed by the Quebec Legislature to prevent any disturbance of the respondents' operations. The respondents were by the Act to make just and fair compensation to the appellant for all his properties and rights taken or affected, and the court was to determine what properties and rights should upon payment of the compensation become vested in the respondents :—

HELD : (i) the Act did not require the court to vest in the respondents all lands or properties affected, if in its discretion, it thought compensation for injurious affection sufficient.

(ii) the amount of an award may be varied by an appeal court where it is clear that it is based upon a wrong principle of calculation or not justified by the admitted facts.

(iii) although undertakers cannot offer remedial works in lieu of compensation, the offer of land taken or easements over land taken for the restoration of a piling ground and a railway siding was a proper one and ought to be taken into consideration.

[EDITORIAL NOTE.] In this case the parties had proceeded to contest their rights in court before the power company obtained any special statutory powers for the purpose of their undertaking. It being possible that the court might give judgment in favour of the appellant in the appeal and order the company to remove their dam, a special Act was passed to avoid such a result and to provide for the compulsory purchase of the appellant's land. The appeal deals with the position arising upon the passing of the Act and how far the court can review the calculations of the courts below.

AS TO COMPULSORY PURCHASE UNDER LOCAL ACTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 8, 9, para. 4; and FOR CASES, see DIGEST, Vol. 11, pp. 109-119, Nos. 53-123.]

Cases referred to :

- (1) *Ruddy v. Toronto Eastern Railway* (1917), 86 L.J.P.C. 95; 11 Digest 196, case (i).
- (2) *Flint v. Lovell*, [1935] 1 K.B. 354; Digest Supp.
- (3) *Cossette v. Dun* (1890), 18 S.C.R. 222; 17 Digest 177, case (a).
- (4) *Cedars Rapids Manufacturing & Power Co. v. Lacoste*, [1914] A.C. 569; 11 Digest 130, 187.
- (5) *Maclaren v. A.-G. for Quebec*, [1914] A.C. 258; 44 Digest 106, case (o).
- (6) *Lacoste v. Cedars Rapids Manufacturing & Power Co.* (1928), Q.R. 47 K.B. 271; Digest Supp.
- (7) *McHugh v. Union Bank of Canada*, [1913] A.C. 299; 21 Digest 242, 700 ix.

- (8) *Owen v. Sykes*, [1936] 1 K.B. 192; Digest Supp.
(9) *Levi v. Reed* (1881), 6 S.C.R. 482; 17 Digest 165, 661 (ii).
(10) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; Digest Supp.
(11) *Haack v. Martin*, [1926] 1 D.L.R. 76; 31 Digest 140, 2756 (i).
(12) *Sidney v. North Eastern Railway Co.*, [1914] 3 K.B. 629; 11 Digest 128, 171.
(13) *Re Lucas & Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; 11 Digest 127, 169.
(14) *Fraser v. Fraserville City*, [1917] A.C. 187; 86 L.J.P.C. 91; 11 Digest 124, case (e).

APPEAL by Freeman T. Cross from two judgments of the Court of King's Bench for the Province of Quebec (DORION, LETOURNEAU, HALL, WALSH, GALPEAULT, JJ.), dated Dec. 28, 1934, reducing the amount of compensation awarded to the appellant in a judgment of DE LORIMIER, J., of the Superior Court for Quebec dated June 28, 1933.

The facts of the case, relevant to the appeal, appear in the judgment of their Lordships delivered by LORD ROCHE.

Louis S. St. Laurent, K.C., and *W. B. Scott, K.C.*, for the appellant, referred to: *Maclaren v. Attorney-General for Quebec* (5), *Lacoste v. Cedars Rapids Manufacturing and Power Co.* (6), *McHugh v. Union Bank of Canada* (7), *Flint v. Lovell* (2), *Owen v. Sykes* (8), *Levi v. Reed* (9), *Cossette v. Dun* (3), *Cedars Rapids Manufacturing and Power Company v. Lacoste* (4), *Powell v. Streatham Manor Nursing Home* (10), *Haack v. Martin* (11).

D. N. Pritt, K.C., and *T. R. Ker, K.C.*, for the respondents, referred to: *Sidney v. North Eastern Railway Co.* (12), *Re Lucas and Chesterfield Gas and Water Board* (13), *Fraser v. Fraserville City* (14).

LORD ROCHE: This is an appeal from two judgments of the Court of King's Bench for the Province of Quebec dated Dec. 28, 1934, reducing the amount of compensation awarded to the appellant in an action which was heard by DE LORIMIER, J. in the Superior Court, and in which he pronounced judgment on June 28, 1933. The compensation in question is compensation for the properties and rights of the appellant taken for, or affected by, the respondents' works in connection with power development on the Gatineau River. The appellant was awarded \$348,481.22 by the Superior Court, but on appeal to the King's Bench Division that sum was reduced to \$157,493.89.

The relationship of the parties out of which the litigation arose was as follows: The appellant, a lumberman and property owner, was, at the material time, possessed of lands and buildings on the Gatineau River, which is a tributary of the Ottawa River. These lands which were situate above Chelsea Falls on the Gatineau River included part of the bed of the river itself at a series of rapids or falls called Cascades. The buildings included a saw mill used for the appellant's timber business and a power house and plant for the production and distribution

of electricity, which were both of them situate at a place on the Gatineau River known as Farm Point and were both worked by water power from Meach Creek, a stream flowing into the Gatineau River. These properties were acquired and these businesses were started and developed by the appellant in the period between 1903 and 1926. In the latter year, predecessors in title of the respondents, the Canadian International Paper Company, formulated a scheme for the development of hydro-electric power on the Gatineau River, and on May 21, 1926, the plans for such development were approved by order in council. Later in the year 1926, the respondents took over the scheme as assignees of the Paper Company and proceeded with the development. Between the end of 1926 and the date when the present action was begun, that is to say Mar. 2, 1931, a contest was in progress between the parties conducted in or before the Quebec Public Service Commission with appeals to the King's Bench Division and the Supreme Court of Canada. It is unnecessary to consider further the course of this contest or the rights debated therein. It is sufficient to say that the respondents were attempting to expropriate for the purposes of their scheme a number of the appellant's properties, and that the appellant was resisting these attempts. Meanwhile, however, the respondents in 1927 erected the dam at Chelsea Falls, which was the feature in their scheme most materially affecting the appellant, and when the dam was complete, the river was thereby raised, and a good deal of the appellant's property, both at Cascades, Farm Point and elsewhere, was submerged and others of his properties were affected. On Mar. 2, 1931, the appellant brought the present action praying for an order against the respondents for the lowering of the water to the natural level, unless they preferred to pay a named sum for compensation. Questions of title were raised in the action, as well as other questions of law and fact, and the hearing took place between Sept., 1931, and Jan., 1932, when judgment was reserved. But before it was given, the situation was radically changed by the passing of a special Act of the Legislature of Quebec (No. 128) which was assented to on Feb. 19, 1932. The terms of the Act are as follows :

Whereas the Gatineau Power Company has developed certain water-powers at Chelsea Falls, on the Gatineau River, and has, by its works erected for that purpose, raised the level of the river above the said Falls and thereby submerged in whole or in part, since the 12th of March, 1927, certain properties of which one Freeman T. Cross claims to be the owner and with respect to which he claims to have suffered serious loss and damage :

Whereas the said Cross has instituted in the Superior Court, in the district of Montreal, a petitory action against the said company with respect to some of the said properties, which action is still pending.

Whereas the said Cross has opposed certain proposed amendments to the Water-Course Act as being apt to affect the rights asserted by him in the said petitory action, but has expressed his willingness to allow the said Gatineau Power Company

to acquire all of his said properties submerged or affected by the said development provided he be paid fair compensation :

Whereas the said company has expressed its desire to expropriate the said properties :

Whereas it appears that the parties are unable to agree as to what would be fair compensation :

Whereas it appears proper, under the circumstances, to provide by special legislation that the said company shall not be disturbed in the operation of its said power development and that fair compensation to the said Cross shall be assessed in his favour and awarded to him by the courts in the said pending case :

Therefore, His Majesty, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows :—

1. The Gatineau Power Company shall not be disturbed by the said Cross, his successors or assigns, in the operation of its power development at Chelsea Falls by maintaining the level of the Gatineau River above the said Falls at any controlled elevation not exceeding 321.5 feet above sea level at Farm Point as determined by the geodetic survey bench mark on the church of the United Church of Canada at Wakefield Village, provided fair compensation to the said Cross shall be assessed and paid as hereinafter determined.

2. The Gatineau Power Company shall make just and fair compensation to the said Cross for all his properties and rights taken for or affected by the said development up to the said elevation and by the operation thereof.

The date with reference to which valuation shall be made shall be the date of the order in council approving the plans for such development.

4. In fixing the compensation to be awarded to the said Cross, the Superior Court shall include such amount as it deems just for the disbursement, fees and costs incurred in such pending action and in connection with the passing of the present Act.

5. Such compensation shall be assessed and awarded to the said Cross in his said pending case against the company, with such interest as the court may deem proper, and the parties to the said case may, under the control of the said court, make such amendments to their pleadings and/or file such supplementary pleadings, and submit such further evidence with respect to the new issues raised thereby as may appear proper to the said court to give full effect to the provisions of this Act.

6. The court shall in the judgment to be rendered in the said case determine what properties and rights shall, on payment of the said compensation, interest and costs, become vested in the Gatineau Power Company, and make such order for the lowering of the level of the said river on or opposite the properties of the said Cross and for the payment of damages, interest and costs as may appear to be proper in the event the said company should fail to pay the amounts awarded as full compensation interest and costs.

7. On payment or deposit in full of the amount awarded, the said properties and rights shall be vested in the company and the compensation shall stand in lieu of such properties and rights.

8. The judgment to be rendered in the said case shall be deemed for all purposes of appeal or otherwise a judgment of the said court.

9. This Act shall come into force on the day of its sanction.

As has been already stated, the date of the order in council referred to in clause 3 of the Act was May 21, 1926, and accordingly that became and is the date in reference to which the valuation had to be made.

After the pleadings in the action had been amended or supplemented as contemplated by the Act, the hearing of the action, thus changed in its nature, was resumed and continued throughout the months of Oct. and Nov., 1932 ; judgment was reserved on Nov. 24, 1932, and delivered on June 28, 1933. The main items and amounts going to make up the sum of \$348,481 adjudged by the judge of the Superior Court to be due were four in number, and were as follows : Cascades water power, \$90,000 ; Lumber business, \$115,000 ; Hydro-electric system, \$60,000 ; Disbursements, fees, etc., under clause 4 of the Act, \$76,981. There were a few other smaller items which were unimportant, and are not now in question. Interest was also awarded, but no question arises as to that. The judgment of DE LORIMIER, J. further, and in compliance with clause 6 of the Act, contained an order detailing the properties and their extent to be vested in the respondents.

From this judgment the respondents appealed to the Court of King's Bench, and on Dec. 28, 1934 the judgments now appealed from were pronounced. The result in connection with the four main items above referred to was as follows :

An adjustment was made in the amount for disbursements and fees, whereby it was reduced from \$76,981 to \$75,493. No question now arises as to this item.

The compensation was very substantially reduced thus :—

As to Cascades	from \$90,000 to \$35,000
As to the hydro-electric system	from \$60,000 to \$16,000
As to the lumber business ..	from \$115,000 to \$28,100

The judgment of the King's Bench also made alterations in the form of the order as to the vesting of properties in the respondents ; but their Lordships are satisfied that there was no real difference of opinion between the two courts as to the construction of the vesting clause in the Act or as to the powers of the court thereunder, or as to the order intended to be made. The alterations made by the judgment of the King's Bench in relation to the property which was to be vested in the respondents were directed to form rather than to substance, and to the removal of uncertainties that might be thought to arise on the wording of the judgment below. The meaning and effect of the language of the Act in its bearing upon the heads of claim to be considered will be discussed later in this judgment when those heads of claim are under consideration, but certain general observations fall to be made. The Act was a very special Act to deal with an exceptional situation. Works had been carried out at great cost and they submerged or affected properties of the appellant. It was sought in the action to obtain an order undoing what had been done. The Act took it out of the power of the court to make such an order, and it was natural that in this situation the court well conversant already with the facts should be entrusted with wide discretionary powers

as to the compensation to be awarded and as to the lands to be vested in the respondents. Their Lordships think that in both matters, that is to say compensation and vesting, a wide discretion of that nature was granted by the terms of the Act, and as regards vesting, they think that the Act did not require the court to vest in the respondents all lands or properties affected, if in its discretion, it thought another determination more proper. It is also to be observed that a right of appeal was contemplated and preserved by the Act. The appeal against the judgment of the King's Bench is founded on the contention that there was no sufficient ground for interference by the appellate court with the assessment of amount by the trial judge, and that the trial judge proceeded upon proper legal principles and assessed an amount that was justified by the facts and not excessive in amount.

The arguments before this Board included some discussion of the principles applicable to a consideration upon appeal of determinations as to amount by a trial judge. There seems to their Lordships to be no uncertainty or difficulty as to those principles themselves, though their application to complex facts is far from easy. The principles were admirably stated in this case by LETOURNEAU, J., who, amongst the judges of the King's Bench, gave the most detailed reasons for the judgment. The learned judge used the following language :

j'estime que cette cause doit être décidée comme toute autre nous venant de la Cour Supérieure, à savoir que sur une question de fait, l'on doive en principe tenir compte du choix qu'aurait pu faire le juge de première instance entre deux groupes de témoins qui se contredisent ; que son appréciation des faits soit d'un grand poids, surtout si elle est motivée ; que si quant au montant accordé la preuve vague et indéfinie ne permet pas de dire qu'un autre chiffre serait juridiquement plus sûr, mieux vaut ne pas intervenir. Mais hors de là, il nous faut reconnaître que d'après notre système l'appel existe pour le fait comme pour le droit et qu'il n'y avait d'autre alternative, dans le cas qui nous a été soumis, que de reprendre l'étude très longue de la preuve faite, sauf à ne conclure autrement que ne l'a fait le savant juge de première instance—je le répète—, que si nous sommes convaincus d'une erreur quant aux montants qu'il a fixés, et que d'autres montants sont plus sûrement conformes à la preuve offerte.

This statement of the principles accords in all material respects with the principles frequently stated with authority, as for example, by this Board in *Ruddy v. Toronto Eastern Railway* (1), and by the Court of Appeal in England in *Flint v. Lovell* (2), and by the Supreme Court of Canada in *Cossette v. Dun* (3). Their Lordships, however, observe that in the present case, as in many other cases, the differences of view between the trial and the appellate courts, though resulting in a difference of amount, really arose from differences of view on questions of fact and law preliminary to the question of amount, and such questions of fact and law can be examined and decided upon appeal with less difficulty than can such mere questions of amount as are dependent upon estimation or opinion.

Such being the principles applicable to this appeal, the real question is to what extent have they been correctly applied, and to what extent is the very drastic revision by the King's Bench of the decision of the trial judge justified on the law and facts of the case. To solve this question the attention of their Lordships has been called to a very considerable amount of the evidence and documents contained in the 14 volumes constituting the record in this appeal. Counsel on both sides have been both skilful and helpful in eliminating the unessential, but in the end the argument has been of necessity protracted. It is neither necessary nor proper that the evidence should now be reviewed or discussed at any length, and their Lordships propose to confine themselves to as compendious a statement as possible of such matters as lead them to prefer the one view or the other in respect of the three heads of claim now remaining in question. Counsel for both parties preferred a request to the Board that in the event of it appearing upon any head that some other measure of amount than that adopted by either court was more proper to be adopted, their Lordships should not remit the matter for reconsideration and for re-assessment of compensation, but should themselves fix the compensation and so avoid further delay and expense. Having regard to the conclusions which their Lordships have reached on the several heads of claim and which will now be explained, it will appear that neither remission nor re-assessment is in their view proper or necessary.

The first head of claim to be considered is for the land and for the water power at the Cascades Falls. The learned trial judge purported to found his judgment on the principles laid down by this Board in the case of *Cedars Rapids Manufacturing & Power Company v. Lacoste* (4), at p. 576, citing the language of the judgment delivered by LORD DUNEDIN to the following effect :

For the present purpose it may be sufficient to state two brief propositions :—
 (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

The learned judge was presented with a very large amount of evidence as to the value of these water rights, and it need hardly be said that it was of a very conflicting character. It was put as low by some witnesses for the respondents as a few thousand dollars, and as high by some witnesses for the appellant as six hundred thousand dollars. The finding of the judge as to their value would appear to be amply justified by evidence both oral and documentary unless certain criticisms directed by the Court of King's Bench to the judgment and to the evidence relied upon therein are sustainable. The main criticisms may be considered under three heads.

First, it was said that if the potentiality of Cascades for the production of power was properly estimated and at a proper price, the figure of \$35,000 would result instead of the figure of \$90,000. But though LETOURNEAU, J., in his very careful and detailed judgment assumed in estimating the power of the falls under the control of the appellant, a fact which the respondents now concede to be correct, namely, 7.6 feet of fall, it is not clear what rate of flow the learned judge took for his calculation. It is now conceded by the respondents that 3,000 cubic feet per second should be taken. Further, the learned judge appears to have formed the mistaken impression that 18 to 20 dollars per horse power was the capital price to be used for the calculation, but it is conceded that this had not been given by the witnesses as a capital price but as an annual price for current sold in large quantities. This mistaken impression as to price appears in the notes of other judges and, as their Lordships think, must be corrected by the substitution of some figure such as \$30 to represent capital value. HALL, J., while agreeing with a result of \$35,000 only, does so by using factors different from those which are now conceded by the respondents to be correct. That is to say he bases himself on a fall of 4 feet and apparently on a flow of 1,900 ft. per second. Similarly WALSH, J., though he found that it was established beyond doubt that the flow of the river was 3,000 cubic feet per second, took the fall as being of 5 feet only, that is to say 50 per cent. less than the 7.6 feet fall now agreed upon. If the necessary corrections are made in the factors so used by these learned judges, the resulting total figures will nearly approach the figure arrived at by the trial judge.

Secondly, there was a transaction between the respondents and the Canada Cement Company as owner of a lower portion of the Cascades falls involving the transfer by the latter to the former of the water powers arising from such ownership. Inasmuch as these water powers were of the same nature and at the same place as those now to be valued, this transaction is of obvious importance as an illustration of market value, and it was considered and discussed as such by LETOURNEAU, J., who thought that but for one fact this transaction would have guided the court. The date of the transaction was July 10, 1926, and very close, therefore, to the date material to this action. It consisted in the transfer to the respondents of certain properties of the Cement Company, including the bed of the river, for use in connection with the hydro-electric development of the respondents by means of the Chelsea Dam. The consideration for the transfer was expressed to be the delivery to the Canada Cement Company of 3,000 electrical horse power per annum for a minimum term of 15 years at a price of 10 dollars per horse power. The evidence was that as compared with this price of 10 dollars the prevailing prices were 40 dollars or more to a small consumer such as the appellant—18 to 20 dollars to large consumers and a price

of 15 dollars to the Ontario-Hydro-Electric Commission. The respondents' principal witness put the average charge to large consumers at 14 dollars per horse power. A prospectus of the respondent company bearing date of July 21, 1926, said that over 90 per cent. of the power to be developed by the schemes then in contemplation, including the Chelsea scheme, was contracted to be sold to specified large customers, one of whom was the Canada Cement Company, and that the balance was expected to be readily absorbed in the adjacent power markets. There was evidence that at certain times there was a surplus load of electricity, and that when this happened at irregular intervals, it was disposed of very cheaply for steam drying of pulp wood to consumers who could use such irregular supply when it was available at a price as low as 7 or 8 dollars per horse power. But this fact would not seem to justify any inference such as appears to have been drawn by LETOURNEAU, J. Moreover, even if, contrary to their Lordships' view, the evidence justified such a conclusion, the test of what the Canada Cement Company got for their interest in Cascades is to be measured not by the cost of the power to the respondents, but by the difference between what was the market or ordinary price for power and what the Canada Cement Company were to pay by reason of their agreement. That difference is indubitably not less than \$4 per horse power and allowing for a discount on that figure because the consideration was taken in kind instead of in cash and adjusting the figures to meet the difference in the amount of water power provided by the appellant as compared with that provided by the Canada Cement Company, the resulting figure certainly supports the award of the trial judge.

Thirdly, a transaction of the appellant himself on the Gatineau River much higher up the river and much earlier in date was thought to justify the reduction of the trial judge's figure. In 1917 the appellant acquired as agent for the Hull Electric Company water powers at the Paugan Falls on the Gatineau River, and it was said that the prices worked out at \$3,333 per foot of fall. But apart from a question of difference of locality and other circumstances, the lapse of time between 1917 and 1926 is of no small importance. There was evidence of a marked increase of electrical development proceeding continuously as time went on, and there was a special fact as to the Paugan Falls which was of considerable importance. In 1926 the respondents acquired the business of the Hull Electric Company and with it the Paugan Water Power at a very large price of over \$4,000,000. No specific part of the purchase price was shown to be allocated to the Paugan Water Power, but the appellant adduced some evidence to show that the value of the other assets of the vendor company accounted for so small a part of the purchase price as to justify the allocation of a very large sum to the Paugan Water Power. This evidence was inexact, and quite insufficient to warrant acceptance

of the very high figures for Paugan contended for by the appellant's witnesses, but it was of such a nature as to call for answer by evidence on the point on the part of the respondents. No such answer was made, and in these circumstances, an estimation of the value of the Cascades fall in 1926 by the values of the Paugan fall in 1917 is both unsafe and unsatisfactory. For these reasons as to this head of claim the criticisms upon the judgment of the Superior Court seem to their Lordships not to be well founded, and they are of opinion that there were not and are not any sufficient reasons shown for impeaching its assessment of the compensation for matters under this head at the sum of \$90,000.

As to the appellant's lumber business: the very wide divergence of view between the Superior Court and the Court of King's Bench in the estimation of the appellant's loss upon this head arises not solely or principally from different estimations of values and amounts but rather from a broad difference upon an essential and vital question of fact. This question of fact in its turn depends, to some extent, on the true construction and effect of the statute under which this assessment of compensation is made. The matter stands thus: the trial judge in assessing the compensation at the large sum of \$115,000 avowedly did so on the basis of the claim as finally presented by the claimant's counsel, and Mr. St. Laurent frankly admitted that such claim was formulated and was supportable only upon one view of the facts, namely, that the claimant's timber business at and near Farm Point was totally destroyed by the respondents' works. The judges of the Court of King's Bench examined this fundamental question with great care and decided it against the appellant, thus reversing the finding of the trial judge. The question was one of economic fact not dependent to any material extent on the demeanour or credibility of witnesses and assisted by an exhaustive review of the facts by counsel, their Lordships have arrived at the conclusion that the Court of King's Bench was right in holding that the loss in respect of the timber business was partial and not total. In arriving at their conclusion the appellate judges agreed with the trial judge in vesting the appellate's property in the respondent up to the 321.5 contour line, though holding—in their Lordships' opinion rightly—that under the statute they were not bound to do so but in their discretion could have vested less. It follows from this conclusion that they certainly were not bound to vest anything beyond that line as, for example, to vest property above that line but within the area of possible seepage, that is to say, up to the 324.5 contour line. That a greater extent of land was not included in the vesting order was not really complained of on behalf of the appellant, and in any case, their Lordships are of the opinion that both courts acted within the discretion allowed to them by the statute in fixing the line at the 321.5 contour. It was, however, not in dispute that compensation had to be paid for any affection of

property above that line, and the question debated was as to the extent of injury done by submersion or other affection of property used in the timber business. It was common ground that the saw mill itself was above both the 321.5 and 324.5 contour lines, and that substantially the elements in the appellant's business—and those important ones—which were interfered with were the lumber piling ground and the railway siding. It was said that the submersion of parts of these elements rendered the carrying on of the business to a profit impossible. Against this contention was the fact that after the water had been raised to 318 and 319 feet, the appellant did a very large lumber business if not a larger business than he had done before at, and in connection with, this mill at Farm Point. A further rise to 321.5 feet would submerge or affect a considerably larger area, but nevertheless much ground was left and on a review of the facts the appellate judges held that a sufficient piling ground could be provided at an expense which they assessed and allowed as compensation. Their Lordships agree with this conclusion. It was said that it was wrong because it took into account or was dependent upon a view taken by the judges as to what were called remedial works on ground vested in the respondents. It does not appear that the conclusion was dependent upon such a view. On the contrary, the assessment purported to be such as to cover provision of a piling ground apart from such remedial works. What was said by the judges was that remedial works would be the least expensive and were open to the appellant under an offer from the respondents. The offer is contained in the record (Vol. XIII, p. 149) and was in substance to grant to the appellant land or a servitude over land vested in the respondents for the restoration of the piling ground and railway siding. It was contended for the appellant that to take such an offer into account was not permissible in law. Their Lordships do not agree with this contention. It is no doubt well settled that if undertakers are granted permission to acquire property on paying compensation for it they cannot offer remedial works instead. But no such question seems to arise here. The appellant complains that property not submerged or physically affected by the undertaking and not to be taken by the respondents is rendered useless because some others of his properties were taken. It is an admissible answer that other lands or facilities can be acquired at an expense the undertakers will provide as compensation, and it seems to their Lordships that no principle of law or good sense is violated if amongst the suitable lands consideration is given to lands taken and paid for by the undertakers and over which they are willing to grant such rights as will prevent the anticipated injury from accruing to the property owner. In these circumstances, the judges of the Court of King's Bench seem to their Lordships to have proceeded upon principles which are correct in law to a conclusion which was correct in fact.

As to the amount of compensation assessed by the Court of King's Bench, the matter stands thus : the trial judge having proceeded to his assessment upon a finding of fact which has now been held to have been rightly disturbed by the appellate court, and not having considered or assessed compensation on the alternative basis of a partial loss, it fell to the Court of King's Bench to make such an assessment for the first time. While not denying the force of the arguments of counsel for the appellant directed to showing that the assessment was too low, it is clear that these same arguments were addressed to and considered by the Court of King's Bench, and their Lordships do not feel themselves either entitled or disposed to make a new or different assessment. The figure of \$28,100 allowed by the Court of King's Bench in respect of this head of claim must therefore stand.

One further point may be mentioned. The notes of the judges of the Court of King's Bench refer to the respondents' offer of land or of servitudes above referred to as if it would form part of the judgment, but no doubt by inadvertence it does not seem to find a place in the formal judgment itself. Their Lordships think that the appellant is entitled to have the judgment amended in this respect so as to record that the rights so offered are available to the appellant if he desires to make use of them. The precise terms of the amendment of the judgment can doubtless be agreed between counsel for the parties and, if necessary, there should be liberty to apply to the Court of King's Bench on the matter.

As to the hydro-electric system : Here also the difference between the two courts below arose from a difference in their conclusions of fact similar to that just discussed in connection with the lumber business. The judge of the Superior Court held that there was a total loss or destruction of the business. The judges of the King's Bench held to the contrary and that the loss was partial only. Hence the difference in the two assessments of amount. But here the similarity between this head of claim and the head relating to the lumber business ends. The facts were very different here. The power house was actually on the 321.5 contour line, and a small part of it was included in the property vested in the respondents, while the whole of it was within the 3 foot seepage area. In other words, the power house was liable to be awash. The out-flow of water power was so affected by the raising of the water outside that the power was diminished by at least 10 per cent. Part of the distribution system and some of the consumers' properties were submerged or affected and a substantial part of the business was wiped out. The result was that to carry on the business at all the appellant eventually took a supply of power from the respondents at an annual cost of about \$45 per horse power, but its distribution to a diminished body of consumers left no margin of profit. There is ample evidence

to warrant the conclusion of the trial judge with which their Lordships agree that in these circumstances the life of the business as a profitable concern was terminated by the respondents' scheme. In this view of the facts it is unnecessary to discuss further the vesting order in its operation upon the power house. Theoretically, a line of vesting passing through a building does not seem very appropriate, but practically so far as the shell of the power house can be of value to anyone it is likely to be of more use to the appellant than to the respondents and no real complaint is made by the appellant in this regard. Nor is it necessary to discuss the question whether the reasoning of the Court of King's Bench does not in respect of the power house impinge upon the principle that remedial measures on lands to be taken are not a proper substitute for compensation. In this case their Lordships do not agree with the view that any such measures would be effectual to save the business. As to the question of amount, the Court of King's Bench did not as a court purport to assess damages on the alternative basis of a total loss, though one judge, HALL, J., mentioned a figure of \$25,000 as sufficient, even if this basis were the correct one. But there was clearly a difference of view between the two courts as to what was the extent and value of the appellant's business before the respondents came on the scene. In this matter, which, in the absence of any system of book-keeping in the appellant's business, depended very largely on the credibility of the appellant himself and the large body of witnesses called from amongst his customers, the trial judge was in a much more favourable position than any appellate court for arriving at a true conclusion. It is clear from what he said and did that the trial judge accepted the evidence of the appellant and his witnesses. In these circumstances their Lordships with regard to this assessment by the trial judge take the same view as they expressed with regard to the assessment by the King's Bench of the injury to the lumber business, and they are of the opinion that the reduction of the figure arrived at by the judge of the Superior Court was not justified and that his judgment upon this point should be restored.

The result of the above conclusions on the question of amount may be summarised as follows :

As to Cascades : The order of the Court of King's Bench is to be varied by restoring the figure of \$90,000 fixed by the Superior Court.

As to the lumber business : The order of the Court of King's Bench fixing the figure of \$28,100 is to stand.

As to the hydro-electric system : The order of the Court of King's Bench is to be varied by restoring the figure of \$60,000 fixed by the Superior Court.

It is also open to the appellant if he so desires, to have the judgment amended so as to embody the respondents' offer above referred to.

There remains the question of costs. Their Lordships think that the proper order is as follows :

The appellant in accordance with the order of both courts below will have his costs of the proceedings in the Superior Court.

As to the proceedings before the Court of King's Bench : treating the order of that court as being that which, it has been held by this Board, it should have been, the respondents had to proceed in that court to secure an alteration of the judgment below and that alteration has been sustained here ; but nevertheless the respondents have in the result failed as to such large and important matters in issue in the Court of King's Bench that, in their Lordships' view, each party should bear their own costs there.

As to the costs here : To avoid the difficult and almost impossible task of taxation of costs of the separate issues, their Lordships think that the proper order is that the respondents pay to the appellant two-thirds of his costs of the appeal to this Board.

Their Lordships accordingly hold that the appeal should be allowed and the judgment of the Court of King's Bench varied to the extent and in the manner above indicated and on the terms as to costs above set out, and they will humbly advise His Majesty accordingly.

Solicitors : *Blake & Redden* (for the appellants) ; *Lawrence Jones & Co.* (for the respondents).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

BARBANELL v. NAYLOR.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), **October 13, 1936.**]

Criminal Law—Vagrancy—Fortune-telling—Newspaper article—No reference to any particular person—Vagrancy Act, 1824 (c. 83), s. 4.

N. was the author of an article in a newspaper, headed "What the Stars Foretell," which purported to forecast general events according to the positions of the stars. It also gave a particular forecast for each dated day of the current week purporting to relate what would be the fortunes of people who were born on these particular dates. N. was charged with pretending to tell fortunes contrary to the Vagrancy Act, 1824, s. 4, and the charge was dismissed upon the ground that the article was too vague to come within the meaning of the section:—

HELD: the article being addressed to the public generally, and stating or forecasting the future of all persons born on a certain day did not purport to tell the fortune of an individual and was not within the above section.

[EDITORIAL NOTE.] The practice of including articles on fortune-telling in newspapers is not unusual and this decision is the first reported decision on this aspect of the matter. In *Penny v. Hanson* (1) the distribution of a pamphlet was held to be fortune-telling, but in the present instance, it is held that the fortune of any individual was not purported to be told and the offence was not proved.

AS TO FORTUNE-TELLING, see HALSBURY, Hailsham Edn., Vol. 9, p. 566, para. 957; and FOR CASES, see DIGEST, Vol. 15, pp. 1073-1075, Nos. 12,160-12,171.]

Case referred to:

(1) *Penny v. Hanson* (1887), 18 Q.B.D. 478; 15 Digest 1075, 12167.

APPEAL by way of case stated from a decision of Sir LOUIS A. NEWTON, one of the Aldermen of the City of London sitting at the Mansion House Justice Room, given on Mar. 15, 1936.

The respondent was the author of a newspaper article entitled: "What the Stars Foretell," which purported to forecast the future of persons, according to the date of their birth and the positions of the stars at that date. That for Feb. 11 was as follows:

Tendencies—A propitious day for young people of all ages. Plunge in the scramble and grab the prizes. For luck to-day wear or use, Topaz, 5, yellow.

Birthday Predictions—The mixture, but hardly as before. Life will present new problems, but also offer pleasantly unfamiliar consolations. The star L calls upon young married subjects. Older folk are equally well consoled by dividend warrants and other negotiable securities. But young folk under sixteen, especially those near ten or fifteen, will have the best of luck of all. Startling news from a distance. Probably an aftermath of a family estrangement. Business men launch, and substantially profit by, new ideas. Those in stable salaried appointments may reasonably expect promotion, but it will come through a re-shuffle and not through seniority. Young people will be very much concentrated on love's young dream—meaning a tendency to choose lovers or sweethearts of less age than themselves.

Gilbert Beyfus, K.C., J. Buchan Ford and H. S. Simmons, for the appellant.

Christmas Humphreys, for the respondent.

Beyfus, K.C. : The article professes to tell fortunes of people by the position of the stars at their birth. The Act was passed to protect the foolish and the article is the very thing the Vagrancy Act was directed against, as it professes to tell the fortunes of people.

DU PARCQ, J. : Is there not a distinction between purporting to tell the fortune of a person and the making of generalisations for persons born on a particular day ?

Beyfus, K.C. : The article purports to foretell fortunes of persons, according to the date of their birth. *Penny v. Hanson* (1) is on the same point and in this case the same information would have been given to the same people on the same day. There is no difference between posting to separate individuals and publishing to a number. Each prediction in the article is addressed to persons whose birthday falls on that particular day. If sent to a number of individuals separately, there would be an offence. The Act makes the offence the pretending or professing to tell fortunes, and any person who pretends to read the future by any pretended science not known to the other party comes within the Act. The case is covered by *Penny v. Hanson* (1). The fact that the fortune-telling is done openly and on a large scale, makes no difference.

Christmas Humphreys was not called upon.

LORD HEWART, L.C.J. : The article in question is addressed generally to all readers of the articles and the purported forecasting of the future for persons born on a particular day is too vague and uncertain to amount to the professing to tell the fortune of any individual. In my view the decision of the alderman is right and I see no reason which would justify this court in finding that the decision of the alderman was wrong.

DU PARCQ, J. : I agree.

GODDARD, J. : I agree.

Solicitors : *Henderson & Simmons* (for the appellant); *Lloyd & Armstrong* (for the respondent).

Reported by HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

C. CHRISTOPHER (HOVE), LTD. v. WILLIAMS AND ANOTHER.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.),
October 14, 1936.]*Practice—Alternative claims against two defendants—Leave to sign judgment against one defendant—Whether bar to proceeding against other—Election.*

A firm of costumiers claimed against a husband and wife the price of various articles supplied to the wife. An order was made that the plaintiffs, the costumiers, be at liberty to sign final judgment in the action against the wife, the summons (under R.S.C. Ord. 14) against the husband being adjourned. Judgment was never signed against the wife. The matter went on to trial against the husband who alleged that in the circumstances of the case he was not liable in respect of orders given by his wife, even for necessities. The county court judge found that the husband had given authority to the wife to pledge his credit in respect of the goods supplied and that he had not revoked his authority in any way, and judgment was given for the plaintiffs against the husband. The husband appealed on the grounds that, as the liability of the husband and wife was alternative and the plaintiffs had obtained leave to sign judgment against the wife, the plaintiffs were barred from proceeding against the husband in respect of the same debt, and further that the obtaining of an order against the wife constituted an election which barred proceedings against the husband:—

HELD: (i) liberty to sign judgment against the wife was not sufficient to bar the plaintiffs from proceeding against the husband.

(ii) the obtaining of liberty to sign judgment against the wife did not amount to an election, and as in all the circumstances of the case there had been no election the plaintiffs were entitled to proceed against the husband.

[EDITORIAL NOTE.] The point considered in this case, though one of some importance in practice, is a very narrow one. It is settled law that where there are alternative claims against two defendants, if judgment is signed against one, any further proceeding against the other is barred. The question here arose whether the result is the same where the plaintiff only obtains leave to sign judgment against the one defendant and does not in fact sign judgment, and it was held that the proceedings against the second defendant are only barred where judgment is in fact signed.

AS TO NECESSITY FOR JUDGMENT TO BE SIGNED, see HALSBURY, Hailsham Edn. Vol. 19, pp. 230, 231, para. 534; and FOR CASES, see DIGEST Practice, p. 288, Nos. 217, 218.]

Cases referred to:

- (1) *Morel Bros. & Co., Ltd. v. Westmorland (Earl)*, [1904] A.C. 11, 27 Digest 186, 1527.
- (2) *Re Gurney, Clifford v. Gurney*, [1896] 2 Ch. 863; Digest Practice 288, 218.
- (3) *Moore v. Flanagan*, [1920] 1 K.B. 919; 27 Digest 187, 1529.

APPEAL from a judgment of His Honour JUDGE AUSTIN JONES, given at Brighton County Court on June 18, 1936, in favour of the plaintiffs for £44 5s. 7d. and costs.

The plaintiff company claimed £44 5s. 7d. as the price of clothes sup-

plied to Irene Williams, wife of Captain Rupert Williams. The learned judge found as facts that during the material time the male defendant authorised his wife to pledge his credit with the plaintiffs and that her authority to do so was not revoked until she committed adultery in June, 1934; that he did not revoke her authority expressly until Apr., 1935; that she had his authority to order all the goods that she ordered up to June, 1934, and to pledge his credit for payment for them; that he held out his wife to the plaintiffs as having his authority to buy from them all the goods the subject of the action and to pledge his credit for payment; and that he did not at any time give to the plaintiffs any notice that he had revoked his wife's authority to order goods from them or pledge his credit to them. The male defendant appealed.

The only important ground of the appeal was that on May 1, 1936, the plaintiffs took out a summons under R.S.C., Ord. 14, for leave to sign judgment against both defendants and one of their directors swore an affidavit declaring that one or both were liable; that on May 8, 1936, the registrar gave the plaintiffs leave to sign judgment against the wife; and that therefore the learned judge was wrong in law in finding that the husband was liable as principal.

The plaintiffs had proceeded in the following way. They first issued a writ against the wife, and on Mar. 5, 1936, they obtained an order joining the husband as co-defendant. They then took out a summons under R.S.C., Ord. 14, against both defendants, in order that they might, if possible, obtain judgment against either or both. On May 8 they obtained leave to sign final judgment against the wife. On May 12 the husband obtained leave to defend, and thereafter the action proceeded against him. The plaintiffs never actually signed final judgment against the wife. The husband's submission was that, by obtaining liberty to sign judgment against his wife, the plaintiffs had barred their right to proceed against him.

C. J. T. Pensotti and *A. J. F. Wrottesley* for the appellant husband.

Peter T. Miller (*Geoffrey Lawrence* with him)[¶] for the respondent company.

Wrottesley: The order giving the respondents leave to sign final judgment against the wife barred their remedy against the husband, just as the signed judgment itself would have barred it. This was an act amounting to election. In *Morel Bros. & Co., Ltd. v. Earl of Westmorland* (1) it was held that R.S.C., Ord. 14, r. 5, did not apply where the right of action against two parties could only be alternative and not joint, and that in such a case judgment against one of the defendants was conclusive evidence of an election not to proceed against the other. In *Moore v. Flanagan* (3) the court held that, as the remedy was alternative, the plaintiff, having signed judgment against the agent, could not afterwards recover judgment against the principal in respect

of the same debt. In his judgment, ATKIN, L.J. (as he then was), said at p. 928 that the plaintiff's conduct offended against

the rule, which is founded on good sense, that a plaintiff cannot sue an agent to judgment and then sue the principal. . . . This depends, not on election, but on the construction of the contract. . . . Election is a separate principle which at a stage short of judgment may bar the remedy which a person may otherwise have against the principal. That is the law as laid down in *Morel v. Earl Westmorland* (1).

Miller : In the case of *Re Gurney* (2), it was held that an order under R.S.C., Ord. 14, r. 1, giving liberty to sign final judgment for the amount claimed by the writ of summons, is not equivalent to signing or entry of judgment so as to give a judgment creditor's right of priority to a plaintiff who has failed to follow up the order by signing judgment under R.S.C., Ord. 14. KEKEWICH, J., at p. 864, said :

Liberty to sign judgment cannot, according to the ordinary rules of the English language, be equivalent to the actual signing of judgment, or to judgment.

Those words are quoted with approval in the ANNUAL PRACTICE, 1936, at p. 176. There is no authority which overrules this decision, and it is conclusive on this point.

Wrottesley, in reply.

LORD WRIGHT, M.R. : This is an appeal from a judgment of JUDGE AUSTIN JONES, sitting as a judge of the Brighton County Court. The matters at issue can be quite shortly stated. The plaintiffs, who are costumiers, claimed for various articles supplied to Mrs. Williams, the wife of Captain Williams. The action was brought against them both. I can pass over the intermediate proceedings ; they were both defendants in the action, and an order was made on May 8, 1936, that the plaintiffs be at liberty to sign final judgment in this action against the defendant Irene Clare Williams, wife of Captain Williams, for the amount in question ; and it was further ordered that the summons so far as regards the defendant Captain Rupert Williams be adjourned until May 12, 1936. The summons referred to is a summons under R.S.C., Ord. 14, under which this order was made. The matter then went to trial against the husband, who was given leave to defend on an affidavit in which he alleged, among other things, that he was not under any liability in respect of orders given by his wife, even for necessities, because she had committed adultery in June, 1934, which was a date anterior to the supply of any of the goods concerned in these proceedings. That being so, the issue before the learned judge appears to have been in substance limited to this—namely, whether, notwithstanding this conduct of the wife, the tradesmen could still recover against the husband because he had done positive acts holding the wife out as his agent. A good deal of evidence was led on that issue, and the learned judge, as appears from his note,

found that the husband had given authority to the wife to pledge his credit in matters of this sort and that he had not revoked his authority in any way. On that basis His Honour gave judgment for the plaintiffs for £44 5s. 7d. with costs.

When the matter comes before this court it is argued that that judgment is wrong because the liability in this case concerning the husband and wife is an alternative liability and not a joint liability. That, of course, has long been laid down: it was not laid down, but was reaffirmed, by the House of Lords in *Morel Bros. v. Earl of Westmorland* (1), where their Lordships held that, as the liability was alternative, if judgment were signed against either the husband or wife the effect of signing that judgment would be to merge the debt in the judgment. There could not be more than one judgment for the same debt, and there could therefore not be a second judgment against a defendant whose liability was merely alternative—that is to say, against a principal whose liability was alternative to that of the agent who incurred the debt, for the husband was the undisclosed principal. In the present case it is clear that this rule does not apply, because the judgment has not been signed. It is, however, argued that the order to which I have referred, giving the plaintiffs liberty to sign final judgment against the wife, has the same effect as if the judgment had actually been signed. I cannot accept that view. It is contrary to what was said in the case of *Re Gurney* (2), at p. 864, where KEKEWICH, J., said:

Liberty to sign judgment cannot, according to the ordinary rules of the English language, be equivalent to the actual signing of judgment, or to judgment.

The application of that principle there was somewhat different, because it had reference to a judgment creditor's right of priority, but the principle in my opinion was quite correctly stated and applies here. Now it is further said by Mr. Wrottesley that, even though as a matter of law it cannot here be said that the rule laid down in *Morel v. Westmorland* (1) applies, still he is prepared to contend, and has contended, that the mere obtaining of the liberty to sign final judgment constitutes an election, by which he means a conclusive election, to charge the wife to the exclusion of the husband. That issue can only be regarded as an issue of fact, and the difficulty of the appellant here is that, in order to establish that issue so as to upset the judgment of the learned judge, which we must assume to be correct unless it is affirmatively shown to be erroneous, he must produce a finding of fact of the learned judge that there has been such an election. There is no such finding, and that, it seems to me, is enough to dispose of this point.

I want, however, to say that it would require very strong evidence indeed to satisfy a court that a plaintiff has conclusively elected to release one possible defendant, or to accept one defendant in place of

the other, by anything short of an actual signing of judgment. Signing of judgment no doubt in one sense is not strictly subject to an act of election, because it has a higher value : it substitutes for the debt the right under the judgment. In the present case what has happened seems to me to be far removed from anything in the nature of election. The plaintiffs got a liberty to sign final judgment against the defendant, but they did not exercise it, and the very order which gives them liberty to sign final judgment goes on to give them the right of proceeding with their claim, with their summons under R.S.C., Ord. 14 for judgment against the male defendant, the husband. That seems to me the clearest possible indication that, while they were willing to have at their disposal a liberty to sign judgment against the wife if they were minded to avail themselves of that liberty, they were seeking to secure what rights they could against the husband. Probably there was some doubt, as this issue of adultery was raised, whether he was liable at all. The learned judge has found that he was liable. Under those circumstances, however, the natural and prudent thing for the plaintiffs to do seems to be to do what they did : to get their liberty to sign judgment and then to decide, when they had disposed of the issue as against the husband, whether they would avail themselves of that liberty or not. As events emerged, they did not desire that liberty ; they got judgment against the husband, which is no doubt a far more desirable position to achieve. I think the appeal should be dismissed with costs.

ROMER, L.J. : I agree. It seems to me that the plaintiffs, in the steps they took, and subsequent to May 12, 1936, were at pains to show that they made no definite election to proceed against the wife in lieu of proceeding against the husband. By obtaining leave to sign judgment they merely put themselves into a position in which they would be safeguarded should it subsequently turn out that they had no alternative remedy against the husband.

MACNAGHTEN, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Gordon Gardiner, Carpenter & Co.*, agents for *F. H. Carpenter & Veale*, Brighton (for the appellants) ; *Routh, Stacey & Castle*, agents for *John C. Bosley & Legg*, Brighton (for the respondents).

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

SMITH v. KINSEY.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.).
October 14, 1936.]

Landlord and Tenant—Notice to quit—Severance of reversion—Notice as to severed part by owner of that part.

Upon a sale of five cottages and the gardens attached, the five cottages and four of the gardens were sold together, but the remaining garden was sold separately to the plaintiff. The cottage and garden had been let together to the defendant. In due course the plaintiff gave notice to quit and, possession not being given, he sued for possession. It was contended that the reversion having been severed it was necessary for the purchaser of the cottage to concur in the notice to quit:—

HELD: the plaintiff was entitled to possession although the reversion had been severed, and the effect of the Law of Property Act, 1925, s. 140, was to overrule *Re Bebington's Tenancy*, *Bebington v. Wildman* (1).

[EDITORIAL NOTE.] The general view has been that the case of *Re Bebington's Tenancy*, *Bebington v. Wildman* (1) was overruled by the enactment of the Law of Property Act, 1925, s. 140. This case confirms this view which had not been adopted by the county court judge.

AS TO SEVERANCE OF REVERSION, see HALSBURY, Hailsham Edn., Vol. 20 p. 372, para. 449; and FOR CASES, see DIGEST, Vol. 31, p. 451, Nos. 5979, 5980.]

Cases referred to:

- (1) *Re Bebington's Tenancy*, *Bebington v. Wildman*, [1921] 1 Ch. 559; 31 Digest 451, 5979.
- (2) *Prince v. Evans* (1874), 29 L.T. 835; 31 Digest 449, 5958.

APPEAL from a judgment of His Honour JUDGE LONGSON, given at Derby County Court on Feb. 20, 1935, in favour of the defendant, dismissing the plaintiff's claim with costs.

The plaintiff's claim in the action was for the possession of a small garden at Willington, Derbyshire, which was let to the defendant for 7s. 6d. a year; and for a year's rent from Sept. 29, 1933, to Sept. 29, 1934. A Mr. G. L. White owned five cottages with their gardens. On his death his executors sold the five cottages and gardens together, except for one garden plot, which was sold separately to the plaintiff, whose land it adjoined. By the special conditions of sale every condition or right of re-entry was apportioned. The defendant was at the time of the sale tenant of one of the cottages and of this plot, and he continued in possession of the plot in spite of the sale. The plaintiff wished to have possession, but the defendant refused to recognise any right in the plaintiff and paid his rent through a Mrs. Faulkner, who bought the five cottages. The plaintiff delivered on Sept. 27, 1933, a notice to quit on Mar. 25, 1934, "or at the end of your tenancy, which will expire next after the end of six months after the date of the service of this notice." The defendant did not comply with the notice and the plaintiff sued for possession. The learned judge held that the notice

was bad ; he did not give his reasons in his note but he apparently took the view that the owner of one part of a severed reversion could not give a valid notice of re-entry, on the authority of *Re Bebington's Tenancy* (1). The plaintiff appealed.

H. V. Lloyd-Jones, for the appellant : Since the passing of the Law of Property Act, 1925, s. 140, if there has been an apportionment or severance of the reversion, there is no objection to the service of a notice to quit by a person who has become the purchaser of the reversion in part of the land. That provision was expressly enacted in order to overcome the difficulty of law expressed in *Re Bebington's Tenancy* (1), and has overruled that case. [Counsel referred to *WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES*, 12th Edn., p. 473, note 2, and *WOODFALL ON THE LAW OF LANDLORD AND TENANT*, 23rd Edn., Chap. 7, sect. 4, p. 318.] The plaintiff only asks for an order for possession and not for rent.

The respondent did not appear.

LORD WRIGHT, M.R. : This appeal comes before this court in somewhat unfortunate circumstances, in that the respondent has not appeared and the court therefore have not had the benefit of any argument on his behalf. On the other hand, the matter at issue has been very clearly put before the court by Mr. Lloyd-Jones, and it turns on a narrow question of law. The facts are not in dispute. The only claim which is made here is for possession of the piece of land in question. No question is raised by the tenant in respect of any claim for rent, and indeed the amount is so trivial as not to be worth any serious investigation. The rent is apparently something in the neighbourhood of seven shillings and sixpence per year. The piece of land in question is a small garden plot of about 133 square yards, or thereabouts. At some time before 1931 the garden was enjoyed along with a cottage some little distance away, but the owner of that property, a Mr. White, having died, his executors disposed of that cottage with certain other cottages—five freehold cottages in all—and the gardens. The particular garden plot now in question, however, was not included in that sale ; it was sold separately and was conveyed under a conveyance dated Oct. 27, 1931, to the present plaintiff. At the time of the conveyance and of the sale the defendant was in occupation as a tenant, and in fact he has continued in possession both of the cottage and of the garden, notwithstanding the severance of the reversionary interest which has taken place in virtue of the sales and the corresponding conveyances. The plaintiff, who has become the owner of this land under the conveyance to which I have referred, has been anxious for some time to recover possession. The defendant, however, has refused to recognise that the plaintiff has any right or title to the garden. He has, indeed, paid two years' rent—

fifteen shillings in all—but he has paid it through a Mrs. Faulkner, who is now the owner of the cottages, and he has written as long ago as Sept., 1933, to say that he is not the plaintiff's tenant and that he will keep the garden as long as he remains in the house and the plaintiff can take what proceedings he thinks fit.

The matter came before the learned judge, and the only question now material to consider is whether the notice to quit on which this action is based was or was not a good notice. It is in these terms :

To Edward James Kinsey, Canal Cottages, Willington. We, the undersigned J. Robert Pinder & Son, of 10, St. Mary's Gate, Derby, as solicitors and agents for and on behalf of your landlord Francis Arthur Smith, of Canal Cottages, Willington, hereby give you notice to quit and deliver up possession of the piece of land used as a garden situate at Willington aforesaid which you hold of the said Francis Arthur Smith on the 25th day of March, 1934, or at the end of your tenancy, which will expire next after the end of six months from the date of the service of this notice. Dated this 27th day of September, 1933. (Signed) J. Robert Pinder & Son.

That notice presupposes a tenancy, and it deals with a difficulty which would otherwise be felt in determining, on the facts of this case, when the tenancy began and when it ended. It is not at all clear that there was anything in the nature of a tenancy at all, but assuming that there was a tenancy, and assuming—which is most favourable to the tenant—that it was a yearly tenancy, this notice itself has provided for every contingency. It was given on Sept. 27, 1933, and the proceedings were not commenced until January, 1935, and so on any view of the position it would not be bad on the ground of the period of notice. The learned judge, however, has held that it was a bad notice, and, as I understand, his reason for so holding was that there had been a severance of the reversion and that the owner of one part of the reversion so severed could not give a valid notice of re-entry. That undoubtedly was the old law, as stated in *Re Bebington's Tenancy* (1) by PETERSON, J., who says this at pp. 562, 563 :

There is no doubt that the defendant's notice taken by itself was not a good notice to terminate the tenancy. It was a notice to deliver up part of a tenancy and not the whole, and it is well established that such a notice is invalid. If authority were needed for this proposition *Prince v. Evans* (2) is sufficient. In that case the assignee of part of a reversion gave notice to the tenant to quit that part of his tenancy. The tenant had in no way recognised the assignee as his landlord and the notice was held to be bad.

In the present case it is not suggested—indeed, the contrary appears from what I have already stated—that the defendant had already acknowledged the plaintiff as his landlord. That state of the law was, however, altered by the Law of Property Act, 1925, s. 140 (1), the material effect of which is this :

Notwithstanding the severance by conveyance, surrender, or otherwise of the

reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary . . . in like manner as if the land comprised in each severed part . . . had alone originally been comprised in the base.

Then by subsect. (2) it is further provided that right of re-entry includes a right to determine the lease by a notice to quit or otherwise, with a right in certain cases to the lessee which is not here material.

I think that the effect of that section is in the present case to render this a good notice. There has been a severance by conveyance; every condition or right of re-entry appertaining to the land was apportioned; and the right of re-entry, which included the right to determine the tenancy by a notice to quit, has remained annexed to the severed part of the reversionary estate—that is to say, in this case to the small garden plot. In those circumstances I see no ground for holding that the plaintiff was not within his rights in claiming to recover possession of this piece of land. That being so, I think that the appeal ought to succeed, the notice ought to be held to be good, and an order ought to be made giving possession of this property to this owner.

I may add that it is not necessary here to consider any question relating to rent. Sect. 140, for some reason, does not refer to apportionment of rent, and, indeed, rent under an entire lease could not be apportioned as between severed portions, except either by consent of the parties or by an order of the court. The amount of rent here, as I have already explained, is nugatory, and it is unnecessary to consider what the position as to the rent would have been if it had been sought to claim that any order should be made with reference to it. In my opinion this appeal should be allowed with costs.

ROMER, L.J.: I agree. The Law of Property Amendment Act, 1859, s. 3, provided as follows:

Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

Be it observed by that section that the power given to an assignee of part of the reversion in respect of the conditions of re-entry and so on only arose where the rent had been legally apportioned—that is to say, where the tenant had recognised the severance or the division of his tenancy. In that state of facts it was held by PETERSON, J., in the case

of *Re Bebington's Tenancy* (1), and was also recognised as being the law, that where the rent had not been legally apportioned, that is to say, where the tenant had not consented to and so recognised the division of his tenancy, a notice of re-entry or notice to quit given by the assignee of part of the reversion only was a bad notice. But by the Law of Property Act, 1925, s. 140, it is provided :

Notwithstanding the severance by a conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and so remain annexed to the severed parts of the reversionary estate as severed—

and so on. And by subsect. (2) of that section it is expressly provided that in the section the words “right of re-entry” include a right to determine the lease by a notice to quit. Now it will be observed that in this section the legislature has carefully omitted the words that were to be found in the Law of Property Amendment Act, 1859, s. 3, which confined the right of re-entry in the assignee of part of the reversion to cases where there had been a legal apportionment of the rent. It would appear from that fact, therefore, *prima facie*, that since the coming into operation of the Law of Property Act, 1925, the assignee of part of a reversion can serve a proper notice to quit in respect of the part of the land assigned to him. It is no longer necessary to get either an apportionment of the rent before so doing or to have the concurrence in the notice of the owners of the other part of the reversion. That is the view I myself should have taken on looking at the Acts of Parliament, and I should have been confirmed in that view by what has been said in the two textbooks to which our attention has been called. In WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES, 12th Edn, on p. 473, I find this note :

After 1925, where the owner of the original reversion could, under the terms of the lease, give a notice to quit, the assignee of a part acquires a similar right as respects that part, whether the tenant has recognized the severance or not.

But the learned authors go on to point out that the tenant may within one month—this is the effect of subsect. (2) of the section—by giving a counter-notice elect to determine the whole tenancy. The other textbook to which our attention was called is WOODFALL ON THE LAW OF LANDLORD AND TENANT, and that learned author says, on p. 309, referring to sect. 140 (2) :

The subsection is new and over-rules a recent case.

and the recent case to which he refers is that of *Re Bebington's Tenancy* (1). That authority is fifteen years old. For these reasons, in addition

to those which have been given by the learned Master of the Rolls, I agree that this appeal must succeed.

MACNAGHTEN, J. : I agree with all that has been said by both my learned brethren.

Appeal allowed with costs.

Solicitors : *Boxall & Boxall*, agents for *J. Robert Pinder & Son*, Derby (for the appellant).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

CONWAY v. NEW IDEAL HOMESTEADS, LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.),
October 13, 1936.]

County Courts—Appeal—Claim less than £20—Leave refused by county court judge—Jurisdiction of Court of Appeal to hear appeal—County Courts Act, 1888 (c. 27), ss. 120, 124.

The plaintiff in an action in the county court claimed £1 5s. 4d. damages for breach of contract, and judgment was given in his favour for that amount. The defendants applied to the county court judge for leave to appeal, which was refused. The defendants thereupon applied to the Court of Appeal for leave to appeal, offering to pay the plaintiff's costs in any event. The attention of the Court of Appeal was not drawn to the County Courts Act, 1888, s. 120, and *per incuriam* the court gave leave to the defendants to appeal against the county court judge's judgment. At the hearing of the appeal the plaintiff raised the preliminary objection that the Court of Appeal had no jurisdiction to hear an appeal from the judgment of a county court judge in an action for breach of contract where the claim was for less than £20, when the county court judge had not given leave to appeal:—

HELD : upon a consideration of the County Courts Act, 1888, ss. 120 and 124, there was no jurisdiction in the Court of Appeal to hear the appeal.

[EDITORIAL NOTE.] Generally speaking where it is necessary to obtain leave to appeal, it is possible upon leave being refused, to appeal against the refusal or to make application to the appeal court for leave. In the case of appeals from county courts where the claim or damage is under £20, the only person who can give the necessary leave is the county court judge ; and this is the result of the wording of the County Courts Act, 1888, s. 120, as read with the definition section, sect. 186. A similar case in High Court practice occurs under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (h), and was the subject of decision in *Ex p. Stevenson*, [1892] 1 Q.B. 611.

AS TO LEAVE TO APPEAL FROM COUNTY COURTS, see HALSBURY, Hailsham Edn., Vol. 8, p. 380, para. 813 ; and FOR CASES, see DIGEST, Vol. 13, p. 533, Nos. 843-847.]

Cases referred to :

(1) *Argent v. Baker* (Oct. 26, 1931). Unreported.

(2) *Fell v. Lancashire & Yorkshire Ry. Co.* (1907), 96 L.T. 785 ; 13 Digest 533, 846.

(3) *Brune v. James*, [1898] 1 Q.B. 417; 13 Digest 525, 757.

(4) *Dixon v. Brown*, [1915] 2 K.B. 294; 13 Digest 525, 758.

PRELIMINARY OBJECTION to the hearing of an appeal set down by the defendant company against a judgment of His Honour JUDGE KONSTAM, K.C., delivered on Apr. 7, 1936, at Dartford County Court, ordering the defendants to pay the plaintiff £1 5s. 4d. damages and costs. The action was brought by the purchaser of a freehold house on a building estate owned by the defendants. He had been obliged to pay this sum to the local authority to defray the expense of constructing a ramp or crossway over which he might drive his motor car in and out of his premises across the pavement. He alleged that the defendants had warranted that such works would be done at their expense, and claimed the amount as damages for breach of contract. The action was in the nature of a test action, for if it succeeded the defendants would have to indemnify many other purchasers against similar charges, amounting to about £1,000. The learned county court judge gave judgment in favour of the plaintiff and, on application by the defendants for leave to appeal, refused leave. The defendants appealed against his refusal, and on Apr. 21, 1936, the Court of Appeal allowed their appeal against such refusal and granted leave to appeal against his judgment, on condition that they paid all the costs in any event. The plaintiff did not appear at that hearing, although he had been served with notice of motion. At the present hearing to determine the defendants' appeal against the judgment, counsel for the plaintiff raised the preliminary objection that the Court of Appeal had no jurisdiction to hear an appeal from the judgment of a county court judge in an action for breach of contract where the claim was for less than £20, when the judge had not given leave to appeal.

R. T. Sharpe, for the appellants, the defendants in the action.

W. Longley James and *Lewis F. Sturge*, for the respondent, the plaintiff in the action.

James: In *Fell v. Lancashire & Yorkshire Railway Co.* (2), the plaintiff claimed £9 from the defendants in the county court and the judge decided against him. Before the expiry of the time within which the plaintiff might have applied for leave to appeal, the judge died. The deputy-judge declined to grant leave, and the plaintiff appealed to the vacation judge of the High Court, who granted leave. The Divisional Court held that they had no jurisdiction to hear the appeal. The present case is *a fortiori*, as the judge was asked for leave and refused it. The judge has complete discretion. In *Brune v. James* (3), the plaintiff in an action for trespass claimed 40s. damages and an injunction. The judge decided in his favour and the defendant asked leave to appeal. The Divisional Court held that the defendant might appeal without leave from so much of the judgment as granted the injunction. In *Dixon v. Brown* (4), it was held that where damages are claimed with some other

relief, such as an injunction or a declaration, then although the damages claimed do not exceed £20 an appeal will lie to the appropriate appellate tribunal without leave from that part of the judgment which concerns the other relief. In the YEARLY COUNTY COURT PRACTICE, 1936, p. 140, there is a reference to an unreported case, *Argent v. Baker* (1), heard on Oct. 26, 1931, in which a Divisional Court consisting of TALBOT and MACNAGHTEN, JJ., refused leave to appeal from a refusal of the county court judge to grant leave to appeal in an action in which the claim did not exceed £20.

Sharpe, opposing the preliminary objection: There is no authority on this point. The judge was informed that the judgment governed hundreds of similar cases on a building estate within his jurisdiction. This court has inherent jurisdiction, if it thinks that the judge has used his discretion wrongly, to grant leave although the judge has refused it, since it is the appellate tribunal constituted by the statute to review the proceedings of the county court. County Courts Act, 1888, s. 124 merely means that if the judge refuses leave and this court also refuses leave, the aggrieved party cannot get round the refusal by other expedients such as *certiorari*. In *Fell's* case (2), the judge was never asked for leave; here the defendants have asked at each stage.

LORD WRIGHT, M.R.: It has been said that an appellate court may have all the discretions which the court below would have had, but that principle does not apply where the jurisdiction of the court is governed, as here, by an express statute.

MACNAGHTEN, J.: The defendants may apply to have any further actions removed into the High Court by *certiorari* under sect. 126, as they will be brought to recover a payment or toll.

Sharpe: The defendants' undertaking to pay costs should be dissolved, for the plaintiff has chosen to reserve the point until this moment instead of raising it on the application for leave to appeal.

James: That was a possible course, but the plaintiff would have had to give notice of motion to strike out the appeal, and that would have meant a substantial addition to the costs.

LORD WRIGHT, M.R.: In this case an action was brought in the county court against the defendants, who are builders developing a building estate, and the claim was to recover from the defendants the sum of £1 5s. 4d. damages for breach of contract, and the claim was based on the considerations that the plaintiffs had failed to pay this sum of £1 5s. 4d for certain road expenses which the defendants—it was said—should not have paid, or at least would not have been payable if the warranties involved in the contract had been fulfilled. The learned county court judge decided against the defendants, who desired to appeal, and they applied to him for leave to appeal, and on that leave being

refused they applied to this court for leave, offering to pay the plaintiff's costs in any event, and alleging that, although the sum involved was only £1 5s. 4d, there was a very large number of other cases raising the same point and involving a very considerable sum of money. The matter came before this court, and the attention of the court was not drawn to the terms of the County Courts Act, 1888, s. 120. The court, therefore, dealt with the application, *per incuriam*, on the same footing as the ordinary case of leave to appeal from a judge in chambers, who has been asked to give leave and has refused, and various other cases of a similar character.

In this case the right of appeal is very precisely fixed by the County Courts Act, 1888, s. 120, which is in these terms :

If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment may appeal to the Court of Appeal—

this is the result of a recent amendment in the law—

in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court . . . Provided always, that there shall be no appeal in any action of contract [and various other cases are put which are not here material] where the debt or damage claimed does not exceed £20—

and then follow various other exceptions, no one of which is here material. The section proceeds :

unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal.

The word “ judge ” there means the judge of the county court. This appears from the interpretation section, sect. 186. In connection with sect. 120, there must also be read sect. 124, which is in these terms :

No judgment or order of any judge, nor any action or matter brought before him or pending in his court, shall be removed by appeal, motion, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions in this Act mentioned.

That refers to sect. 120. I may also observe that in a proper case the conditions of sect. 126 have to be taken into account ; this section provides for the removal into the High Court by *certiorari* or otherwise any action commenced in the county court ; but that section does not apply to this case, because it applies to an action but not to an appeal.

I think that the respondents are right in objecting that the provisions entitling the appellants to appeal have not been complied with ; in other words, I think the terms of sect. 120, read with the other sections of the Act, have this effect ; that no appeal in the various matters which come within the provisions of sect. 120 is to lie, save with leave of the judge

of the county court. It follows from that, that his refusal of leave to appeal is final and that the matter is, in this case of minor importance, entirely left to his discretion.

But I cannot do otherwise than make some remark on the effect of sect. 120. It appears from a note in the YEARLY COUNTY COURT PRACTICE, 1936, p. 140, that in the unreported case of *Argent v. Baker* (1), on Oct. 26, 1931, a divisional court, consisting of TALBOT and MACNAGHTEN, JJ. :

Refused leave to appeal from the refusal of the county court judge to grant leave to appeal in an action in which the claim did not exceed £20.

Whether they did so on the grounds of incompetence or for other reasons does not appear in this statement, but there was a case—*Fell v. Lancashire & Yorkshire Railway Co.* (2)—where it was held, under sect. 120, that there was no right of appeal where leave to appeal had not been given by the county court judge, and that the High Court had no jurisdiction to entertain the appeal notwithstanding that leave had been obtained from a High Court judge, sitting in the vacation.

In the case of *Brune v. James* (3), there was a claim for an injunction, among other things, and it was held that the defendant might appeal against so much of the judgment as granted an injunction without first obtaining leave of the judge, notwithstanding the provisions of the County Courts Act, 1888, s. 120. That was the decision of a divisional court, whose very good judgment clearly applies.

In these circumstances the result seems to follow that the respondents succeed in the objection and will be entitled to an order that the appeal be struck out and to their costs. As a matter of practice, if this same position were to arise in future it would certainly be better that the respondent, when notice of motion is served upon him, take steps at once to apply to strike out the appeal before any further costs are incurred. In the circumstances of the present case the order which I have indicated will be made.

ROMER, L.J. : I agree.

MACNAGHTEN, J. : I agree.

Appeal ordered to be struck out, with costs to the respondents.

Solicitors : *F. B. Brook*, agent for *J. L. Conway*, Erith (for the appellants); *Cartwright, Cunningham, Haselgrove & Co.* (for the respondents).

[Reported by DEREK H. KITCHIN, Esq., Barrister-at-Law.]

MARSHALL v. LONDON PASSENGER TRANSPORT BOARD.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.), **October 13, 1936.**]

Limitation of Actions—Amendment of particulars creating new cause of action—Running down action against authority also highway authority—Adding neglect to repair highway to negligent driving—Writ—Particularity of indorsement.

The plaintiff, on Aug. 12, 1935, was injured in a collision between his bicycle and a tramcar. On Oct. 15, 1935, he issued a writ claiming damages for personal injuries and consequential loss sustained by reason of the negligence of the defendants, their servants or agents. The case was remitted to the county court and on Nov. 22, 1935, particulars of claim were delivered to which were added particulars of negligence setting up a case of negligent driving. On May 1, 1936, further particulars were by leave of the registrar added which set up a case of neglect to keep the tram track and highway in repair, describing the neglect as a breach of statutory duty. On appeal the county court judge reversed the decision of the registrar and disallowed the amendment:—

HELD: (i) the amendment introduced a new case which if set up in an action commenced at the date of the amendment would have been barred by lapse of time, and the amendment must be disallowed.

(ii) the indorsement of the writ did not contain sufficient particulars of the nature of the claim as it did not specify what duty the defendant had failed to perform. This defect had, however, been remedied by the statement of claim.

(iii) the indorsement of the writ being in too general terms, the amendment could not be supported as being within the claim there made.

[EDITORIAL NOTE.] The law does not allow the Statutes of Limitations to be circumvented by the device of bringing in a fresh claim by amendment of the pleadings in a pending action. The question here is whether the amendment sought to be made, i.e., to add to a case that the injuries were due to negligent driving, a case that they were due to failure to repair the track, is such an alteration of the nature of the case as to make it in effect a new action. The judgments also include an interesting discussion of the degree of particularity necessary in an indorsement of a writ. In practice any defect of this kind is usually cured by the statement of claim, but here the question is quite material.

AS TO REFUSAL OF AMENDMENTS BY REASON OF THE STATUTORY BAR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 784, 785, para. 1087; and FOR CASES, see DIGEST, Vol. 32, pp. 536, 537, Nos. 1891-1897.]

Cases referred to:

- (1) *Weldon v. Neal* (1887), 19 Q.B.D. 394; 32 Digest 536, 1892.
- (2) *Lancaster v. Moss* (1899), 15 T.L.R. 476; 32 Digest 536, 1893.
- (3) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; Digest Supp.
- (4) *Cave v. Crew* (1893), 62 L.J. Ch. 530; 36 Digest 505, 1707.
- (5) *Doyle v. Kaufman* (1877), 3 Q.B.D. 340; 32 Digest 538, 1908.
- (6) *Nocton v. Ashburton (Lord)*, [1914] A.C. 932; 32 Digest 536, 1894.

APPEAL from an order made on May 11, 1936, by His Honour JUDGE STURGES in Bloomsbury County Court, reversing an order of the learned registrar allowing the plaintiff in a running-down action to amend his

particulars of claim by adding a paragraph alleging, as a particular of negligence, a breach of the statutory duty of the defendant corporation to maintain the road beside their tramlines in proper order.

On Aug. 12, 1935, the plaintiff, an infant, was riding along a street and collided with a tramcar which came up from behind. He claimed damages for personal injury caused by the negligence of the driver of the tramcar, the servant of the London Passenger Transport Board, issuing his writ in the High Court on Oct. 15, 1935, and delivering a statement of claim on Oct. 30. The action was remitted to the county court for want of security for costs. On Nov. 27 particulars of claim were filed, alleging the ordinary acts of negligence against the driver of the tramcar. On Dec. 6 the defendants filed a defence denying negligence. On Feb. 12, 1936, the 6 months expired within which an action against a public authority must be brought, under the Public Authorities Protection Act, 1893.

On Apr. 30, the plaintiff applied to the registrar for leave to amend his particulars of claim by adding to the particulars of negligence the following :

Further, the defendants are the owners of the tramway system laid in the said road and/or are the road and highway authority in respect of the said road. As such owners or authority they were under a statutory duty at all times to maintain and keep in good condition and repair the said road and tramlines. In breach of their said duty the defendants negligently or otherwise failed to maintain or keep in good condition or repair the said road and/or the said tramlines whereby the infant plaintiff was caused to collide with the defendants' tramcar aforesaid.

It was common ground that the defendants were a public authority and that they were responsible under the Tramways Act, 1870, s. 28, for maintaining the tramlines in question and the road within 18 inches of the lines.

The registrar allowed the amendment and the defendants appealed to the judge, who reversed the registrar's order on the ground that the new allegation set up a new cause of action which was barred by the Act of 1893. The plaintiff appealed.

C. H. Gage for the appellant plaintiff.

Montague Berryman for the respondent Board.

Gage : This amendment was not a new cause of action, and even if it were, it is not a "commencement" of a new cause of action within the Public Authorities Protection Act, 1893, s. 1. It is merely another particular of the negligence which has already been alleged. The essence of the claim is the physical act of knocking the plaintiff down and injuring him by negligence. Breach of a statutory duty is negligence. When the plaintiff alleges breach of a duty in his writ, he can then set up a breach either of a common law duty or of a statutory one ; either is

covered by his writ alleging negligence. The amendment merely makes precise the matters of which the plaintiff has already complained. R.S.C. Ord. 20, r. 4, allows a plaintiff to alter, modify or extend his statement of claim without amending the indorsement of the writ. The plaintiff here has not gone outside his writ. R.S.C. Ord. 2, r. 1, only requires a writ to be indorsed with a statement of the date, places, and injuries complained of.

Weldon v. Neal (1) is distinguishable. There a plaintiff who obtained an order for a new trial with leave to amend her statement of claim added to it fresh claims, alleging other kinds of injury, which at the time of the amendment were statute-barred. In *Cave v. Crew* (4) it was held that a plaintiff cannot so alter his claim as to include a different cause of action; and in *Lancaster v. Moss* (2) the plaintiff sought to set up a different cause of action which arose earlier than the original one, on which he had been defeated. *Doyle v. Kaufman* (5), where it was laid down that the court has no power under R.S.C. Ord. 57, r. 6, to extend the time for renewing a writ of summons where the claim would, in the absence of the renewal, be barred by the Statute of Limitations, does not apply here. Where a new cause of action is set up in a statement of claim, the defendant need not apply to have the amendment struck out, because he may have the statement of claim struck out as not being in accordance with the writ: *Cave v. Crew* (4).

LORD WRIGHT, M.R.: It is much simpler to oppose the application to amend, for amendment requires leave and notice and gives the defendant an opportunity to object.

Berryman: The amendment sets up a new cause of action: *Nocton v. Lord Ashburton* (6). The writ alleges no personal breach of duty against the defendants, but only a vicarious one. The amendment charges them with direct negligence. If there were no statutory limitation, the plaintiff would start a fresh action on these new grounds. A cause of action is any fact which the plaintiff has to prove in order to enable him to get the judgment of the court. This is a new cause of action within that definition. Different defences would lie against it; common employment or *volenti non fit injuria* would not be available.

Gage did not reply.

LORD WRIGHT, M.R.: This is an appeal from an order made by JUDGE STURGES in the county court of Bloomsbury, reversing an order of the registrar. The order appealed from is an order refusing to the plaintiff his application for leave to amend his pleading. The ground upon which leave was refused was that the defendants were entitled to rely on the defence of the Public Authorities Protection Act, 1893 (that is not disputed and I need say no more about it), and that the

amendment would, if granted, raise a new cause of action which was not covered by the original writ. The writ itself was issued within the statutory period of 6 months, but the application to amend was outside that period: it was at a date which was something like nine months after the date of the injury in respect of which compensation was claimed.

The relevant words of the Public Authorities Protection Act, 1893, which are to be found in sect. 1, are:

Where any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of. . .

The writ here was issued in the High Court and was indorsed simply with the claim for damages for personal injuries and consequential loss sustained by reason of the negligence of the defendants, their servants or agents. I feel that the writ standing alone is not in accordance with the form set out in the appendix to the Rules of the Supreme Court, 1883, because I think it is lacking in particularity. The statutory form, as it now appears in R.S.C., app. A, part III, sect. 4, is in these words:

The plaintiff's claim is for damages for injury to the plaintiff by the negligent driving of the defendant or his servants.

There can be no doubt that that was intended to be the import of the writ, because 15 days after the date of the writ a statement of claim was delivered which set out that:

The plaintiff was riding a pedal cycle along the Hampstead Road when he was overtaken and knocked down by a tramcar owned by the defendants and driven by their servant, whereby he sustained the injuries,

and so on. Then come particulars of negligence, all relating to the manner of driving by the defendants' servant, the driver of the tram.

He drove the tramcar too close to the plaintiff, gave no warning of approach, failed to keep a proper lookout, and failed to keep the tramcar under proper control.

The case was remitted to the county court, and in Nov., 1935, the application now before the court was made to amend, and the amendment proposed was in this form. It kept the original heading "Particulars of Negligence," and then, under para. 2a, it said:

Further, the defendants are the owners of the tramway system laid in the said road and/or are the road and highway authority in respect of the said road. As such owners or authority they were under the statutory duty at all times to maintain and keep in good condition and repair the said road and tramlines. In breach of

their said duty the defendants negligently or otherwise failed to maintain or keep in good condition or repair the said road and/or the said tramlines, whereby the infant plaintiff was caused to collide with the defendants' tramcar aforesaid.

That alleges breach of a statutory duty. The particular statute in question is the Tramways Act, 1870.

The question is whether that involves a new cause of action within the meaning of the Public Authorities Protection Act, 1893, within the meaning of the words which I have just read. I think it does, and I think that the learned judge was right in dismissing the application, because it is well settled that an amendment will not be allowed if its introduction would deprive the defendant of a defence under the Statute of Limitations or under the Public Authorities Protection Act, 1893—in other words, if it is something which involves a new departure, a new head of claim, or a new cause of action. That rule has been laid down in comparatively simple circumstances in *Weldon v. Neal* (1). It is enough to read what LORD ESHER, M.R., says at p. 395 :

If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust.

In that case the original writ had been issued for slander, and the amendment asked for was an amendment setting out further claims "in respect of assault, false imprisonment and other causes of action." That, as I say, was a comparatively simple case. But a much more difficult case is illustrated by *Lancaster v. Moss* (2), a case which is not quite satisfactory because of the brevity of the report, but it seems that the original writ was issued simply claiming a repayment of money lent and setting out the two dates on which the loans were made, and these dates were such that at the date of the writ the claims were statute-barred if they were simply claims for money lent which on ordinary principles would be repayable at the dates of the respective loans. It was sought to get over that difficulty by an amendment alleging that the loans were made under an express agreement providing only for payment on a certain date which would have been within the statutory period, and the Court of Appeal refused to allow that amendment. They said that that would be taking away from the defendants an existing right. If the agreement had been originally declared on, there was some ground for saying that the defendants might have set up a counter-claim for damages for breach of the agreement to advance the money, but the main ground on which I think the court proceeded was that it would have been depriving the defendants of their existing right—their right to plead the statute—which they would have had if a new claim had

been made for the first time on the date on which it was sought to amend it. That shows, I think, a very strict interpretation of the rule and a very strict limitation of what is meant by a cause of action or a new cause of action.

In the present case I think the position is very much clearer. The claim originally indorsed on the writ was for damages for personal injuries caused by the negligent driving of the defendants' servant—that is, a claim based on negligence in driving and negligence of a vicarious character; it proceeds on the liability of the defendants for their servant's default. The amendment which is proposed is based upon what I regard as something entirely different, not as a claim for negligent driving and not as a claim for breach of duty by the defendants' servant for which the defendants are liable; it is based on a claim for breach of statutory duty that may indeed be regarded as statutory negligence, as explained in the recent case of *Lochgelly Iron & Coal Co., Ltd. v. M' Mullan* (3), but it is certainly an entirely different claim from a claim for negligent driving, and it is a claim which is not based on vicarious liability. It is a claim for breach of a statutory duty, which is a liability personal to the corporation and not capable of being delegated; but in addition to that it involves, as I read the proposed amendment, a quite different set of ideas, quite a different allegation of fact. As I understand it, the original claim of negligence had been because the defendants' tramcar was driven into and struck the plaintiff, whereas the proposed amendment seems to allege that the bad repair of the road and the tramlines caused the plaintiff to collide with the defendants' tramcar, which is quite a different set of ideas from the idea of negligent driving. In my view, therefore, the proposed amendment would, if allowed, have set up a new cause of action involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries. No doubt in cases of negligence injury is the gist of the action, but it is only one element. The cause of action involved duty, breach and damage, and the proposed amendment would have set up an entirely different duty and an entirely different breach of that duty. The one remaining feature of damage, it may be, would have been the same. In these circumstances, I think that the amendment could not be allowed consistently with the Public Authorities Protection Act, 1893, and that the learned judge was right in refusing to allow it; and that this appeal should be dismissed with costs.

ROMER, L.J.: I entirely agree. It was laid down in the case of *Weldon v. Neal* (1) that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations. In the

present case, if the plaintiff in his writ had claimed damages occasioned to him by reason of the negligent driving of the servant of the defendants, I do not see how it would be possible to say that the amendment now proposed to be introduced into the statement of claim was not an amendment introducing a new cause of action. It appears to me to be entirely a new cause of action. The first cause of action was owing to the breach of one duty on the part of the defendants. The alleged amendment proposes to charge the defendants with a breach of an entirely different kind of duty. Then Mr. Gage, recognising that, advances two ingenious arguments. He says: "Oh, yes, but if you look at my writ you really will see that what I am suing in respect of is that I have been knocked down by the defendants' car, and that being so I am entitled to claim damages from the defendants under that writ, whether I was knocked down owing to the breach of duty of the defendants' servant by negligently driving, or whether it was owing to the breach of duty on the part of the defendants in not keeping their tramways in proper repair." I would venture to point out to Mr. Gage that the mere fact that the plaintiff is knocked down by the defendants' tram does not give rise to a cause of action in the plaintiff.

If the plaintiff in his statement of claim had alleged that while riding along the highway he was knocked down by the defendants' tram, and claimed damages and nothing more, his statement of claim would, I apprehend, have been struck out as disclosing no cause of action. "Then," said Mr. Gage, as an alternative argument, "if you look at my writ again you will find that I am claiming damages for negligence, and I have specified the negligence in my writ, and further, by amendment, in the statement of claim I allege negligence on the part of the Transport Board in not keeping the tramways in repair. I am not going beyond what I have already claimed in my writ." As the learned Master of the Rolls has already pointed out, a writ indorsed in that way is insufficiently indorsed. It is provided by R.S.C. Ord. 2, r. 1, that :

Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action,

and R.S.C. Ord. 3, r. 2, says this :

In the indorsement required by Ord. 2, r. 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.

And R.S.C., Ord. 3, r. 3 goes on to provide that :

The indorsement of claim shall be to the effect of such of the forms in Appendix A, Part III, as shall be applicable to the case, or if none be found applicable, then such other similarly concise form as the nature of the case may require.

Reading these rules, and reading the forms set out in the appendix, it is apparent to my mind, although it is not requisite to state the precise nature of the claim made by the plaintiff, that the plaintiff must by the indorsement of his writ of summons give to the defendants some general idea of the nature of his claim. It is not sufficient for the plaintiff to indorse his writ merely with a claim for damages. Plainly, that would be insufficient. Nor, in my opinion, is it sufficient for a plaintiff to indorse his writ with a claim for damages for breach of contract or damages for negligence without giving the defendants some indication of the contract which he, the plaintiff, alleges has been broken, or some idea of the duty which he says the defendants have failed to perform. In the present case, as Mr. Gage has pointed out and indeed he is relying upon the fact, the writ merely claims damages for negligence. That, in my opinion, is insufficient, but the difficulty occasioned by that is at once remedied, or remedied very shortly afterwards, by the statement of claim being delivered by the plaintiff, in which he made it clear that the negligence he was suing on was negligence on the part of the defendants' driver in not driving the tramcar with reasonable care. Having so made it clear, I think the plaintiff has remedied his want of observance of the provisions of the rules relating to his indorsement, but as from that moment it was perfectly plain that his cause of action was a cause of action based upon the negligence of the defendants' driver in the way he drove the tram. After that, in my opinion, the case was precisely the same as the plaintiff had had originally in his writ, specifying the negligence on which he was relying. For these reasons and those given by LORD WRIGHT, M.R., I think this appeal fails.

MACNAGHTEN, J. : I am of the same opinion and have nothing to add.

Appeal dismissed with costs.

Solicitors : *Raymonds* (for the appellant); *Solicitor to the London Passenger Transport Board.*

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

ESPIR AND OTHERS *v*. BASIL STREET HOTEL, LTD.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 13, 1936.**]

Landlord and Tenant—Lease—Covenant against alterations—Breach—Measure of damages—Injury to reversion.

E. was the tenant of part of certain premises under a lease for a term of 98 years, and he sublet that part to B. for the unexpired residue of that term less the last 15 days. E.'s superior landlord then let to B., for a term of 999 years, the whole of the premises, subject to E.'s interest in the part. B., in breach of a covenant in his sub-lease, made considerable structural alterations to the whole of the premises, which B. used for the purpose of running an hotel. E. brought an action against B. for breach of the conditions in the sub-lease. The county court judge awarded E. £60 damages, which he assessed on the basis of the restoration work which would have to be done to that part of the premises in which E. had an interest, before E. could let that part to some other person. B. appealed:—

HELD: (i) the proper measure of damages was the diminution in the value of E.'s reversion due to B.'s breach of covenant, and not the cost of restoring the premises.

(ii) as B. was entitled to possession of the whole of the premises for 999 years, apart from E.'s reversion of part for 15 days, and B. had acquired possession of the whole of the premises for the unitary purpose of running an hotel, there was no evidence of diminution in the value of E.'s reversion and E. was entitled only to nominal damages.

[EDITORIAL NOTE.] The consideration of the right of an intermediate reversioner in respect of waste or dilapidations makes this case of importance, and it is particularly interesting since, the sub-lessee having in effect acquired the head lease, the plaintiff was only entitled to a nominal reversion of 15 days, after the expiration of which the premises would revert to the sub-lessee in his capacity of head lessee. In the circumstances the court rejected the submission that account must be taken of the possibility of the sub-lease being determined by forfeiture or otherwise than by effluxion of time, and held that in any event the holder of the nominal reversion was only entitled to claim damages in respect of such nominal reversion and in the present case to nominal damage.

AS TO MEASURE OF DAMAGE FOR FAILURE TO REPAIR DURING TERM, see HALSBURY, Hailsham Edn., Vol. 20, pp. 219, 220, para. 240; and FOR CASES, see DIGEST, Vol. 31, pp. 339, 340, Nos. 4820-4834, p. 360, Nos. 5057-5059.]

Cases referred to:

- (1) *Whitham v. Kershaw* (1886), 16 Q.B.D. 613; 31 Digest 360, 5058.
- (2) *Davies v. Underwood* (1857), 2 H. & N. 570; 31 Digest 340, 4830.

APPEAL by the Basil Street Hotel, Ltd., from a decision of His Honour JUDGE HARGREAVES, given in the West London (Brompton) County Court on May 18, 1936, in which he awarded £60 damages to the plaintiffs in an action for breach of a condition in a sub-lease of premises at Basil Street, Knightsbridge, in which the plaintiffs were the lessors, and the Basil Street Hotel, Ltd., the lessees.

F. R. Evershed, K.C., and *J. Ricardo* for the appellants.

H. I. P. Hallett, K.C., and *J. C. Leonard* for the respondents.

SLESSER, L.J. : In this case, the plaintiffs, a number of gentlemen, are the trustees of one David Solomon, and David Solomon had become, through a number of assignments which it is not necessary here to consider, the lessee of certain premises at Basil Street, Knightsbridge, which are defined on a plan which has been placed before the court. The premises consist substantially of the first and mezzanine floors of a building of which formerly the ground floor was occupied by an electric railway company for the purposes of their business as a railway company. The plaintiffs being thus the lessees of a part of the whole of this building, sublet to the defendants, the Basil Street Hotel, Ltd. (or, rather, to their predecessors in title), these premises, which were then known as the Sloan Gate Hotel, but are now known as the Basil Street Hotel, for the unexpired residue of 98 years less 15 days from Dec. 25, 1910. So that the defendants, through their predecessors in title, became entitled to possession of these premises, other than the part occupied for the purposes of the London Electric Railway Company on the ground floor, for the whole term less 15 days. In that sub-lease, there are the usual conditions to be found about the payment of rent, the execution of repairs and the like ; but substantially the position was that the defendants came into possession of the premises as I have stated. There was contained in the lease, in clause 16, a clause which has really given rise to the present litigation ; it is to the following effect :

That the tenant shall not at any time during the said term without the written consent of the lessor pull down cut alter or injure any of the main walls timbers floors or ceilings of the demised premises or without the like consent alter or in any manner interfere with the internal construction or arrangement of the demised premises or do anything which may in any manner weaken the structure of the station buildings or of the demised premises or which may depreciate the letting value of the demised premises or at any time without the written consent of the lessor block up darken obstruct or obscure any external doorway passage window light grating or opening belonging to the demised premises or to the lessor or to the railway company.

Now it appears that the railway company were the head landlords of this lease which the plaintiffs had let by underlease to the defendants, and owing to an alteration in the arrangement of their railway station, they no longer required that part of the premises which was not covered by the sub-lease to which I have referred, which was coloured blue on the plan, and consequently they entered into a lease with the defendants for the disposition of the whole of the property. That deed is dated June 6, 1935, and by that deed the London Passenger Transport Board, who are the successors in title of the London Electric Railway Company who were, as I have said, the grantors of the lease, sub-demised for a period of 999 years less 10 days from Dec. 25, 1902, to the defendants, subject to the plaintiffs' said interest, the whole of the premises referred to in the statement of claim. The effect of that was that as from the entering into

of that deed, the defendants, subject to the plaintiffs' interest, became entitled, for the period of 999 years, to the whole of the premises, both the part which the plaintiffs had formerly had, and the part in blue which the defendants there and then obtained from the railway company, subject to the plaintiffs' interest, which interest was, on the assumption that the covenants of the lease between them and the defendants were properly carried out, an interest of 15 days at the end of their lease, and no more. Now, being thus in possession, the defendants wished to adapt the premises for the purposes of their hotel. They appear to have sought to obtain consent from the plaintiffs, as required by clause 16 of the underlease to which I have already referred between them ; but the learned judge came to the conclusion that no such consent was ever given, and that consequently the defendants, proceeding as they did to make substantial alterations in the premises, did so in breach of clause 16 of their lease with the plaintiffs. I do not think it necessary to state in detail the alterations which they made. Evidence was given on the matter by a Mr. Douglas Rowntree, an eminent architect ; having seen the alterations which were made, the new floors which were put in, the spaces made for staircases both on the mezzanine and on the first floor, and new windows in both, he said : " Regarded as part of the whole hotel, I should say the work would probably be an improvement. The work has been well and tastefully done ; " and being asked what it would cost to restore the work before offering for re-letting, he said it would cost £450 according to present-day prices. As I say, that work was done, and was done in breach, as it is admitted, of clause 16, and assuming that no consent was given, it would follow that for that breach of the covenant, damages might properly be claimed by the plaintiffs.

In those circumstances the plaintiffs sued the defendants in the county court, not relying on any general allegation of waste, but putting their case upon a direct breach of the conditions of the lease, namely, clause 16, and claimed damages ; £450 was their estimate, but bringing their action in the county court they limited their claim to £100. The whole question which this court has now to consider is whether on that claim the learned county court judge was right when, having heard the evidence, he came to the conclusion that the plaintiffs had suffered damage to the extent of £60. The actual language of the learned judge on this point is as follows :

As to the question whether the reversion has been damaged I have come to the conclusion that before the plaintiffs could let their portion of the premises now occupied by the defendant company at all, they might have and probably would have to do a certain amount of work by way of restoring the premises and particularly by way of replacing the flooring which has been cut away. . . . It is not easy to assess the sum which ought to be awarded to the trustees by way of damages, but I have assessed these damages as nearly as I can at £60.

With every respect to the learned judge, I find myself unable, from his somewhat short note, to understand upon what principle he has proceeded in assessing these damages ; but whatever principle he has proceeded upon, the right principle appears to me that which has been enunciated in the case of *Whilham v. Kershaw* (1). That was an action for waste brought by the reversioner against the tenant upon a covenant by the tenant not to commit waste on the demised property, and the question arose as to what was the proper measure of damage. It is pointed out by LORD ESHER, M.R., at p. 616, that :

It would be wrong to say that the reversionary value had necessarily been diminished by the cost of restoring the property to its original condition.

He seemed to think, as I understand him in that case, that :

The value of the reversion might be diminished, but the question of how much injured would be a question of value, and the proper way to ascertain the damages, would be to ask skilled valuers to say how much the property has been diminished in value ;

and therefore he does not take the view that the test is the measure as to how much would have to be spent to restore the property to the same condition as that in which the tenant originally received it, but he says that the right measure is to ask how much the property, that is the value of the reversion, has been diminished in value. Now, I agree with Mr. Hallett when he says that in considering how much the reversion has been diminished in value, you are not limited to the consideration of the duration of that reversion. It is, I think, an element to be taken seriously into consideration, that the particular reversion in this case could only exist for 15 days if the covenants in the lease between the plaintiffs and the defendants were duly performed. Mr. Hallett says that there always is a possibility that in one way or another the lease will fall in before that time : there may be a bankruptcy and a disclaimer ; there may be a failure in the payment of rent ; there may be breaches of covenant putting an end to the lease, or the like ; we need not speculate on what may happen. He says there is a possibility, great or small, that in fact this reversion will be for more than 15 days, and he says that is a matter which ought properly to be taken into account. I think he is entitled to make that submission, because, as was pointed out in an early case dealing with repairs, the case of *Davies v. Underwood* (2), by WATSON, B., at p. 574, the great object of a covenant of this sort is not to put money into the pockets of a lessor, but to enforce the performance of the acts stipulated for ; and that is not necessarily limited to that one consideration, but nevertheless, one has to have regard to the probabilities of the case. In this case, as I see it, there is this important circumstance which cannot be disregarded, namely, that the defendants themselves have, by agreement with the head

landlords, acquired possession of the remainder of the premises ; they are therefore, apart from these 15 days, and apart from these breaches of covenant, really entitled in substance to the possession of the whole of the premises throughout the whole of the period, because, of course, the 15 days is merely a draughtsman's method of producing the necessary legal result that there shall not be a complete merger ; but they cannot, in themselves, contemplate, if there be only 15 days, that for those 15 days the plaintiffs will be able to let these premises. There is specific power given in the lease between the London Electric Railway Company and the defendants to use these premises as an hotel, and they always have been so used by them as I understand. All these matters must be taken into consideration. Having regard to the fact, first of all, that there are only these 15 days, having regard to the fact that the defendants have really acquired possession of the whole of the premises for one unitary purpose, that of running an hotel, I find it very difficult, as a practical man, to make that notional severance of these premises which Mr. Hallett asks us to make. What Mr. Hallett says, as I understand his argument, is this : eliminate the blue part, imagine the plaintiffs once more coming into possession of their part and imagine that they have regained possession for one reason or another for a substantial period during which they might let it (that is something considerably more, I think, than 15 days) : they are entitled to say : " We are now entitled to let these two floors which are ours, in the condition which they would have been in if there had been no breach of covenant, and we are entitled, therefore, to ask that these premises be substantially put back, or if that is too rigorous a claim, we are entitled to say that the reversion has been injured to the extent that these holes have been made in the floors, and the premises are not self-contained, and these windows overlap into other premises, so that there may be disputes about them." That is the argument which is addressed to us, and I see nothing in law to say that those matters, considered in a proper case, might not be a reason for saying that a reversion had been injured in value ; but in my view, when the realities of this particular case are looked at, I find it impossible to say that this reversion has been so diminished in value. As I say, the fact that the whole thing has become one hotel, one unit, the fact that clearly the defendants have now become possessed either by lease from the plaintiffs or by lease from the London Electric Railway Company of the whole of these premises to run as one hotel, brings me to the conclusion that in reality, the only interest which can practically be considered in this case of the plaintiffs', is the interest for 15 days in the upper part of this building. I cannot believe, therefore, that in putting in this staircase which, without putting it too favourably, is admittedly an improvement of the whole premises and not a detriment from anybody's point of view—I cannot believe that it can properly be said

that there has been any essential damage to this reversion, and I think the learned judge was wrong when he assessed these damages at £60. This is not an action for waste, it is an action on the covenant, and there is nothing to prevent the plaintiffs, as I understand the law, from recovering nominal damages. It might be otherwise if it were an action in case, but it is an action in contract; therefore I think that if the plaintiffs here are awarded 40s. in place of the £60 which the learned judge has given to them, they will have recovered all that they can show the reversion has suffered through the facts which I have recited.

SCOTT, L.J. : I agree, and only add a sentence or two. I think it is quite clear, from the terms of the judge's note that he was taking the view that the cost of restoring the premises, and particularly replacing the flooring which had been cut away, was germane to the measure of damages. I conclude from that that he was rejecting the true measure of damages, namely, the injury to the reversion, in the sense of the present depreciation in the present value of the ultimate reversion. That being so, I think he was guilty of an error of law in applying the measure which he did apply. The cost of repairing has no relevance in itself to the question of the diminution in value of the reversion. It is a matter which no doubt a valuer might take into account in arriving at his final conclusion as to the market diminution in value, but it is not in itself any part of the measure of damages. That being so, I think it is quite clear that there is a fundamental error of law in the judgment.

The next question is : was there any evidence before the learned county court judge of damages in the true sense, as applicable to a covenant not to alter ? In my view there was not. I have looked carefully through the evidence, and I can see no evidence at all to justify his giving more than nominal damages for the breach of covenant. There was no evidence that I can see of any actual diminution in value of the reversion. For those reasons, I entirely agree with the judgment which my Lord has delivered.

EVE, J. : I agree, and I have nothing to add except this : that I think that such valuation as was made was not made according to the well settled rules.

Appeal allowed. Judgment for plaintiffs for 40s. The costs of the appeal to be the appellants', and the appellants to have their costs below after the date of payment in. £5 paid into court to remain in court to abide the result of taxation. Leave to appeal refused.

Solicitors : *Gisborne & Co.* (for the appellants) ; *T. Eggar & Son* (for the respondents).

Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

WRAY v. ESSEX COUNTY COUNCIL.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.),
October 15, 1936.]

*Education—Local education authority—Liability for negligence of master—
 Boy carrying oilcan.*

The plaintiff, a boy of 12 years of age attending a school owned and conducted by the defendant council, was "trotting" from one classroom to another, when at a blind corner he collided with another boy, B., carrying an oilcan. The spout of the oilcan, about 6 ins. long, struck the plaintiff in the eye and severely injured him. The boy B., who was carrying the can in a perfectly proper way, had been told to take it from one room to another by a master. The plaintiff sued the council as the employer of the master, alleging that the latter was negligent in not taking special precautions when entrusting a boy with a dangerous article :—

HELD : the oilcan was not an inherently dangerous thing, nor was it a dangerous thing in the special circumstances of a school for young children, and the master was under no duty in such a case to take special precautions.

[EDITORIAL NOTE.] This case will naturally recall the case of *Chilvers v. London County Council* (5), where a child fell on a toy and injured his eye. In the present case the children are rather older, and the boy carrying the oilcan was doing so upon the express instructions of the master, so that the latter had an opportunity of giving any special instructions which might be necessary. The court taking the view that the can could not, in any sense or circumstances, be classed as a dangerous thing, there was clearly no duty on the master to give any such instructions to the boy.

AS TO LIABILITY OF EDUCATION AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 12, p. 41, para. 86 ; and FOR CASES, see DIGEST, Vol. 19, pp. 556, 557, Nos. 17-24.]

Cases referred to :

- (1) *Dixon v. Bell* (1816), 5 M. & S. 198 ; 36 Digest 57, 354.
- (2) *Sullivan v. Creed*, [1904] 2 I. R. 317 ; 36 Digest 57, case (c).
- (3) *Williams v. Eady* (1893), 10 T.L.R. 41 ; 36 Digest 57, 359.
- (4) *Langham v. Wellingborough School Governors & Fryer* (1932), 101 L.J.K.B. 513 ; Digest Supp.
- (5) *Chilvers v. London County Council* (1916), 80 J.P. 246 ; 19 Digest 557, 23.
- (6) *Glasgow Corp'n. v. Taylor*, [1922] 1 A.C. 44 ; 36 Digest 70, 453.

APPEAL from a judgment given by His Honour JUDGE BEAZLEY on July 27, 1936, at Ilford County Court, dismissing the claim of the plaintiffs for damages for personal injury caused to the infant plaintiff.

John Wray, the infant plaintiff, was aged 12 years and was a pupil at the Halbutt Road School, Dagenham, which was owned and directed by the defendant county council. On Feb. 14, 1936, at 3.20 p.m., he was proceeding from one classroom to another ; he "trotted" (his own word) ahead of the other boys of his class, and collided at an entrance, which was a blind corner with two steps, with another boy called Arthur Biggs, 13 years old, who was carrying an oilcan in his

hand. He was carrying it by the handle, with the spout, which was about 6 ins. long, projecting in front, and the spout struck Wray in the left eye, disabling him for several weeks and practically destroying the sight of that eye. There was a school rule, known to all pupils, forbidding them to run on the school premises except at games, but the judge found that neither boy was negligent. Biggs was taking the oilcan to the handicraft room on the instruction of a master, a Mr. Lawrence, whose words to him were: "You are just the boy I want; you are a prefect; take this to Mr. Sharpe." Boys were moving between classes at that time. Wray and his father sued the council and alleged negligence in their servant, Mr. Lawrence, that he did not give Biggs proper instructions how to hold the oilcan. The judge, after reviewing the authorities, held that the oilcan was not a thing which was in itself dangerous, like a gun or a bottle of phosphorous, and that there was no duty on Mr. Lawrence, as a reasonable man, to give directions to Biggs to hold the can in any particular way, or to anticipate that such an unfortunate event as this would result from his entrusting the can to Biggs to carry from one classroom to another. In case his judgment should be reversed on appeal, he assessed the damages at £450 general and £2 4s. 6d. special damage.

The plaintiffs appealed.

D. G. A. Lowe (*Harold Brown* with him) for the appellant plaintiffs.

G. Sutton-Nelthorpe for the respondent council.

Lowe: The oilcan was a dangerous thing to entrust to a boy of 13 years, without any instruction how it should be carried. This was not an ordinary incident of life in school. The master selected a boy whom he considered to be responsible, because he had in mind that the oilcan was dangerous. In *Williams v. Eady* (3) a boy was injured by an explosion of phosphorus in a bottle; a master had left it in a place to which the boys had access and they had found it and played with it; LORD ESHER, M.R., said at p. 42:

The schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster.

In the circumstances of the present case, a careful father would have directed his son how to carry the oilcan. In *Dixon v. Bell* (1) the defendant sent a servant girl of 13 or 14 to fetch a loaded gun, and she discharged it and injured the plaintiff; the defendant was held liable to damages. He who sends a young person to fetch or deliver a dangerous thing must give proper directions to guard against the danger. In *Langham v. Governors of Wellingborough School and Fryer* (4) a pupil struck a golf ball from the playground and hit another pupil in the eye. The injured pupil claimed damages from the headmaster, alleging failure to exercise proper supervision or to take proper care for the pupils' safety. He himself said that he had never known a golf ball to be struck

in the playground before. It was held that there was no evidence of lack of supervision or that such lack caused the accident, and the case was not one of *res ipsa loquitur*. The present case is stronger, because there is evidence that the master selected a prefect and gave him no direction.

In *Sullivan v. Creed* (2) the defendant left a loaded and cocked gun standing in his grounds; his son aged 15 found it and injured another boy with it. GIBSON, J., enumerated in his judgment at p. 325 a series of dangerous articles:

The question of liability depends on the particular circumstances, including the nature of the dangerous article, the place, the persons likely to be brought into contact with it, and the time. A hatchet, a bottle of poison labelled "poison," the same bottle unlabelled, a loaded gun, gunpowder, or dynamite, all represent articles of varying degrees of danger, and the greater the danger the higher is the standard of diligence which the law exacts.

In *Chilvers v. L.C.C.* (5) a toy soldier with a lance was held to be short of the danger line. GIBSON, J., said that a hatchet was over the line. The oilcan is also over the danger-line, though short of the hatchet.

Sutton-Nelthorpe: The finding that the oilcan was not inherently dangerous was a finding of fact. As it was not inherently dangerous, the master was under no duty to give the boy special directions. In *Glasgow Corporation v. Taylor* (6), where a boy of seven died, through eating deadly nightshade berries in the Botanic Gardens, the House of Lords held that the pursuer's averments disclosed a good cause of action. LORD SUMNER there said at p. 67:

Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations.

The learned judge has correctly considered the place, the age of the boy, the nature of the article, and what was likely to happen, and has found as a fact that there was no duty on Mr. Lawrence.

LORD WRIGHT, M.R.: That is not a finding of fact. Duty is a question of law.

Sutton-Nelthorpe: The learned judge has found that this was a mischance so improbable that it would not be reasonable for anybody to foresee it. In *Chilver's* case (5), where children in an infant school were allowed to play with toy soldiers and one of them injured his eye on the lance of a soldier, BAILHACHE, J., found that there was no evidence of negligence: the toy was similar to the toys with which children usually played, and the accident might have happened in a nursery under the eyes of several nurses. This is a similar case.

LORD WRIGHT, M.R. : The facts in this distressing case are simple. The plaintiff, a boy of 12 years of age, was at the defendants' school at Dagenham. On Feb. 14 of this year he was very seriously injured and lost his eye, because coming at a trot round a corner on the school premises he ran into the point of the spout of an oilcan which another boy at the school, 13 years of age, was carrying. The oilcan itself was an oblong metal article of the usual character, with a projecting spout about 6 inches long. The boy who was carrying it was a boy of 13 called Biggs, and he had been told by Mr. Lawrence, a master at the school, to take this can and carry it from one part of the school premises to another and give it to a master there. In the course of that journey he came out of an entrance, turned sharp to the right, and while he was doing so the plaintiff, very unfortunately, trotting, as I say, ran into the can, the point of which struck him in the eye. The boy Biggs was not running ; he was going in the ordinary way, and he was carrying the can in a way which appears to be quite normal and usual ; that is, he had it in his left hand and was holding his left elbow in or close to his side. Under those circumstances the action is brought against the Essex County Council as owners and conductors of the school and as employers of Mr. Lawrence, the master.

The action is grounded in negligence, and the breach of duty alleged is a breach of duty as between Mr. Lawrence and the plaintiff. As I understand, it is put in this way. It is said, first of all, that the can was a dangerous article and that the giving of the can to the boy Biggs to carry was itself an act of negligence involving a breach of duty to anyone who, in the normal course of events, came within the radius of the danger and was injured. It is also said that, although the can is not a dangerous thing within the meaning of the particular rule, still the circumstances were such that Mr. Lawrence ought reasonably to have foreseen that, unless special precautions were taken and special warnings given to the boy Biggs as to how he was to carry this can, injury might ensue to any of the boys moving about in the school ; that it was, in fact, an hour when boys moved freely from one place to the other, and that therefore Mr. Lawrence was guilty of negligence in not foreseeing that which actually happened and in not taking the appropriate precautions by warning the boy Biggs what he should do ; and it was said that there was a special duty attaching to the master in those circumstances because the pupils of the school were boys of tender years, for whose care and protection there was a special duty of taking precautions.

The learned county court judge has decided against the plaintiff. I can best sum up the effect of his careful judgment by reading a short passage. He said :

In my view there was no duty upon Mr. Lawrence, as a reasonable man, to give directions to Biggs to hold the can in any particular way, or to anticipate that

such an unfortunate event as this would result from his entrusting the can to Biggs to carry from one classroom to another, although at the time he entrusted it to him the boys were changing classes and Biggs was likely to encounter other boys whilst he was carrying the can.

Before that the learned judge had held that the oilcan was not a thing which was in itself dangerous. He goes on to say :

I really do not see how it could be. If the boy had been holding a pen with a nib in it the result would have been more or less the same. It is not a thing which is in itself dangerous, as a bottle containing phosphorus was held to be dangerous or a gun or pistol was held to be dangerous.

I agree with the learned county court judge in both these respects. It is impossible not to feel a great sympathy with this poor boy who has suffered this serious injury at the outset of his life and who will be in future a one-eyed person ; but in an action of this sort the onus is on the plaintiff to establish that he has a cause of action, and I really find it quite impossible here to hold that there is any such cause of action.

The case of things dangerous in themselves, or, as they are sometimes called, inherently dangerous, is a case separate and distinct and holds a special place in the law of negligence. Where you are dealing with a dangerous thing you are dealing with something which, if left, may at any moment and under modern circumstances cause damage. Such articles are things like a gun or a pistol. If a gun or a pistol is left about loaded, in a condition in which it may go off if handled in a certain way, if anyone handles an instrument of that sort the risk of danger is obvious. Such a case is illustrated by *Dixon v. Bell* (1), and in a very striking way in an Irish case, *Sullivan v. Creed* (2), where GIBSON, J., says this at p. 325:

A hatchet, a bottle of poison labelled "poison," the same bottle unlabelled, a loaded gun, gunpowder, or dynamite, all represent articles of varying degrees of danger, and the greater the danger the higher is the standard of the diligence which the law exacts.

And he gives further illustrations. Then PALLES, B., says this, on p. 329 :

I hold that anyone who is in possession of a dangerous instrument owes a duty to the public, or at least to such members of the public as are reasonably likely to be injured by its misuse, to keep it with reasonable care, so that it shall not be misused to the injury of others.

I need scarcely refer to other cases, but there is the case of a stick of phosphorus, which was considered in *Williams v. Eady* (3). The Court of Appeal held, without much hesitation, that that was a dangerous article. As pointed out by SCRUTTON, L.J. in *Langham v. Governors of Wellingborough School* (4), there may be borderline cases ; there may be cases which fall on the side of dangerous articles and cases which fall on the side of articles which are not dangerous, and SCRUTTON, L.J., cites the interesting case of *Chilvers v. London County Council* (5), where a child was unfortunately injured by the point

of a toy lance which was part of a toy soldier. BAILHACHE, J., whom SCRUTTON, L.J., quotes with approval at p. 515, said :

You cannot say that toy soldiers in themselves are dangerous ; to play with them has been the right of every nursery in the kingdom for centuries, and the fact that the master or mistress had allowed a toy soldier to be in the room could not be treated as evidence of negligence or lack of proper supervision.

I need not quote other cases. It may not be possible precisely to say what article is inherently dangerous and what is not by any general definition, yet when you come to particular articles there is, I think, no difficulty in drawing the line you take as the standard in the one case. Things like a naked sword or a hatchet or a loaded gun or an explosive are clearly inherently dangerous—that is to say, they cannot be handled without a serious risk. On the other hand, you have things in ordinary use which are only what is called “potentially dangerous” : that is to say, if there is negligence or if there is some mischance or misadventure then the thing may be a source of danger ; but that source of danger is something which is not essential to their ordinary character ; it merely depends on the concurrence of certain circumstances—in particular, generally, negligence on the part of someone. I feel, I am bound to say with no doubt at all, that this can does not come within the category of inherently dangerous articles. It is an ordinary article of domestic use ; apart from something quite extraordinary, it is not likely to cause damage and is not calculated to cause damage to anybody.

There is, however, the further point : even if it is not inherently dangerous there may be circumstances in which it would be proper for the schoolmaster to exercise, as LORD ESHER, M.R., said in *Williams v. Eady* (3) he is bound to exercise, “such care of his boys as a careful father would take of his boys” ; he would be :

bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way.

Therefore the schoolmaster in this case, Mr. Lawrence, has undoubtedly a special duty towards the boys of the school. But in every case when you consider the standard by which the duty is to be tested and according to which it has to be ascertained whether there has been any breach of duty, it is necessary to consider whether there is something which the schoolmaster ought to have anticipated, something reasonably foreseeable and something, therefore, which, because it is foreseeable, the master ought to have guarded against. I say “foreseeable,” because the mere fact that he did not foresee a risk or a particular contingency would not excuse him if it was something which he ought to have foreseen. But when I look at the facts of this case, it seems to me to be a misadventure which could not have been reasonably foreseen by anybody ; it happened

by an unfortunate concurrence of circumstances. It is true that the master must have known, and did know, I suppose, that boys were moving about the school at that time, but he had no reason to foresee that the plaintiff (for whom I have every sympathy) would be trotting round this blind corner just at the time when he did and under such circumstances. But he came directly straight and in contact with this can. Biggs was carrying the can in the ordinary way, and no one is blaming him for anything he did ; he was moving at an ordinary pace, and if anyone could be held responsible—I do not think anybody is responsible for this unfortunate mischance, which appears to me to be pure misadventure—it would be rather the poor boy himself, who was trotting round the corner. But even so there is no reason for anyone to foresee that this innocuous and ordinary commonplace oilcan carried in the ordinary way by Biggs would have caused the mischief which followed. If you get a foreseeable risk it is, of course, material to consider what are the chances against that risk eventuating ; if there is a real risk there is a duty to guard against it, even though the precise damage which follows has not been carefully foreseen and contemplated. But here, as I think, there is nothing which the master could or ought to have foreseen ; I think he committed no breach of duty towards the plaintiff. His employers, accordingly, are not responsible, and the action must fail. The appeal, therefore, will be dismissed.

ROMER, L.J. : I agree, and I do not think I can usefully add anything.

MACNAGHTEN, L.J. : I also agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors : *Ashby & Rogers*, Upminster (for the appellants) ; *Sharpe, Pritchard & Co.*, agents for *E. S. Holcroft*, Chelmsford, Clerk to the Essex County Council (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

HILDE MARCHANT *v.* FORD, PETER DAVIES, LTD., THE
GUERNSEY STAR & GAZETTE CO., LTD., AND McLEGAN
& CUMMING (Sued as a Firm).
WALTER MARCHANT *v.* SAME

[COURT OF APPEAL (Greer and Greene, L.JJ., and MacKinnon, J.),
October 14, 1936.]

*Practice—Consolidation of actions—Separate libels contained in one book—
Probable embarrassment at trial—Difficulty of apportioning costs—R.S.C.,
Ord. 49, r. 8.*

By the writing and publishing of one book, it was alleged that the female plaintiff had been libelled by portraying her as a grossly immoral woman and that her father had been libelled by portraying him as a coarse, brutal and unsympathetic father, who had driven the daughter into an immoral life. Justification had been pleaded by two of the defendants. The daughter and her father brought separate actions in respect of these libels and an order was made consolidating the actions:—

HELD: the actions ought not to be consolidated on account of the embarrassment to the judge and jury in trying such actions together and the hardship to one party to wait through the trial while matters quite irrelevant to that party's case were being tried, with the consequent responsibility for costs.

[EDITORIAL NOTE.] The consolidation of actions is very largely a matter of discretion, but the guiding principle must be the convenience of such a course to the parties and the court, and the saving of costs by avoiding the necessity of going over the same ground twice. In the present case, although the libels are in the same book, and indeed concern a father and his daughter, yet they are so distinct in character and concern such different passages in the work, that one party would be quite unconcerned with the case of the other. In such a case, the better course is for each action to be tried separately.

AS TO CONSOLIDATION OF ACTIONS, see HALSBURY, 1st Edn., Libel, Vol. 22, p. 142, para. 252; and FOR CASES, see DIGEST, Practice, pp. 658-660, Nos. 2786-2800.]

Cases referred to:

- (1) *Horwood v. Statesman Publishing Co.* (1929), 98 L.J.K.B. 450; Digest Supp.
- (2) *Sandes v. Wildsmith*, [1893] 1 Q.B. 771; 32 Digest 13, 40.
- (3) *Booth v. Briscoe* (1877), 2 Q.B.D. 496; 32 Digest 13, 39.
- (4) *Bailey v. Curzon of Kedleston (Marchioness)*, *Bailey v. Duggan*, [1932] 2 K.B. 392; Digest Supp.

INTERLOCUTORY APPEAL from an order of GREAVES-LORD, J., reversing an order of MASTER BALL and ordering the consolidation of the above two actions.

The plaintiffs in the two actions were father and daughter and claimed by indorsement upon separate writs, the daughter's dated Apr. 1, 1936, and the father's dated May 14, 1936, an injunction to restrain the defendants from "further printing, publishing, selling or otherwise circulating, delivering or disposing of a written work called 'Anna Craft,' by Richard Ford" (one of the defendants), with a further claim for delivery up to the plaintiff of all copies of the work and damages for libel.

The defendant Ford wrote a book entitled "Anna Craft," the plot of which was that the heroine being the mistress of one man, became the mistress of another and underwent an illegal operation. The father of the heroine was drawn throughout the book as a vulgar, brutal and unsympathetic character.

The daughter rested her case upon passages from the book and upon a picture and wording on the wrapper of the book, which she alleged referred to herself and which she alleged meant that she was a grossly immoral woman. The father's case was that other passages in the same book meant that he was a coarse, brutal and unsympathetic father and by his treatment of his daughter had driven her to lead an immoral life. By an order dated July 28, 1936, GREAVES-LORD, J., ordered the two actions to be consolidated and from this order the plaintiffs appealed.

Sir Patrick Hastings, K.C., and *Theobald Mathew*, for the appellants in each case.

Paul Springman, for the respondent Ford.

Valentine Holmes for respondents Peter Davies, Ltd.

G. O. Slade for respondents, The Guernsey Star & Gazette Co., Ltd., referred to *Sandes v. Wildsmith* (2), *Booth v. Briscoe* (3), *Bailey v. Curzon of Kedleston (Marchioness)* (4), *Horwood v. Statesman Publishing Co., Ltd.* (1).

Hon. Ewen Montagu for respondents, McLegan and Cumming.

GREER, L.J. : This appeal raises a question of some difficulty with regard to the practice of this court to interfere with the discretion conferred upon the judge in chambers. There are two actions before this court which have been consolidated. One by a lady complaining of gross libel in a novel which I think can easily be established as referring to her as the person attacked. Two of the defendants plead justification and the main issue in the action by the female plaintiff would be whether the allegations are true. She says that they are not true. It may well be that the pleading will be proved to be true and that the defendant Ford utilised his own experience with an unfortunately immoral girl to make money out of the book. We have to determine whether there are any grounds of principle entitling us to interfere with the decision of the judge who ordered that these two actions be consolidated.

I think the judge was wrong, because he could not have made the order if he had really considered the embarrassment to the plaintiff, the trial judge and to the jury in having these two actions tried together. There is no doubt that the joinder of these actions was in his power. The test in *Horwood's* case (1) was whether the causes of action could have been joined. The respondents are right in saying the case is within R.S.C., Ord. 16, r. 1. The publication is one transaction and the words "out of the same transaction" in r. 1 apply to the publication in this

case. There are some common questions of law and fact arising in both cases, so it is within the powers of the judge to make an order. But the judge has to have regard to everything that is relevant and if he has disregarded something which is relevant it is a wrong decision. Here he did. He disregarded the great embarrassment to the judge and jury to try the two cases together, and the hardship to the father to wait through the trial and his responsibility for the costs of so doing, while matters completely irrelevant to his case are being tried. He and his counsel and solicitor would have to be in court all the time while matters of no concern to him are being discussed. At the end of the case he would have to make an appeal to the judge to make a special order as to the costs in his case. If the actions be tried separately, only two issues would have to be determined, (i) are the statements defamatory in their natural and ordinary meaning, and (ii) what damages have resulted and what is the effect of the apology upon them. No judge considering all these matters would have ordered the consolidation of the two actions.

GREENE, L.J. : I am quite satisfied that in the peculiar facts of this case the trial of the action would be seriously embarrassed if the judge's order for consolidation were allowed to stand, and I am quite assured that the judge could not have given the consideration to all the circumstances which he ought to have given. He must have thought that as the actions were two actions in which the plaintiffs could be joined, that in itself was sufficient justification for an order for consolidation. But the further question of the embarrassment of the trial must be considered. In this case only the most grave embarrassment could result from such an order.

MACKINNON, J. : I agree.

Appeal allowed with costs and the master's order restored.

Solicitors : *Theodore Goddard & Co.* (for the appellants) ; *Blundell, Baker & Co.* (for the respondent Ford) ; *Oswald Hickson, Collier & Co.* (for the respondents Peter Davies, Ltd.) ; *Stanley Johnson & Allen* (for the respondents The Guernsey Star & Gazette Co., Ltd.) ; *Oswald Hickson, Collier & Co.* (for the respondents McLegan & Cumming).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

COLE v. P.C. 443A.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), **October 13, 14, 1936.**]

Ecclesiastical Law—Divine service—Westminster Abbey—Right of member of public to attend—Right of public not parishioners.

Prior to 1932 the plaintiff had acted as a guide to Westminster Abbey under a permit issued to him by the dean and chapter. The permit expired in Mar., 1932. Renewal of the permit was refused. When conducting tours around the abbey under his permit the plaintiff wore a badge which was inscribed "Cole's Sightseeing Tours Guide." On Dec. 12, 1935, the plaintiff, wearing this badge, was present at Divine service in the Abbey. There was nothing improper in the plaintiff's conduct. The dean had previously given orders that the plaintiff was not to be allowed in the abbey. A police constable was called and, after requesting the plaintiff to leave, ejected him without unnecessary force. The plaintiff lodged an information against the police constable for assault:—

HELD: Westminster Abbey is a royal peculiar and a collegiate church and non-parishioners have no more right to enter a royal peculiar than of entering a parish church.

EDITORIAL NOTE. The only right to attend a church is founded upon the correlative duty to be there. The duty is confined to attendance at the parish church and there is no right, therefore, to attend the services at a church which is extra-parochial, e.g., a royal peculiar.

FOR THE RIGHT TO ATTEND CHURCH, see HALSBURY, Hailsham Edn., Vol. 11, p. 871, para. 1576; and FOR CASES, see DIGEST, Vol. 19, p. 231, Nos. 87-90.]

Cases referred to:

- (1) *Freeland v. Neale* (1848), 1 Rob. Eccl. 643; 19 Digest 525, 3866.
- (2) *Barnes v. Shore* (1846), 1 Rob. Ecc. 382; 19 Digest 525, 3876.
- (3) *Jarratt v. Steele* (1820), 3 Phillim. 167; 19 Digest 258, 401.
- (4) *Re St. Columb (Londonderry) Pews* (1863), 8 L.T. 861; 15 Ir. Jur. 115; 19 Digest 464, case (s).
- (5) *Taylor v. Timson* (1888), 20 Q.B.D. 671; 19 Digest 304, 1031.
- (6) *Hancock v. Stephens* (1915), 31 T.L.R. 434; 19 Digest 524, 3863.
- (7) *Bosanquet v. Heath, Heath v. Bosanquet* (1860), 3 L.T. 290; 19 Digest 525, 3875.

APPEAL by way of case stated from a decision of a Metropolitan Magistrate sitting at Bow Street. The special case stated by the learned magistrate set out the following:

CASE.

(5) Upon the hearing of the said information the following facts were proved before me:

(a) The appellant was granted by the dean and chapter a permit to act as a guide in Westminster Abbey.

(b) The permit expired in March, 1932.

(c) The appellant applied for the permit to be renewed but the application was refused.

(d) Later, the Dean of Westminster Abbey gave instructions that the appellant was to be excluded from the Abbey.

(e) On Dec. 12 the appellant was in the Abbey during Divine service and was wearing a badge bearing the words "Cole's Sightseeing Tours Guide" when Police Constables 149 A and 443 A ejected him, without unnecessary violence, after having requested him to leave.

(f) There was no misconduct by the appellant on that day prior to his ejection.

(g) Letters patent dated May 21, 1560, granted by Queen Elizabeth were produced in evidence and contained *inter alia* the following provisions :

We will and ordain that the said scite and church may be and henceforth for ever shall be a collegiate church.

The dean and chapter shall be one body corporate with power to prosecute claim plead, to receive and purchase manors and to have a common seal. We have given and granted to the aforesaid dean and chapter all our church of the late monastery of St. Peter now dissolved and all the scite circuit, compass, and precinct of the said late convent or monastery with all ancient privileges liberties and free customs.

(6) On the part of the appellant it was contended that the Abbey is a public church, licensed for the public celebration of Holy Matrimony and Baptism and open for public service, that the dean had no authority to make an order excluding him from the Abbey and that therefore the constables were guilty of an assault in ejecting him.

(7) On the part of the respondent it was contended (a) that under the letters patent granted by Queen Elizabeth in 1560, the Abbey was handed over to the dean and chapter with all its ancient privileges, and that the dean and chapter were appointed, under the Queen, to control the Abbey, (b) that by virtue of these ancient privileges not only was the Abbey subject neither to archiepiscopal nor episcopal control but that to the dean "belongs the government of the whole college and all its parts," (c) and that therefore the constables were justified in ejecting the appellant and in so doing they were carrying out the lawful orders of the dean.

(7a) I understood that the words "belongs the government of the whole college and all its parts" were extracted from the letters patent aforementioned, but on further inquiry, I find that they appear in contemporary statutes made by the sovereign in pursuance of the letters patent.

(7b) In addition to the letters patent aforementioned, my attention was drawn to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol XI, p. 475, concerning the exemption of peculiars, and p. 871 concerning the right to attend church.

The right to attend Divine service in a church is limited to those who have by statute the duty to attend Divine service. By 5 & 6 Edw. 6 c. 1, the duty to attend Divine service within a parish church is upon parishioners only, and inferentially I was of opinion that anyone other than a parishioner could be excluded by the dean and chapter. The appellant did not claim to be a parishioner, and could produce no evidence of permission having been given to him to be there.

OPINION.

(8) I formed the opinion that under the authorities quoted the dean and chapter acted within their powers in excluding the appellant, and accordingly I dismissed the information.

QUESTION.

(9) The question upon which the opinion of the said court is desired is, whether, upon the above statement of facts, 1, the said magistrate, came to a correct determination in point of law, and, if not, what should be done in the premises.

John B. Blagden for the appellant.

Walter Monckton, K.C., and *G. G. Raphael* for the respondents.

Blagden : Westminster Abbey, though a collegiate church, is still a church. A church is a public building and the public have a right to enter for and remain during Divine service. A right to a seat is distinct

from a right to attend. Subject to the parishioners' right to seats the public have a right to attend. Before the Reformation the right of worship at the Abbey was extended to the public by the courtesy of the Abbey. After the Reformation and the Dissolution of Monasteries and Abbeys Act, 1539, the site of the former Abbey vested in the Crown. By letters patent Elizabeth granted the former site to the dean and chapter and granted it as a church and as a place of public worship. The Act of Uniformity, 1548, prescribes the use of a book for common and open prayer in a cathedral or parish church or other place, and Westminster Abbey is such an "other place." The Act of Uniformity, 1551-2, was the first Act prescribing a duty to attend church and prescribes that duty for both laity and clergy. Sect. 2 of that Act prescribes that all persons shall endeavour themselves to attend their usual place of worship.

Sect. 3 imposes on the clergy a duty to attend on holy days and on Sundays. This Act was repealed by Mary and re-enacted in 1558 by the Act of Uniformity, 1558-9, sect. 2 of which re-established the book of common prayer, and sect. 4 of which defined open prayer as—"that prayer which is for others to come unto, or hear, either in common churches. . . ." Common churches means any churches and not only parish churches. The charter was granted just after this Act, and what was granted was a church where "open or common prayer" was to take place, that is, public worship. The Act of Uniformity of 1662, established the prayer book in its present form, which is therefore a statutory form and which in many cases refers to services as public. A service ceases to be public if particular persons or classes are excluded.

By the Public Worship Regulation Act, 1874, services to be held in collegiate churches are public, and sect. 6 defines a church as "any church, chapel, or place of public worship in which the incumbent is by law or by the terms of licence from the bishop required to conduct Divine service according to the Book of Common Prayer," which includes extra-parochial churches. Westminster Abbey is a collegiate church and worship there is public, the incumbent being obliged to conduct common prayer. The Act of 1662 imposed a duty on the dean and chapter to use the Book of Common Prayer and to hold daily services, and these services at which the Book of Common Prayer must be used are public services and if public then the public has a right to attend. By the second paragraph of the coronation service the public are represented at that service by customary right by the boys of Westminster school and the dean could not exclude any one of those boys. Westminster Abbey has no parish and no diocese, so that the only persons who can attend or have a right to attend must be the public generally. The respondents to succeed must establish that when holding Divine service there is a right to exclude members of the public. [He also referred to Canon No. 51 of GIBSON'S CODEX, *Jarratt v. Steele* (3), *Re the Pews of the Cathe-*

dral Church of St. Columbs, Londonderry (4), and *Taylor v. Timson* (5).]

Monckton, K.C. : It is not correct to say there is no parish and no parishioners. An order in council of 1888 describes it as "the church of the parish of the close of the collegiate church of St. Peter." The masters of the school have seats allotted and are parishioners. The Act of Uniformity has to be read with recollection of what existed at that time, its object being to introduce public worship as opposed to secret services. There is no authority for any wider right of entry than that of a parishioner. *Taylor v. Timson* (5) refers only to parishioners. In *Hancock v. Stephens* (6) it was held that no person could intrude in a private chapel without the consent of the owner and the Act of Uniformity applied to this chapel although it was private. In *Heath v. Bosanquet* (7), it was held that a person may be removed if he refuses to leave Divine service when requested by the churchwarden. It is wrong to assume that because the Act of Uniformity applies that all the public have a right to be present. The dean is the King's representative. The letters patent of 1560 created a collegiate church and contains nothing to give the public a right to attend Divine service, and retains to the Crown the right to appoint the dean and prebends who are not under the jurisdiction of the Archbishop of Canterbury, a protest against any notices by him always being lodged. The Abbey is a royal peculiar and failure to conduct services can only be called to account by the visitor who acts for the King. No other body has any jurisdiction over the dean and no members of the public other than those residing in the precincts have a duty and therefore a right to attend.

LORD HEWART, L.C.J. : In my opinion this is a perfectly clear case. The first question is what exactly does the case mean, and I think that the learned magistrate has left no doubt as to the meaning that he intended to express. The appellant, at whose instance this case was obtained, appeared at Bow Street police court on Dec. 13 last to prefer an information under the common law and under the Offences against the Person Act, 1861, s. 42, against a particular police constable for that on the previous day he unlawfully assaulted this appellant, and the learned magistrate, having heard that information, dismissed it.

The facts which are found, and I must take it not superfluously found, are these : that the appellant had previously been granted by the dean and chapter a permit to act as a guide in Westminster Abbey ; that permit, however, had expired in March, 1932, and an application for its renewal had been refused. After that abortive attempt to obtain the renewal on the part of the appellant, the Dean of Westminster Abbey gave instructions that the appellant was to be excluded from the abbey.

Then on Dec. 12, the day of the alleged assault, the case says that the appellant was in the abbey during Divine service and was wearing a badge bearing the words : " Cole's Sightseeing Tours Guide," and thereupon the appellant, having been requested to leave and having refused, was ejected without unnecessary violence. The case, having found as a fact that on this occasion the appellant was wearing this badge inscribed in the manner which is stated, goes on to say that there was no misconduct by the appellant on that day prior to his ejection. It is perfectly obvious, therefore, that the learned magistrate, who has a habit of expressing himself with precision, was drawing a contrast between actual misconduct, that is to say, something in the nature of brawling on the one hand, and wearing a badge offering services as a guide on the other hand. There was no misconduct in the strict sense of the term, but the appellant was wearing a badge, that is to say was engaged in offering his services to sightseers as a guide. Then there follows the contention which was made on the part of the appellant :

that the Abbey is a public church, licensed for the public celebration of Holy Matrimony and Baptism and open for public service, that the dean had no authority to make an order excluding him from the Abbey and that therefore the constables were guilty of an assault in ejecting him.

On the part of the respondent, on the other hand, it was contended :

that under the letters patent granted by Queen Elizabeth in 1560, the Abbey was handed over to the dean and chapter with all its ancient privileges, and that the dean and chapter were appointed, under the Queen, to control the Abbey, (b) that by virtue of these ancient privileges not only was the Abbey subject neither to archiepiscopal nor episcopal control but that to the dean " belongs the government of the whole college and all its parts,"

and finally,

that therefore the constables were justified in ejecting the appellant, as in so doing they were carrying out the lawful orders of the dean.

The learned magistrate adds that the appellant did not claim to be a parishioner and could produce no evidence of permission having been given him to be there. The opinion, which the learned magistrate formed, was that under the law the dean and chapter acted within their powers in excluding the appellant, and accordingly he dismissed the information.

The question, and the only question, which this case raises is whether, in so dismissing the information, the learned magistrate came to a correct determination in point of law. I am bound to say that for my own part this case has become invested with a manifest air of unreality. At no time did this appellant say, or say in effect : " Though I went as a guide with a badge, I desired to remain as a devout worshipper." What he did say *arguendo* was : " True, you excluded me because,

although a permit had been refused to me, I was nevertheless offering my services as a guide, but you could not properly exclude me at all, because, in theory at any rate, I might have been taking part in public worship."

That, in my opinion, is really humbug. It is an afterthought designed to cover what the man was really doing. The argument is really a sermon upon the ancient text "*Virtus post numos.*" This person was complaining, not that the dean had interfered with his devotional exercise, but that he had interrupted the flow of half-crowns, and so failing about the *numos* he says "What about my *virtus*?" He never said, and nobody would have believed him if he had said: "My real object in being there was to worship." In those circumstances, especially when one remembers that with engaging frankness on the application for this case it was stated that what was being interfered with was Mr. Cole's livelihood—not his immortal soul but his livelihood—it seems to me that the excursions into constitutional and ecclesiastical law and history, which we have had, however edifying and however ably done, are absolutely irrelevant. The magistrate was perfectly entitled to dismiss this case, because it was obvious to those who looked at the facts that this man, having been refused a permit as a guide, was nevertheless claiming to be in Westminster Abbey as a guide, holding out his services as a guide although he knew perfectly well that he had no right to do so. But, if one may, in a sentence, deal with the interesting afterthought which has been developed, it is said that the claim put forward by the Dean of Westminster Abbey was too large; he was claiming at his own discretion to exclude the appellant from the Abbey. Nobody suggests that the Dean of Westminster Abbey would employ that discretion in any circumstances in an arbitrary or capricious way, but it is said that if the matter really rested upon the particular application of the universal authority in the dean to exclude, then the order to exclude this man must have been wrong. In my opinion that conclusion does not follow. I cannot imagine that any argument of a useful kind can be drawn, either from the dimensions of Westminster Abbey or the magnificence of the building. What one has to look at is the position in point of law. I am perfectly satisfied upon the argument that Westminster Abbey is in the legal position of being a royal peculiar, and that it was absolutely within the competence of the dean to give instructions that the appellant was to be excluded from the Abbey. In those circumstances, I think that this appeal fails and must be dismissed.

DU PARCQ, J.: I agree in the result, but as, in my view, this case raises a question of public importance, and the view which I take of the effect of the case stated is not the same as that of my Lord, it is right that I should express my view in my own way, and it is, I hope,

unnecessary to add that where that view differs from that which has been expressed by my Lord, I express it with unfeigned diffidence.

The facts, as I understand them in this case, and I do not want to look outside the case, are these : The appellant was present in Westminster Abbey during Divine service on Dec. 12, 1935. The case is dated May, 1936. The date " 1935 " is not stated in the case, but I understand that the date is Dec. 12, 1935. At one time the appellant had had a permit granted by the dean and chapter, as it appears—although I think it may really have been granted only by the dean—to act as a guide in Westminster Abbey. In 1932, that is to say, more than three years before the date of the alleged assault, his permit had expired, and he then applied that it might be renewed, and his application was refused. There is no finding that at any time during those three years he had made any attempt to act as a guide in Westminster Abbey. The Dean of Westminster—again this is found as a fact—gave instructions, not that the appellant was to be prevented from acting as a guide in Westminster Abbey, but that the appellant was to be excluded from the Abbey, and I take that to mean at all times, and in all circumstances, and whether the appellant was desirous or not of acting as a guide. That finding by an experienced magistrate who, as my Lord has said, and I heartily agree, expresses his findings with precision, is to be found in the case, and is plain enough. On Dec. 12, 1935, when Divine service was going on, a police constable, who was aware of this instruction from the dean, was in the Abbey, and he requested the appellant to leave the building. It is quite true that at that time the appellant was wearing a badge which had upon it these words : " Cole's Sightseeing Tours Guide." I find it difficult to suppose that if he had not been wearing the badge the police constable, who we are told acted in pursuance of the instructions of the dean, would have thought that he was entitled to use his own discretion, and not expel the appellant from the Abbey, and I do not understand that the dean left it to the discretion of any police constable or other officer to decide whether the circumstances were such as to make it appear that the appellant was seeking to act as a guide ; nor do I find, speaking only for myself, that the learned magistrate has so drawn this case as to raise the question whether the fact that the appellant was wearing that badge was a sufficient justification for his exclusion from the Abbey, assuming, as for this purpose one must assume, that there was no right in the dean, or those acting by his orders to exclude the appellant so long as he was behaving decorously, and with propriety. When I look to see what was contended before the learned magistrate I do not find that it was contended that, because the appellant was wearing that badge he was properly excluded. The contention is put in this way :

On the part of the respondent it was contended (a) that under the letters patent

granted by Queen Elizabeth in 1560, the Abbey was handed over to the dean and chapter with all its ancient privileges, and that the dean and chapter were appointed, under the Queen, to control the Abbey, (b) that by virtue of these ancient privileges not only was the Abbey subject neither to archiepiscopal nor episcopal control but that to the dean "belongs the government of the whole college and all its parts," (c) and that therefore the constables were justified in ejecting the appellant as in so doing they were carrying out the lawful orders of the dean.

I need not repeat what I said, that the order of the dean which is here, in the argument of the respondent described as the "lawful" order, was an order that the appellant was to be excluded from the Abbey. When this case first came before this court I am bound to say that it appeared to me especially when I understand Mr. Raphael, the learned junior counsel for the respondent, to say that he was claiming a right in the dean to exclude any person at his discretion from Divine service in the Abbey, that a question of importance was being raised, and I think that the court thought that it was not satisfactory that a decision should be come to upon that question upon an argument presented on the one side only by the appellant in person, who did not claim to be an authority upon ecclesiastical law. In the circumstances it seemed right to the court to offer to Mr. Cole, the appellant, the services of learned counsel, if learned counsel were willing to argue this case. The result of that has been that Mr. Blagden has been good enough to argue this case on behalf of the appellant, and, if I may be allowed to say so, I feel grateful to him for the assistance which he has given to the court by an argument which I have found not only interesting, but valuable.

I think that I have sufficiently indicated the reasons which make it difficult for me to say that this case raises the first of the two questions which was dealt with in argument by Mr. Monckton, that is to say, the contention that, assuming that the dean had no right to exclude any person whom he thought fit to exclude from the Abbey during Divine service, he had the right to exclude this man, or those acting under him had the right to exclude this man, the appellant, because he was wearing that badge. I think it may well be that it would have been a question of fact whether the wearing of that badge amounted to some breach of propriety in circumstances which would justify this man's exclusion. So far from there being any finding of fact about it, the finding is that there was no misconduct by the appellant on that day. Speaking for myself, I should have been disposed to read those words as meaning that in the view of the learned magistrate, the wearing of that badge did not amount to misconduct. If it were open to the court to deal with the matter on that point only I should feel great doubt myself whether it could be said that the mere fact that a man who was not permitted to act as a guide, three years after he had been refused permission to do so, came into the Abbey wearing a badge which did not in terms assert that he was a guide to the Abbey, but referred to sightseeing tours, was sufficient to

justify his exclusion, if one postulates, as for this purpose one most postulate, that he could not be excluded if he were not doing something improper; and I feel this further difficulty that it is not found as a fact, and indeed we know that it is not a fact, that the appellant in this case was ever asked to remove the badge. I should have thought that, postulating, as I say, that he was otherwise behaving himself, it would have been a necessary preliminary for his ejection on the ground that he was claiming to wear a badge that he should be asked to remove it, and refused.

I therefore find it necessary, for the decision of this case, to come to a conclusion upon the other matters which have been argued. One other fact has been referred to which I regard as extraneous to this case, but Mr. Monckton referred to it, and no doubt importance may be attached to it, and that is that in asking that a case should be stated, or in some application that he made, the appellant stated that he was anxious that the matter should be speedily dealt with, not in this case alone, but in others which have been dealt with by this court already, because his living depended upon it. As I say, I think that those matters are extraneous to this case, but I cannot, for myself, attach much importance to that statement when I remember that in the other cases, which related to Westminster Hall and the Houses of Parliament, the appellant was claiming a right to act as a guide there. When I remember that, so far as the two other cases out of three were concerned, his living, to some extent, did depend upon the decision, I cannot think that that statement, even if it were not extraneous to the special case, can be used against him here.

It now remains to deal with the other points which are, in my view, the two points raised by the special case, and I can deal with them very shortly, because the matter, thanks to the argument of learned counsel, has been fully dealt with at the bar, and also because, so far as this part of the case is concerned, I am happy to think that I find myself in agreement with my Lord. It was a matter for argument at one time whether the person who had authority to exclude anyone who might properly be excluded was, or was not, the Dean of Westminster, and the learned magistrate has dealt with that in the special case. Nothing need be said about that now except that Mr. Blagden admits that if anybody could exclude the appellant from Westminster Abbey the only person who could exclude him was the Dean of Westminster. Then Mr. Blagden says that there is authority, and in this he is right, for the proposition that in as much as there is a duty upon every one of His Majesty's subjects to attend Divine worship on Sundays and Holy Days, there must be a corresponding right to enter the church at which he is to attend Divine worship. It may be that his right extends only to his parish church, but I think that Mr. Blagden is probably right in saying—

though it is unnecessary to express any final opinion upon it in this case—that his right would extend to any other church if he were prevented by reasonable cause from attending his parish church, and that other church were the convenient church for him to attend, but all that part of Mr. Blagden's argument—although I do not say that he was wrong in putting it before us, because it is perhaps desirable that it should be present to our minds in considering this important question—really goes by the board when one remembers that Divine service on the date in question was not being held either upon a Sunday or a Holy Day, so that there was no obligation upon the appellant, or anybody else to attend Divine worship on that day. Then Mr. Blagden says that although it is true, as he concedes, and as he must concede, that the appellant was bound to attend Divine worship, there was an obligation upon the dean of this collegiate church to hold Divine worship on that day, and on every day, and it was said that the prayer book which was used was the book of common prayer. I say that it was said, because when he last addressed us Mr. Blagden gave up that part of his argument, but it is still argued that as there was an obligation to hold public worship, that involved, as I follow it, the admission of the public. In my view that argument is fallacious, and is not supported by the authorities. Westminster Abbey is one of the very few churches in the country which are properly described by the expression “a royal peculiar.” There is no authority whatever, as it seems to me, for the proposition that wherever you find a collegiate church any member of the public is entitled to attend any service which is being held there. I say that argument is fallacious because it is clear if one looks at the authorities, and I think that it might be clear without them, that the fact that public worship is prescribed, and that public worship must be conducted in a certain way, does not mean that every member of the public who wishes to attend must be admitted. As was said by the Dean of Arches in the case of *Freeland v. Neale* (1), at p. 651, to which we were referred, following what he had already said in the earlier case of *Barnes v. Shore* (2) :

In *Barnes v. Shore* (2), I said, what I now repeat, that where two or three are gathered together, who do not strictly form part of a family, there is a congregation, and the reading to them the service of the church is a reading in public.

This “royal peculiar” is a collegiate church. It is, in a sense, as is conceded, a parish church, and I think it is not in dispute, although I am not deciding it, that those who can properly be called the parishioners have the same right to attend as parishioners, as in the case of the ordinary parish church which is familiar to all of us, but just as there is no authority for the proposition that people who are not parishioners, and who are under no obligation to attend service at a church may, nevertheless, insist on entering the church during Divine worship, so it follows that there is no authority for the proposition which, on the face of

it, would be more difficult to maintain, that there is such a right in any member of the public, so far as a "royal peculiar" is concerned. I think that Mr. Blagden has failed to satisfy me that the appellant had any right to be present. It is conceded that he had no duty to be present. The dean was therefore within his rights in giving instructions that the appellant was to be excluded from the Abbey, even if one reads that, as I do, as including his exclusion during Divine worship, and even if one reads it, as I do, as meaning the exclusion during Divine worship, even though he might attend as a worshipper. It follows that when he was asked to go he should have gone, and that as he did not go the police officer was entitled, using no more force than was necessary, to remove him. I think that the dean was justified in giving that order, and that the contention put before the learned magistrate and here, that the constables were carrying out the lawful orders of the dean, was a correct contention. For these reasons I agree that the appeal should be dismissed.

GODDARD, J. : I agree, and as I take respectfully the same view of the point raised by the case stated as DU PARCQ, J., I think, with him, that a question of some general importance is raised by the case, and I therefore propose to give, shortly, my reasons for agreeing that the appeal fails.

The proceedings in this case were a summons by the appellant against the police constable for assault. The assault complained of was an eviction from Westminster Abbey during the time of Divine service. It was for the constable to justify the assault. The constable justified the assault by proving an order by the Dean of Westminster excluding the appellant from the building. The order of the dean as proved was an entirely general order. So far as the case finds, the order was an order excluding Mr. Cole from the Abbey at all times, irrespective of whether he was purporting to act, or desirous of acting, as a guide or not, and irrespective of whether or not Divine service was at the time being celebrated. Therefore the question raised by the case seems to me to be whether the dean had authority to give that order.

The control of Westminster Abbey is by the royal charter of Elizabeth vested in the dean and chapter, and the government of the Abbey is vested solely in the dean. If, therefore, the dean, who would be in the same position as an incumbent of a church for this purpose, requested the appellant to leave the appellant would not be in the Abbey by the leave or licence of the freeholders, and therefore, unless he can show a right to remain there, he becomes a trespasser. How does he attempt to show a right to be in Westminster Abbey during the time of Divine service? From the argument of Mr. Blagden, which, if I may say so, I have found both interesting and helpful, I gather that it is said that

any member of the public has a right to attend a church when Divine service is being celebrated. It is curious that in no reported case, so far as counsel have been able to find, nor so far as I have been able to ascertain, nor, indeed, in any of the writings of the many learned civilians who have written upon these topics of ecclesiastical law, is any authority to be found upon the subject of a non-parishioner's right to attend at a place of worship. It is clear, and it is agreed on all hands, that a parishioner has a right to attend his parish church, but the learned magistrate in the case, and, indeed, some writers, I think, have expressed the view, that the right to attend is limited to those who have by statute the duty to attend divine service; in other words, it is said that the right to attend Divine service in the parish church is merely correlative to the duty which is imposed by the Act of Uniformity, 1551-2, and the Act of Uniformity, 1558-9, to attend Divine service at the parish church on Sundays and Holy Days, but I cannot myself think that the right of the parishioner depends upon that statutory obligation. I think that the right of the parishioner to attend his parish church must be of far more ancient origin than that, and it may be described as a common law right. The church, by being dedicated to sacred uses, is being dedicated to the use of the parishioners to be there for worship, and it seems to me, therefore, that the right of the parishioner to attend his church which is indeed regarded by all writers upon the subject as clear, depends, not upon the statute, but upon the wide and common law right.

So far as non-parishioners are concerned, it seems that the view that has been put forward is this: the Act of Uniformity provides that a person is to attend his parish church on Sundays and Holy Days or, if there is a reasonable let—that is to say a hindrance—from his attending his parish church, he is to attend at some other usual place of worship. Therefore, if a man is prevented from attending his parish church, he may have the right to present himself to attend at another place of worship. I am not satisfied myself, from anything that I have heard in this case or anything that I have read, that that gives him a right to demand admission. What I think it would provide would be that if he were, as in theory he might still be, prosecuted in the spiritual court to be admonished for not attending, he would have a good defence to the suit by saying: "I presented myself in accordance with the Act at some other place of worship and I was not admitted." I at any rate can find no clear authority, and I am by no means satisfied that anybody has a legal right, a right that the law will enforce, to attend at any church of which he is not a parishioner. Mr. Blagden's argument has been that the right must arise because of the statutes which direct the public reading of prayers, a duty which is put not only on the incumbents of parish churches, but on the chapters of cathedrals and collegiate

churches and the use of the Book of Common Prayer under the Act of Uniformity, but as it seems to me, the object of the Acts of Uniformity was to ordain that where there is congregational worship, as distinct from private and family devotion, the prescribed liturgy of the Church of England and none other must be used, and apart from the cases that have been cited to-day, I find in the Act of Uniformity, in the parenthesis which defines what open prayer means, these words :

By open prayer throughout this Act is meant that prayer which is for others to come unto or hear, either in common churches or private chapels or oratories, commonly called the service of the church.

No one suggests that a person has a right to enter into a private chapel, a chapel that may be attached, and is very often attached, to the large houses or to such places as the church of the Temple, but nevertheless the Act provides that if others come to hear the service in those places, that is to say, if they are permitted to come and hear it, although it be in a private chapel, the common prayer is to be used. I do not think, therefore, that light is thrown by the fact that common prayer must be used at any congregational service which may be held at Westminster Abbey or elsewhere. I do not think that that affords any assistance in determining as to who has the right to attend. As at present advised, I am of opinion that no one can claim a right to attend a church unless he be a parishioner of the church, although it may be that, if he is prevented from attending his own church on a Sunday or Holy Day, he may have a right to go to some other usual place where the service is usually said.

When we come to the particular church, in this case Westminster Abbey, we find that it is a church which occupies a very special position. It is a royal peculiar. It is not a parish church in the ordinary sense of the word. The parishes of Westminster are St. Margarets and St. Johns, both of them formerly Archbishop's peculiars. That is only by the way. This is a royal peculiar. It is not a cathedral, for there is no see at Westminster. If it were a cathedral, then according to the opinion of many learned civilians who have written on the subject—and there is a case in Ireland direct on the point—the church would be the cathedral church, and it is the parish church of the diocese, and possibly any inhabitant of the diocese would have a right to enter it. But Westminster Abbey is not a cathedral, and if it is a parish church at all, the only parishioners are the persons who live in the close or precincts in just the same way as in most cathedrals, if not all, we find that there are people living in the precincts or closes of the cathedral, and for them no doubt the church is the parish church, but there are no other parishioners of Westminster Abbey than those whom I have mentioned. It is a royal peculiar because by the charter of Elizabeth the dean and canons were set up as the Chapter of Westminster. They are freed from

any visitation or jurisdiction, either by the archbishop or the bishop, and the sovereign is the visitor and the only person who can control the actions of the chapter. The church is in fact, it seems to me, in exactly the same position as the other royal peculiars of St. George's at Windsor and the Chapels Royal. If it is said that any member of the public has the right to enter a royal peculiar while service is being held, I ask myself upon what legal principle such right can rest. It is not suggested that it can be based on prescription. I cannot see myself that there is any common law right to enter private property. Unless, therefore, it can be maintained—and for the reasons which I have already given I think that it cannot be maintained—that there is a celebration of Divine service to the public, it seems to me that the claim must fail. I am bound to say that at one time I was impressed by the fact that marriages took place in the Abbey and also ordinations, and that in both of those services you find it ordained that the celebrant of the marriage, or the bishop who is conducting the ordination, should at one part of the service call upon the people, as it is said, to state whether they know of any impediment why the persons should not contract matrimony or of any defect in the ordinand, which would make him unfit for ordination. Of course, it might be said that the value of that invitation to the public to state objections would be gravely impaired if people who might know of the impediment, but who were not parishioners, or dwellers in the diocese, could not claim to enter the church or cathedral, but I think it is enough to say for the present that the occasion when the appellant was ejected was neither one when a marriage was being celebrated nor when an ordination service was in progress. If ever the question should arise—it is most unlikely to arise—as to whether there is any greater or higher right in the public when these services are in progress and whether there is any right to prohibit any person entering, the question can be decided when it arises. I do not think that it arises in this case. While it is not to be supposed that the Dean of Westminster would ever desire to exclude any person from the Abbey except for some good and sufficient reason, he has, in my opinion, as the governor of a royal peculiar, the right to exclude the public or any member of the public, except perhaps those living in the precincts, without being called upon to justify his action. It follows that, in my opinion, the police constable was obeying a lawful order in the ejection of the appellant and that the summons was rightly dismissed.

Appeal dismissed. No order as to costs.

Solicitors: *E. Gordon Lawrence* (for the appellant); *Solicitor to the Metropolitan Police* (for the respondent).

[Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.]

RITZ CLEANERS, LTD. v. WEST MIDDLESEX ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), **October 15, 1936.**]

Rates and Rating—Industrial hereditament—Partly used as retail shop—Cleaners and dyers—Not more than one-third of articles brought by Customers themselves—Rating and Valuation (Apportionment) Act, 1928, (c. 44), s. 3.

The respondents used certain premises for cleaning and for repairing garments left for cleaning and to a very small extent for dyeing. Articles for cleaning were brought to the premises by customers and the respondents' vanman, who collected them from two receiving offices, from an agency and from customers' houses in response to orders received. Not more than one third of the articles received at the premises were brought there by the customers themselves. The premises consisted of three floors, one of the ground-floor rooms being fitted with a counter for receiving and dispatching goods, and the remaining rooms for cleaning and drying plant, for dyeing, pressing, etc. No goods were displayed on any part of the premises. At quarter sessions it was held that the premises should be treated as an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1), but that part of the ground floor was a retail shop, and an apportionment was made. The assessment committee appealed:—

HELD: quarter sessions had applied the correct principles in finding that the premises were an industrial hereditament subject to apportionment and the decision ought not to be interfered with.

[EDITORIAL NOTE.] It was decided in *Ideal Cleaners & Dyers, Ltd. v. West Middlesex Assessment Committee* (1930), 143 L.T. 483; Digest Supp., that the receiving office of a cleaning and dyeing business was a retail shop, and this was so, although the finishing processes of the business were in fact carried out upon the premises. The decision in the present case is the same, so far as concerns the part of the premises used as a receiving office, but that part where the main process of cleaning and dyeing is carried on (a question that did not arise in the former case) are held to be an industrial hereditament. It will be noted that their Lordships did not go further than to say that quarter sessions had applied the correct principles of law to the facts of the case, and therefore though they themselves might not have reached the same conclusion, the decision below ought not to be interfered with.

AS TO DERATING, see HALSBURY Supp., Vol. 24, Rates and Rating, para. 88; and FOR CASES, see DIGEST Supp., Rates and Rating, Nos. 226a-226bb.]

Cases referred to:

- (1) *Finn (Wimbledon Revenue Officer) v. Kerslake*, [1931] A.C. 446, 457; Digest Supp.
- (2) *Toogood & Sons, Ltd. v. Green*, [1932] A.C. 663; Digest Supp.
- (3) *St. Cuthbert's Co-operative Asscn. v. Edinburgh Assessor*, [1931] S.C. 386; Digest Supp.
- (4) *Turpin v. Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 446, 451; Digest Supp.
- (5) *Wilkinson (Taunton Revenue Officer) v. Sibley & Donovan*, [1932] 1 K.B. 194; Digest Supp.
- (6) *Bristol Co-operative Co. v. Bristol Assessment Committee*, 3 Eng. Der. App. 75.

APPEAL by way of case stated from a decision of the quarter sessions for the county of Middlesex.

The respondents are cleaners and dyers and entered the premises of No. 48, High Street, Uxbridge, on July 14, 1934, under a lease for 21 years, commencing Mar. 25, 1934, at a yearly rental of £215. High Street is a busy shopping street of Uxbridge. The external appearance of the premises is that of a shop. The premises consist of three floors, with five rooms on the ground floor, one of which, entered from the street, is furnished with a counter for receiving and dispatching goods; a room facing the street with a plate-glass window containing a cleaning and drying plant; a steam-pressing room; a room containing a hot box, electric irons, and drier and tables; a boiler house for generating steam for use in the other rooms. On the first floor are two rooms, one used for repairing articles and as a mess-room, store-room and office; the other a bathroom used for washing articles. The two rooms on the second floor are not used for any purpose. Six persons are employed on the premises, but not one of these was specifically employed to attend the counter. The respondents use the premises for dyeing and cleaning, no goods being displayed on any part of the premises. Not more than one third of the articles received at the premises are brought by customers themselves, the remainder being collected. The cleaning and drying plant was placed in the window for ventilation, light and to permit the public to watch the operation; and the premises were registered as a factory under the Factory and Workshops Act, 1901.

The respondents contended that the premises were an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1), and were used primarily for industrial purposes and partly for non-industrial purposes and that an apportionment should be made; and that the premises were not primarily used as a retail shop.

The West Middlesex Assessment Committee contended that the work carried on on the premises was repair work, that the premises were a retail shop under the Rating and Valuation (Apportionment) Act, 1928, s. 3 (4); that the premises were primarily occupied for the purposes of a retail shop; and that the premises were not an industrial hereditament.

The Rating Appeals Committee of Middlesex Quarter Sessions held that the premises should be treated as an industrial hereditament, but that part of the premises was a retail shop and they apportioned the net annual value of £97 as to £59 for industrial purposes and as to £38 for non-industrial purposes. The Assessment Committee appealed.

A. S. Comyns Carr, K.C., and *J. Scott Henderson* for the appellants.
J. G. Trapnell, K.C., and *W. G. H. Cook* for the respondents.

Comyns Carr, K.C.: The dividing line in a repairing garage is whether retail repairs is work done without the intervention of a middle man.

If all the goods were collected and brought to the premises, the premises would have been a factory, and if there were no place for the public to resort the premises would be a factory. This place has all physical characteristics of an ordinary shop, there is facility for the public to resort and the work done there is retail repairing. The whole point is whether the primary purpose is retail repairing, and the onus is on the respondents to establish the primary purpose was for wholesale repairing. The justices had no evidence on which they could find the premises were an industrial hereditament. No part of this business can be other than retail, and the only part that possibly could be is the collection from depots. [He referred to the opinion of VISCOUNT DUNEDIN in *Turpin v. Middlesbrough Assessment Committee & Bailey* (4), and to *Toogood & Sons, Ltd. v. Green* (2), *Finn v. Kerslake* (1), *Wilkinson v. Sibley & Donovan* (5), and *Bristol Co-operative Co. v. Bristol Assessment Committee* (6).]

Trapnell, K.C., was not called upon.

LORD HEWART, L.C.J. : This is a special case stated by the Rating Appeals Committee of Middlesex Quarter Sessions under the Rating and Valuation Act, 1925, s. 31.

The question was whether a certain hereditament in High Street, Uxbridge, was or was not properly to be regarded as an industrial hereditament. The respondents, Ritz Cleaners, Ltd., contended that it was an industrial hereditament. The appellants, the assessment committee, contended that it was not ; and after the hearing at quarter sessions, it was decided that the appeal of the respondents should be allowed and that the hereditament should be treated and assessed as an industrial hereditament. The question for this court is whether, upon the materials which were before the court of quarter sessions, that court, in so finding, came to a correct determination in law.

Now, it is not necessary, I think, to repeat the facts which have, of necessity, been repeated often in the course of the argument in this case. It is found as a fact in para. 8 (6) of the case, that the respondents occupy and use the hereditament referred to :

for cleaning and for repairing garments left for cleaning and (to a very small extent) for dyeing,

and the same subparagraph adds these words :

Articles for cleaning are brought to the hereditament by customers and by the respondents' vanmen who collect from two receiving offices maintained by the respondents at Gerrards Cross and Beaconsfield and from an agency at Harefield and from customers' houses in response to orders received by post or telephone. Not more than one third of the articles received at the said hereditament is brought there by the customers themselves. Most of the articles brought by the customers to the said hereditament are, after cleaning, delivered by the said vanmen.

Now, upon the evidence which was offered, the respondents, Ritz Cleaners, Ltd., contended that the hereditament was an industrial hereditament within the meaning of sect. 3 (1) of the Act of 1928, that the hereditament was occupied and used primarily for industrial purposes and partly for non-industrial purposes and, therefore, that an apportionment of the net annual value ought to be made under the provisions of sect. 4 of the Act of 1928; and finally, it was contended on the part of the respondents that the hereditament: "was not primarily occupied and used for the purposes of a retail shop." The appellants contended in each case to the contrary effect. The court of quarter sessions had the duty of ascertaining the facts and coming to a true conclusion in fact, and having had their attention directed to the relevant decisions in this labyrinth-like class of cases the court of quarter sessions accepted the contentions of the respondents and held "that the said hereditament was an industrial hereditament"—in other words, the court of quarter sessions found as a fact, so far as it was matter of fact, that the hereditament was an industrial hereditament. But with regard to two particular rooms in that hereditament the court of quarter sessions found also that those two rooms comprised a retail shop, and, therefore, that the net annual value ought to be apportioned. On the question of apportionment fortunately there was no controversy; it was agreed as to apportionment that certain figures should be quoted and put in the valuation list. It is apparent, therefore, that the question before quarter sessions was the difficult question: What is the primary use of this hereditament? Having heard all the evidence, the court came to the conclusion that this hereditament was occupied and used primarily for industrial purposes. Now, I am not all prepared to say that, in coming to that conclusion, the court of quarter sessions was wrong. Undoubtedly there are difficulties in the cases and undoubtedly with a little ingenuity it is possible to present a plausible argument on either side of this case. But I did observe in the argument which we have heard to-day—and I observed it not for the first time—a tendency to exaggerate the importance of particular phrases which in the course of a long and varied controversy happen to have been employed for the purpose of arriving at the true conclusion upon the individual facts.

The scheme of this sect. 3 is happily rare. We begin with a general provision as to the meaning of the expression: "industrial hereditament." It is to mean, among other things, a factory or workshop; but that general rule is subject to a proviso, and a factory or workshop is not to be included in that expression if it is primarily occupied and used for any of a series of purposes or a combination of those purposes, (a), (b), (c), (d), (e) and (f) and one of those, (b), is "the purposes of a retail shop." So you begin—as in this case you begin—with a factory. That will come within the expression "industrial hereditament," but

not if it is primarily occupied and used for the purposes of a retail shop. When you ask what the purposes of a retail shop are, you are limited to the definition of retail shop, which appears in sect. 3 (4): “ ‘Retail shop’ includes ”—that is a different thing from saying “means”; the term is wider—“any premises of a similar character where retail trade or business” and then in brackets “(including repair work) is carried on.” In the infinite variety of human circumstances and the infinite variety of businesses, it happens that in the arguments which have arisen during the past few years about particular premises, phrases have been used, such as “the public physically resorting thereto.” That phrase is used to indicate an element of what may be considered, where the question is whether particular premises are a retail shop, but nothing, of course, could be more fallacious than to draw the inference that, therefore, any premises to which the public physically resorts, or in and about which accommodation is provided so that the public may physically resort thereto, must be a retail shop. Again, stress has been laid, in order to turn the scale in a particular case, upon the term “repair work.” If premises in other respects satisfy the definition of “retail shop,” and the facts are such as to lead to the conclusion that the true view of the premises is that they are a retail shop, then it matters not that repair work is carried on upon those premises. Again, nothing could be more fallacious than to turn that statement the other way round and say: “If repair work is carried on in those premises, those premises must be a retail shop.” And again stress is laid, for particular purposes, in particular cases, upon the epithet “retail”—the purposes of a retail shop. What is the antithesis of “retail?” It is “wholesale.” But again, nothing could be more fallacious than the inference that therefore where the business is not wholesale on premises, it follows that those premises are a retail shop.

The only course that is open to a court of quarter sessions in dealing with a particular case is, first of all, rightly to understand, if it is possible, the long series of decisions which has been given, and apply the law so interpreted to the individual facts. I see no reason at all in this case for thinking that the court of quarter sessions misdirected itself in point of law. On the contrary, I think it is apparent that the court has found that, with regard to a particular part of this hereditament, it comes within the definition of “retail shop,” and therefore cannot be regarded as part of an industrial hereditament or as an industrial hereditament itself; but on the other hand, addressing its mind to the only real question: What was the purpose for which this hereditament was primarily occupied and used, the court of quarter sessions has come to the conclusion that that purpose was not the purpose of a retail shop; and although, no doubt, by applying particular passages in judgments which have been delivered, it is easy to make out a plausible argument on the

other side, I am not in the least prepared to say that the conclusion of the court of quarter sessions was wrong. I think there was evidence, and sufficient evidence, before the court of quarter sessions to justify the conclusion which has been arrived at, and therefore, it seems to me that this appeal must fail, and ought to be dismissed.

DU PARCQ, J.: I agree. As I understand the argument of Mr. Comyns Carr, it is this: He says that while, of course, these premises are a factory, the court of quarter sessions was bound to hold upon the evidence that the factory was primarily occupied and used for the purposes of a retail shop—giving to that expression the extended definition contained in the Act, which I need not read again. He says that upon the findings of the court of quarter sessions a part—not more than one-third—of the articles received at the hereditament in order that work might be done upon them was brought there by the customers themselves; and he says where you find customers invited to resort to the hereditament to bring their work there for repair, and accommodation provided for them, you have a retail shop within the extended definition. He says further, that in addition to that one-third of the articles received, a further unspecified quantity of articles was received from customers' houses, in response to orders received by post or telephone, and he says that they must be regarded exactly in the same way as articles brought by customers, because, in dealing with a baker's shop, VISCOUNT DUNEDIN, in *Finn v. Kerslake* (1), said that retail trade was carried on just as much when loaves of bread were delivered by vanmen or when orders were taken by roundsmen, as when orders were taken from or goods handed to customers over the counter. He says, therefore, that on these materials it is impossible to say that the court of quarter sessions could hold as a matter of law that such a substantial part of the business was something other than retail business, that the premises could be treated as an industrial hereditament. What the court of quarter sessions has done, of course, is to treat the premises as an industrial hereditament subject to apportionment; that is to say, the court of quarter sessions has recognised that, in part, these premises are a retail shop.

Now I have stated the argument, as I understand it, and I agree with my Lords that it fails. I think that Mr. Comyns Carr has attempted to base too much upon the speech of VISCOUNT DUNEDIN. It is quite true that VISCOUNT DUNEDIN, dealing with the baker's shop, said that the sale to hotels, etc., was typical retail trade, and that the orders given to roundsmen were just part of the ordinary business of a retail shop. That is a statement with which, I should think, nobody would quarrel. It is true also that VISCOUNT DUNEDIN said, at p. 487:

As already stated, I am of opinion that the dissection of a unified business such as is in fact carried on here is not justified.

Those words : “ such as is in fact carried on here ” are important ; and if one looks at the speech of LORD THANKERTON in the case of *Toogood & Sons v. Green* (2)—I am going to cite a passage which is on p. 672—these words are to be found :

My Lords, I observe a tendency in certain of the judgments in the courts below to put a wider construction than is justified on the views expressed in this House in *Finn's* case (1) ; those views—e.g., as to dissection of a unified business—are expressly confined to the facts of that case.

Now, in *Toogood's* case (2) the goods dealt in by the firm carrying on business on the hereditament there in question were all sold to customers other than the trade. Some were sent to a retail shop, and some were dispatched directly to customers who sent their orders (just as in this case some goods were sent for from customers in response to orders received by post or by telephone), and some chattels were stored upon the premises, which were not manufactured by Messrs. Toogood and were offered for sale to the public. The House of Lords held that the premises were not used to any material extent as a retail shop within the extended definition. When the House of Lords said they were not used to any material extent for that purpose, it amounted to saying that the extent to which they were so used could be disregarded, and that the premises could be dealt with as if they were not to any extent used as a retail shop. They were not a retail shop in any part of them, or any substantial part of them, and were not taken out of the definition “ industrial hereditament.” What was held, therefore, in that case was that if you find that the public do not resort to premises, you cannot say that the premises are not a retail shop, and, as my Lord has pointed out, it is a very obvious fallacy to argue from that that if you can say that to some extent the public do resort to the premises, then the premises must be regarded as a retail shop. Really, it is in my view doing no injustice to Mr. Comyns Carr's argument to say that that fallacy lurks in the propositions which he advanced.

Now, I take the view in this case that the court of quarter sessions had a very difficult question of fact to determine. In my view, they have approached it in the right way. They have ascertained that not more than one third of the articles received in the hereditament are brought there by the customers themselves ; the remaining two thirds come there in such circumstances that, in my view, but for the one third, it would plainly be wrong to consider that these premises came within the definition of a “ retail shop.” I think the court of quarter sessions were right in asking themselves the question : What is the result of finding that one third of the business done is such as may fairly be described as retail trade, and two thirds of it such as ought not to be so described ? That seems to me plainly to be a question of fact. ¶ It would be very wrong, as I think, for this court, upon a case stated, to

say, for instance, "Oh, if it had been one fifth or one sixth or one seventh, they might have been right, but because it is one third they are wrong." It may be—I express no opinion about it—that if the court of quarter sessions had come to a different conclusion upon the facts, we could not have interfered. I do not think it was a very easy question for them to decide. I see no grounds upon which we can set aside their decision upon this case, as they have stated it.

For these reasons, I agree with the judgment of my Lord, and I think that this appeal should be dismissed.

GODDARD, J. : As I respectfully agree entirely with the judgments given by my Lords, I only want to add a very few words, mainly on the question raised by Mr. Comyns Carr that there was no evidence upon which the justices could find as they did find. What I think, perhaps, has been overlooked in his argument, or appears to have been overlooked in his argument, is this : The tests which have been laid down by the House of Lords, or the points which they have emphasised as showing or tending to decide whether a place is a shop or not, are tests for determining whether a place is a retail shop. But that is not a question which the justices have to decide. They have to decide in matters of this sort whether the premises are primarily used as a shop.

Well, now, that concedes that the premises are a retail shop, and on that point, when a question of this sort arises, and this point is raised, we start with the assumption that the premises are a retail shop in some degree. Then the justices have to apply their minds as to whether or not the premises are primarily a retail shop. In view of the reference with approval to the *St. Cuthbert Co-operative Association* case (3) by VISCOUNT DUNEDIN in his speech in the House of Lords in *Turpin's* case (4), it seems to me it must follow that if the business of the respondents in this case is being conducted entirely by collecting garments from receiving offices to which the public had sent them, it could not be said that the premises at Uxbridge, where the cleaning was done, was a retail shop at all. What difference there can be between the public sending their garments to the receiving office of the respondents, or handing them direct to a vanman who calls for them at the house instead of calling for them at the receiving office, I am at a loss to understand.

Therefore, it seems to me that we have a finding of the justices that two thirds of this business carried on on these premises does not come within the term "retail business" at all, and therefore there is a third of the business which is done on these premises which can fairly be described as business done in a retail shop. If that is so, it seems that this court is being asked to say as a matter of law that if you find on a particular hereditament that two thirds of the business is of a non-retail shop character, and one third of the business is of a retail shop

character, you are bound to hold that the premises are used primarily as a retail shop. I decline to hold anything of the sort, and one can easily imagine that all sorts of anomalies might arise. Not having heard Mr. Trapnell, I am far from saying, having read the case, that I should necessarily have come to the same conclusion of fact as that to which the court of quarter sessions came. I do not feel convinced that I should, but I am expressing no opinion upon that because it is nothing to do with me sitting in this court ; but from the way the case is stated, it appears to me that the justices at the sessions had in their minds the very things which the appellate courts from time to time have said ought to be in their minds in considering this very difficult question. They have set out at great length an exact description of the premises, and so forth, the exact way the business is worked, and so on, and I think the correct inference is that the justices, having, as I think, ample evidence before them, did apply the right principles, and whether one agrees with their decision as a question of fact or does not, does not matter. They have come to a decision on evidence and on applying the proper principles of law, and therefore we cannot interfere with their decision.

Appeal dismissed with costs. Leave to appeal.

Solicitors : *Ellis & Fairbairn* (for the appellants) ; *H. G. Greenwood*, Ealing (for the respondents).

[*Reported by* HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

MEZGER v. MEZGER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Langton, J.), **October 15, 1936.**]

Divorce—Maintenance order—Application to revoke—Foreign nationals—Dissolution of marriage by foreign court—Grounds not recognised in England—Discretion of justices.

In 1935 a maintenance order was made in a court of summary jurisdiction in England against M., a German subject. In 1936 a decree of divorce was pronounced between M. and his wife in Germany. Both parties had submitted to the jurisdiction of the court and the decree was pronounced on grounds that by insulting behaviour and incompatibility of temper the wife had failed to fulfil her marriage obligations. M. then applied for a revocation of the maintenance order. The justices refused the application for the following reasons: (i) they considered that the fact that the marriage had been dissolved in Germany on grounds which would not be recognised in England was not a sufficient reason for them to discharge the order, and (ii) the wife's financial position had not changed and was such that she required the maintenance payable under the order for her support, and the justices therefore exercised their discretion in her favour. The husband appealed:—

HELD: (i) the decree of the German court was valid and binding throughout the world and the justices were not concerned with the question whether the grounds of divorce were recognised in England.

(ii) in the case of a foreign divorce where the parties could not make any application to the Divorce Court in England the continuance of the award of maintenance is not a judicial exercise of the magistrates' discretion.

Observations on procedure on proof of a decree of dissolution of marriage by a foreign court.

[EDITORIAL NOTE.] The effect of this case is that where the divorce is a foreign one the justices have no discretion to continue a maintenance order, but where the divorce is an English one, they have such a discretion where the matter is not dealt with by the High Court.

AS TO DISCHARGE OF MAINTENANCE ORDERS, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565, 566, Nos. 6237-6250.]

Cases referred to:

- (1) *Bragg v. Bragg*, [1925] P. 20; 27 Digest 565, 6242.
- (2) *Pastre v. Pastre*, [1930] P. 80; Digest Supp.

APPEAL from the refusal of the justices for the petty sessional division of Lexden and Winstree, in the county of Essex, to revoke a maintenance order.

On Jan. 12, 1935, the justices ordered Max Rudolph Mezger of East Sheen, a German subject, to pay Erna Anna Mezger, his wife, maintenance at the rate of 5s. per week on the ground of his wilfully having neglected to maintain her. The amount was increased to 10s. on Apr. 13, 1935, and to 17s. 6d. on Aug. 17, 1935. On Jan. 29, 1936, a decree of divorce was pronounced between the parties by the Civil Court at Frankfurt in Germany. On Sept. 12, 1936, the husband unsuccessfully applied to the

justices in England for the revocation of the maintenance order against him on the ground that the decree pronounced by the court at Frankfort was valid and binding throughout the world. The reasons given by the justices for their refusal were that it had not been alleged that the wife had committed adultery, and that they considered that the fact that the marriage had been dissolved in Germany on grounds which would not be recognized in England was not a sufficient reason for them to discharge the order; and further that the wife's financial position was such that she needed the maintenance payable under the order for her support, and that therefore they would exercise their discretion in her favour.

M. H. Lush for the appellant.

G. C. Tyndale for the respondent.

SIR BOYD MERRIMAN, P.: This appeal from the justices sitting at Lexden and Winstree in Essex raises a very interesting point and one which at first sight certainly is not easy to determine. The parties had been before the same court of summary jurisdiction on several occasions. An order had been made in favour of the wife for maintenance and, without going into unnecessary detail, that order had been the subject of discussion before the same court on several occasions between the time when it was made in 1935 and the application which is the subject of the present appeal; but I need not go into any detail about that. It is enough to say that on Sept. 12 last the husband made an application to the court for a revocation of the order for maintenance on the ground that on Jan. 29, 1936, the marriage had been dissolved by the decree of the court at Frankfort and that that was a valid and binding decree of dissolution of marriage throughout the world. The justices declined to revoke or vary the order; hence this appeal.

At first I thought that the real substance of the appeal related to the validity of the decree of divorce, but, for reasons which I will give in one moment, I am now satisfied that that is not the real point of substance. On the application the husband gave no evidence himself at all. He contented himself by putting in the decree of the Frankfort court and calling a German lawyer to say that it was a good and valid decree. I protest against that method of procedure. Strictly speaking, that was no evidence at all until the identity of the parties referred to in the decree had been established by some evidence. It is admitted here, and no doubt was treated below as common ground, that the decree did relate to these parties, but if the proper course had been taken of putting the husband in the box to say: "I am the person who appeared before the court and in relation to whom that decree was given," he could also have given evidence that I think ought to have been given, that he was amenable to the jurisdiction of the Frankfort court, and that fact could have been further substantiated by the evidence of the German

lawyer who was called. He could have said in one sentence : " I am a domiciled German," or he could have said : " I am a German national," and if it be the law in Germany that nationality is enough, the German lawyer could have said : " That is enough." No foundation of that sort was laid, and Mr. Tyndale, as he was perfectly entitled to do, has argued that the foundation is not sufficiently laid for the reception of that decree as a decree binding throughout the world, dissolving this marriage, though he has admitted that it is a good decree in Germany and he has admitted that it applies to these parties. If there really was no dispute about it at all in the court below, as I say, the matter could have been dealt with in one sentence of the witness's evidence, but I think it is most unsatisfactory that in a case of this character, the matter of dissolution of marriage, which was the basis of the application, should not have been proved in the usual way. The question still remains whether on the admissions that have now been made it is sufficiently proved, and I find, though with some difficulty and after elaborate examination of the documents, which would have been quite unnecessary if the evidence I have indicated had been given, that the decree of dissolution was sufficiently proved. When once it is admitted that it relates to the parties, the decree itself shows that they were both born in Germany. Mr. Tyndale has quite rightly insisted that he is prepared to make no further admission than that. He is not prepared to admit that Germany was the domicile of origin ; he says it may have been a mere accident that the husband was born in Germany ; his parents may have been travelling there, or anything of the sort ; it is all left in doubt. But that is not all. The decree states that they were both born in Germany and goes on to state that they are both German nationals. It also shows that they were married in New York in 1928, and were living in England for business reasons, he being the representative of a German firm. It also quite plainly appeared from a very full record of the hearing and from a very full record of the reasons of the judgment, not merely that they both submitted to the jurisdiction, but that the wife made substantial countercharges against the husband and supported them herself before the court. In these circumstances and having regard—though I do not wish to attach too much importance to this, certainly not as an excuse for the party not giving evidence which ought to have been given—having regard to the presumption in the case of domicile, of which Mr. Lush has reminded us, I think not merely that there was material on which the foundation, the validity of the decree, was laid, but that the justices were bound on the material available to find that this was a good and valid decree throughout the world of dissolution of marriage by a court of competent jurisdiction in respect of two parties who were amenable to the jurisdiction of that court.

Now that being so, the point which I think is the real point, and

the point that is of interest in this case, emerges. Mr. Tyndale argued on the assumption that this was a good and valid decree and that the parties at the time of the hearing of the application in September had ceased to be husband and wife for all time and throughout the world ; nevertheless, the justices sitting in this petty sessional division of Essex were right in refusing to revoke this maintenance order, and he founded himself on the decision of *Bragg v. Bragg* (1). In that case, where a wife had succeeded in this court in obtaining a decree for dissolution, which decree had been made absolute, it was held by a divisional court that that decree did not of itself vacate the subsisting order for maintenance, and that, though the pronouncing of the decree was unquestionably new matter for the consideration of the justices, a change of circumstances which they were entitled and bound to consider, it did not oblige them to revoke the order for maintenance already made. In other words, the matter was one for the discretion of the justices, and Mr. Tyndale says exactly the same applies here and there is nothing to show that the justices have exercised their discretion wrongly. It goes without saying that we are bound by the decision of *Bragg v. Bragg* (1). So far from appearing to criticise the decision of *Bragg v. Bragg* (1), if I may say so with great respect, it seems to me to be a most useful decision, because it enables this court to allow the parties, without starting fresh proceedings, to rely on orders already made by magistrates, whether with regard to maintenance or with regard to custody and the other consequential matters on which otherwise they would have to start proceedings, either substantive proceedings such as a maintenance petition, or ancillary proceedings such as the taking out of a summons, which would cause unnecessary expense. But while following not merely loyally but cordially the decision in *Bragg v. Bragg* (1), it is necessary to see how far it goes and how far it applies to the circumstances in this case. The magistrate in that case set out in full the reasons which had actuated him and which found approval in this court. He said on p. 22 of the report :

It would appear that in this case no alimony was granted by the Divorce Court, or indeed applied for ; and I will assume for the purpose of my judgment that, if applied for, it might still be granted there. I do not however think, having regard to the status of the parties, that it could be more conveniently dealt with there, but less conveniently ; and I do not therefore consider that the matter of discharging this order could in any way be said to be appropriate to the provisions of sect. 7 of the Act of 1895.

Now what the learned magistrate was there saying was : “ Here is a woman in favour of whom I made a maintenance order on the ground of desertion. She has since the making of that order been able to add to it a charge of adultery and on the two combined issues get a decree of dissolution from the Divorce Court, and no doubt she could have followed that up during the process of the suit by an application for alimony

pendente lite ; but she did not ; she went on having the money under my order and she could now follow it up by filing a maintenance petition. She has not done so and I think it is convenient that this order should go on." Then the court said that the learned magistrate was quite right in saying so, the order was not *ipso facto* vacated and it met the reality of the case. As I have said, there is nothing in that that meets with anything but my cordial approval. But that is not this case. In this case the justices have given the reasons on which they decided their discretion and I will read them, because they are quite short, in full :

It was not alleged the wife had been guilty of adultery, and the justices considered that the fact that the marriage had been dissolved in Germany on grounds which would not be recognised in this country, was not a sufficient reason for them to discharge the order, and, furthermore, the wife's financial position had not changed and was such that she required the maintenance payable under the order for her support, and the justices therefore exercised their discretion in her favour.

There are two grounds there. The first is that the divorce was pronounced on grounds which are not recognised in this country, and the second is that the woman required money. Mr. Lush says that neither of those grounds is a judicial exercise of a discretion at all. Now I propose to examine that contention. It is quite true that this decree was pronounced on grounds which are not recognised in this country. As I have said, the record is full and clear and it appears that it was pronounced on the ground that by insulting behaviour and incompatibility of temper, and other matters of that sort, the wife had failed to fulfil her marriage obligations—quite plainly a ground that is not recognised in this country—which the court below was assured has not been challenged here. That was the foundation for a divorce in the country where the divorce was pronounced and to the courts of which country these parties were amenable. In those circumstances, in my opinion, the justices have got nothing whatever to do with the question whether the grounds for divorce are recognised in this country or whether they approve of them or do not approve of them. The matter was put with characteristic terseness and accuracy by HILL, J., in the case of *Pastre v. Pastre* (2). The case was somewhat similar though not exactly the same as this case. The question was, this court having pronounced a decree of judicial separation with the consequential allowances, whether that should be allowed to survive a decree of divorce pronounced by a French court. HILL, J., said this at p. 82 :

The decree of the French court was made upon a ground which would not be a good ground here—namely, the existence for three years of a decree of judicial separation. But it is the decree of a court of competent jurisdiction in a proceeding in which the wife was an active party.

I stress those words. "It follows that the petitioner and respondent are no longer husband and wife."

There the matter begins and ends ; that is all with which any court in this country is concerned, and it is no business of the justices, in my opinion, to inquire whether there is lacking the element of adultery, which is a necessary ingredient of divorce in this country. For that reason their decision, in my opinion, is invalid.

I now look at their other reason. Mr. Tyndale stated it and supported it in his argument in a way which brings out the naked simplicity of the reason even more clearly than it appears on the face of the justices' decision. He said they may well have thought that it was better that her former husband should pay for her maintenance than that she should become chargeable to the guardians. It rather looks as if that was what they had thought. In my opinion that is no judicial exercise of discretion. The law of this country provides for the chargeability of the husband for the maintenance of his wife. It does not provide for the chargeability of a former husband for the maintenance of a former wife when the marriage has been dissolved ; and it is not for justices to consider whether it is better that a particular individual who happens no longer to be the woman's husband should support her or whether the guardians should support her. In my opinion it is not a judicial exercise of discretion to say that the woman required the maintenance for her support and therefore the justices exercised discretion to continue it. However convenient and proper it may be, in cases where the facts are as they were in the case of *Bragg v. Bragg* (1), that a maintenance order should be continued and not revoked after a decree of dissolution, I find it impossible to say that in a case where the marriage has been dissolved by a court of competent jurisdiction in a foreign country after a contest in which the parties mutually recriminated, where the allegations of the husband have been found to be proved and the counter allegations of the wife have been held to be disproved, and when incidentally one of her counter-charges related to an alleged failure by the husband to maintain her and the court decided that there had been no such failure having regard to his means, and when it follows that this court could not have any jurisdiction to entertain a claim either for compassionate allowance or for maintenance in any shape or form because the parties could not possibly come before the court and there is therefore no question of the relative convenience of a maintenance order in the police court and the alternative, the expense of coming before this court—in all these circumstances it seems to me to be quite impossible to say that there is a judicial exercise of discretion in continuing the award of maintenance as between these former spouses who have for ever ceased to be husband and wife.

I am quite satisfied that the two reasons which have been given are bad reasons, and in the circumstances of this case I find it impossible to imagine any reason which would justify the continuance of this order. The appeal, therefore, will be allowed.

LANGTON, J. : I agree, and since we are differing from the magistrates' decision, I will add a few words. I agree with the judgment that has just been delivered because I am satisfied that when once the German court, a court of competent jurisdiction dealing with its own nationals, both of whom had agreed to submit their disputes to that tribunal, had arrived at a decision, it was a clear, final and binding decision upon all the world, and there was therefore no ground on which the magistrates could exercise discretion. I would add that I have considerable sympathy with the magistrates in this case. The point now, after exhaustive argument, has become clear, but it is by no means a simple matter and the authorities on the subject are not really helpful to a lay tribunal. I think there is no kind of conflict when they are examined here. The case of *Bragg v. Bragg* (1), as my Lord has said, has provided a very convenient instrumentality by which the courts of this country may, so to speak, interweave their powers and obtain the advantage of local knowledge to supplement or implement the decree of the court. The case of *Bragg v. Bragg* (1) provides an instance of the kind. In that case the order for maintenance existed when the wife obtained the decree. It is not surprising that the divisional court should have found it most right and convenient that the order for maintenance should be continued. There is nothing, I think, there which could shock anybody's conscience and it certainly was very convenient from the point of view of expense and avoidance of litigation.

The present circumstances, which are analagous to the case my Lord has quoted of *Pastre v. Pastre* (2), are even stronger than the circumstances in *Pastre v. Pastre* (2). They differ entirely from the circumstances in *Bragg v. Bragg* (1). The order for maintenance being in existence under the magistrates' decision, the parties went to Germany and there fought out their differences. The wife lost on every issue, as I read the judgment, and then came back to this country and upon an application being made to discharge the maintenance order, which would clearly be invalid with the whole tenor of the German decree, the magistrates considered, perhaps having had *Bragg v. Bragg* (1) cited to them, that they still had discretion to deal with this maintenance order. I think there was no possible ground for the exercise of discretion under these circumstances. The parties were no longer man and wife and any such order would be really completely at variance with the decision of the German court.

For these reasons I think this appeal must be allowed.

Solicitors : *Campbell, Hooper & Todd* (for the appellant) ; *Wilberforce Allen & Bryant*, agents for *F. S. Collinge & Co.*, Colchester (for the respondent).

STURTEVANT ENGINEERING CO., LTD. v. STURTEVANT
MILL CO. OF U.S.A., LTD.[CHANCERY DIVISION (Farwell, J.), **October 14, 15, 16, 1936.**]

Trade Names—American company trading only in America—English company formed by American company—Right of established English company to restrain use of name—Right to trade in own real name.

An English company, the Sturtevant Engineering Co., Ltd. (herein referred to as the plaintiff company), had for a number of years carried on business in England as manufacturers of and dealers in general engineering machinery. An American company, the Sturtevant Mill Co., carried on a similar business in America and was the sole owner of certain patents which were protected in both America and England. The American company desired to introduce their patented machinery into England, and for that purpose entered into an agreement with the plaintiff company whereby the latter was granted full licences to have the sole use of the American company's inventions in Europe. Under this agreement the plaintiff company for 22 years manufactured and dealt with machinery which would otherwise have been protected in favour of the American company. When the agreement was determined in 1933, the patents had expired and the plaintiff company continued to manufacture the machinery. The plaintiff company had acquired a considerable goodwill in England, and in England the name of Sturtevant as used in the trade was always applied to the plaintiff company. In 1935 a company was incorporated in England with the name Sturtevant Mill Co. of U.S.A., Ltd., which had wide powers to deal in machinery of all kinds. The American company held virtually all the shares in this new company. The plaintiff company brought an action against this new company asking for an injunction restraining the new company from using its registered name or any other name in which the word Sturtevant formed part. It was found as a fact that the use of the word Sturtevant by the defendant company would lead to confusion which would result in damage to the plaintiff company. The defendant company contended, *inter alia*, (i) that in the circumstances of the case there was an equity which disentitled the English company to the relief it was seeking, (ii) that as the defendant company was controlled by the American company which had acquired a goodwill in America in the name of Sturtevant, the plaintiff company was not entitled to protection, and (iii) that on the principle that any person is entitled to trade under his own name, the defendant company, being controlled by the American company, was entitled to use the name Sturtevant :—

HELD : (i) as any benefit which the plaintiff company had obtained from its connection with the American company was the result of a voluntary agreement between the two companies, there was no equity which disentitled the plaintiff company to relief.

(ii) the goodwill of the American company was for the purposes of this action restricted to America and could not be treated as part of the goodwill of the defendant company and the plaintiff company was entitled to protection for its goodwill.

(iii) the principle that any person may trade in his own real name did not, in the circumstances of this case, entitle the defendant company to use the name Sturtevant.

[EDITORIAL NOTE.] The main point in this case is whether a company which has acquired a trade name in a foreign country can form a subsidiary company in England under the trade name when there is already a company in England

trading under that name. There is also a neat point on the right of persons to use their own real name in trading, since there had never been a Sturtevant in England, but there was in America, and the English company had adopted the name from an American trader, though not in fact the defendant.

FOR THE LAW ON THE POINTS, see HALSBURY, 1st Edn., Vol. 27, Trade Marks and Trade Names, pp. 754, 755, para. 1335, and pp. 749-751, para. 1331; and FOR CASES, see DIGEST, Vol. 43, pp. 292-295, Nos. 1196-1213, and pp. 265-268, Nos. 1023-1042.]

Cases referred to :

- (1) *British Legion v. British Legion Club (Street), Ltd.* (1931), 48 R.P.C., 555; Digest Supp.
- (2) *British Medical Asscn. v. Marsh* (1931), 48 R.P.C. 565; Digest Supp.
- (3) *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537; 9 Digest 67, 216.
- (4) *Fine Cotton Spinners & Doublers' Asscn., Ltd., & Cash (John) & Sons, Ltd. v. Harwood Cash & Co., Ltd.*, [1907] 2 Ch. 184; 43 Digest 265, 1027.
- (5) *Kingston, Miller & Co., Ltd. v. Kingston (Thomas) & Co., Ltd.*, [1912] 1 Ch. 575; 9 Digest 67, 223.
- (6) *Dorman (W. H.), & Co., Ltd. v. Meadows (H.), Ltd.*, [1922] 2 Ch. 332; 43 Digest 297, 1233.
- (7) *Guimaraens (M. P.) & Son v. Fonseca & Vasconcellos, Ltd.* (1921), 38 R.P.C. 388; 43 Digest 297, 1232.
- (8) *Chivers (S.) & Sons v. Chivers (S.) & Co., Ltd.* (1900), 17 R.P.C. 420; 43 Digest 266, 1037.
- (9) *Woolworth (F. W.), & Co., Ltd. v. Woolworths (Australia), Ltd.* (1930), 47 R.P.C. 337; Digest Supp.
- (10) *Salomon v. Salomon & Co., Salomon & Co. v. Salomon*, [1897] A.C. 22; 9 Digest 34, 11.
- (11) *Army & Navy Co-operative Society, Ltd. v. Army, Navy and Civil Service Co-operative Society of South Africa, Ltd.* (1902), 19 R.P.C. 574; 43 Digest 293, 1199.

ACTION for an injunction to restrain the defendant company from carrying on business under the style or title of Sturtevant Mill Co.-of U.S.A., Ltd., or under any other similar or colourable style or title of which the word Sturtevant forms part or under any such other style or title as to lead to the belief that the defendant company is or is in any way connected with the plaintiff company or that the goods of the defendant company are or are in any way connected with the goods of the plaintiff company.

The plaintiff company was incorporated under the Companies Act on July 24, 1899, and has carried on business as manufacturers of grinding and crushing machines and of electrical plant and equipment.

The defendant company was incorporated on Aug. 22, 1935, under the Companies Act, 1929, with a capital of £100 with the object (*inter alia*) of carrying on the business of manufacturers and dealers in boilers, turbines, haulage plant, dynamos, motors, electrical plant and equipment, and crushing, grinding, screening, separating and other machinery.

96 of the shares in the company are held by the Sturtevant Mill Co., a company incorporated in America, one each by two directors of the Sturtevant Mill Co., and one each by two other persons.

The plaintiff company is the successor to a business called the Sturtevant Engineering Company. A Mr. B. F. Sturtevant came to England in 1896, and as a result of negotiations with a Mr. Mower, it was arranged that Mr. Mower should commence business under the name of the Sturtevant Blower Co. At a later date the style was changed to the Sturtevant Engineering Co. In 1899, the plaintiff company was incorporated under the name of the Sturtevant Engineering Co., Ltd. It was still carrying on business in machinery in general and still had its connection with the B. F. Sturtevant Co. There were no business relations between the plaintiff company and the Sturtevant Mill Company until the year 1905, when the president of the mill company came to England and interviewed Mr. Mower. Thereafter, for 6 years, the plaintiff company bought goods from the American Mill Company and sold them in England and on the continent. On May 1, 1911, an agreement was entered into by which the plaintiff company acquired the sole right to manufacture in England articles covered by the patents owned by the American company, or to purchase the articles and sell them.

A. Grant, K.C., and *Gerald R. Upjohn* for the plaintiff company.

R. F. Roxburgh, K.C., and *J. Leonard Stone* for the defendant company.

Grant, K.C. : Sturtevant appears to be a well known name in America. In England it is practically unknown. The Post Office Directory and the Telephone Directory for London give only one other Sturtevant. In the machinery trade the word Sturtevant means only the plaintiff company. As long as the agreement of 1911 lasted the American company could do no other business at all in England as the Sturtevant Engineering Co., Ltd., had the sole selling rights. The agreement lasted until 1933. The defendant company is a new entity. It is established law that a company cannot adopt a name as part of its trade name simply because it happens to be the name of one of the directors.

[He referred to *Fine Cotton Spinners v. Harwood Cash & Co., Ltd.* (4) ; *Kingston, Miller & Co., Ltd. v. Thomas Kingston & Co., Ltd.* (5) ; *W. H. Dorman & Co., Ltd. v. Henry Meadows, Ltd.* (6) ; *M. P. Guimaraens & Son v. Fonseca & Vasconcellos, Ltd.* (7).]

Roxburgh, K.C. : There is no ground for granting an injunction against the defendant company for something which it has not threatened to do. The defendant company has a very real proprietary interest in the name if it uses it properly. The defendant company is entitled to have some benefit from the goodwill it has built up in America and is entitled to bring it over here as part of its name. It is not a case where the company has taken a name. It is a different company from the American company in one sense but in another sense it is not. If the defendant

company had no goodwill to protect and took somebody else's name, it would be to blame if confusion arose. But if it included a name for reasons which were equitable, it would not be right to impute to it the possibility that the public might misuse the name. The test is whether there is a business justification for the use of the name. The defendant company has 100 shares, of which 96 are held by the parent company and two by persons of the name of Sturtevant, and two by people who have no control over the company. There are four directors of whom two are permanent—the Sturtevants. There is no likelihood of the parent company and the subsidiary company parting so long as the parent company is a going concern. For practical purposes the defendant company is the American company's means of exploiting in this country the goodwill which it has acquired in America. If an individual desired to turn his business into a company and it was a genuine business the court would not restrain him. Can it be the policy of English law to prevent a foreign company from doing precisely the same thing? If it is, the effect must be to compel the foreign corporation either to relinquish its own goodwill for the purpose of trading here or else to trade here as a foreign corporation. It has not been so laid down hitherto. There is no question of anything but equitable relief as no damage has been done. [He referred to *M. P. Guimaraens & Son v. Fonseca & Vasconcellos, Ltd.* (7); *Saunders v. Sun Life Assurance Co. of Canada* (3); *S. Chivers & Sons v. S. Chivers & Co., Ltd.* (8).]

Stone, following on the same side: Can it be fairly said that the English goodwill in the name Sturtevant belongs exclusively to the plaintiff company? If there is a goodwill which is partly American and partly English, the claim of the plaintiff company fails. If there is an exclusive goodwill in England, it is a matter of fact. This is not a case like the *Woolworth* case (9), where the goodwill is not in the goods they manufacture but in salesmanship. It is impossible to say that the goodwill in the name Sturtevant exclusively belongs to the plaintiff company.

Grant, K.C., in reply: A company is a separate entity apart from the shareholders who compose it. The evidence and the facts show that the name Sturtevant in the machinery trade has been appropriated to the plaintiff company which has acquired a monopoly to the name and the goodwill attached to it. The American company has no monopoly right in the name which it could transfer to the new company in England. It is said that some people in the new company are named Sturtevant and that the parent company owns shares in it. The company is a different entity from its shareholders, and this company can have no right to take this name if it infringes the rights of others by so doing. The case of confusion and of damage is sufficiently proved, and the use of the letters "U.S.A." is not a sufficient distinction.

[He referred to *Salomon v. Salomon & Co.*, (10); *M. P. Guimaraens & Son v. Fonseca & Vasconcellos, Ltd.* (7); *Woolworth (F. W.) & Co., Ltd. v. Woolworths (Australia) Ltd.* (9); *British Medical Association v. Marsh* (2); *Saunders v. Sun Life Assurance Co., Ltd., of Canada* (3); *Army & Navy Co-operative Society, Ltd. v. Army & Navy & Civil Service Co-operative Society of South Africa, Ltd.* (11).]

FARWELL, J. : This action has given rise to an interesting discussion upon the various questions, but I have not myself any doubt as to the decision which I ought to give. The facts are a little unusual and I ought to deal with them in some detail.

In the year 1886, a Mr. George Augustus Mower started business on his own account, in England, under the title of the Sturtevant Blower Co. Shortly after that business had been established by Mr. Mower, the name was changed from the Sturtevant Blower Co. to the Sturtevant Engineering Co. The name Sturtevant had been adopted by Mr. Mower by reason of his connection with Mr. B. F. Sturtevant, who carried on business in America and with whom Mr. Mower had business connections. The business carried on by Mr. Mower under the name of Sturtevant Engineering Co. consisted of dealing with general engineering machinery, and Mr. Mower acquired all the blower fans for this business from Mr. Sturtevant of America, and owing to that connection he selected the name of Sturtevant for the name of his business. The evidence shows that so far as this company's business is concerned, and generally, at the present time, the name Sturtevant is not a common name. It appears from the Post Office Directory for London and the Telephone Directory for London that there is only one other business in London which carries on under the name of Sturtevant & Co. That business is a business of silver plating, and that business is in no way connected with the business which Mr. Mower established in 1886 and which has been carried on since. Apart from that one company, there is no other business in London carried on under the name of Sturtevant at all. The name may be said to be a descriptive name in this country, and it was adopted by Mr. Mower as the name of his business because it was a descriptive name and because it showed his connection with Mr. B. F. Sturtevant of America. Mr. B. F. Sturtevant died in 1890 and the business he carried on in America was incorporated under the name of B. F. Sturtevant Co., and this company has carried on a large and successful business in America. The business carried on by Mr. Mower continued to be carried on by him until 1899 and he then turned his business into a limited company under the title of Sturtevant Engineering Co., Ltd. That company is the plaintiff in this action. The evidence shows, and to my mind it is completely established, that the Sturtevant Engineering Co., Ltd., has acquired an established and well known position in the machinery trade, and it also appears—

and I am satisfied that these are the facts—that the way in which the plaintiff company is spoken of and known is often either Sturtevant & Co., or Messrs. Sturtevant, or often quite simply and shortly Sturtevents, and by everybody who is connected with this trade in this country the name of Sturtevant does connote the plaintiff company and the goods the plaintiff company supplies.

In America, in addition to the B. F. Sturtevant Co., there is another company which carries on business under the title of the Sturtevant Mill Co. That company also deals in machinery, especially, if not wholly, in grinding, crushing and screening machinery. That company was incorporated about 50 years ago in the State of Maine, U.S.A., and it has carried on a successful business in America, and it is now and has been for many years a business of high standing and repute in America. So far as the evidence shows, there is no evidence before me to indicate since Mr. Mower commenced his business and carried on under the name Sturtevant Engineering Co., Ltd., that the American company has done any business at all in this country and indeed, by reason of the fact to which I will call attention, from the year 1911 until 1933, not only is there no evidence that they did any trade in this country, but it was impossible for them to trade in machinery in this country during those years.

The evidence satisfies me that the plaintiff company has acquired a monopoly in one sense in the name Sturtevant in this country in that the word Sturtevant in the engineering trade means the plaintiff company and no other. The plaintiff company has expended a considerable sum every year in advertising its goods both by means of catalogues and advertisements in trade papers and in other ways. By expenditure of money in that way and by doing personal work, they have built up for themselves a goodwill in this country in this particular trade, and they have acquired a reputation in the trade, so that the word Sturtevant in this trade in this country means the plaintiff company and no other. There was for many years a close connection between the plaintiff company and the American company. The American company made certain crushing and screening machinery which the plaintiff company desired to be able to vend in this country, and in the year 1905 the plaintiff company entered into an arrangement with the American company whereby they purchased certain machinery from the American company and re-sold it in this country. There never was and never has been any sort of relationship of agency. The arrangement was that the plaintiff company should buy as purchasers from the American company the machinery required and that the machinery should thereby become the property of the plaintiff company, who should dispose of it at such prices as it thought fit. There is evidence that the name of the American company which was on machinery was left; but apart from

that, the only relationship between the American company and the plaintiff company was that of vendor and purchaser. The plaintiff company bought goods and dealt with them as they thought fit. On May 1, 1911, a certain agreement was entered into between the plaintiff company and the American company. The American company had various patents for their machinery both in America and in this country and, for obvious reasons, they desired to have these patents worked in this country, and they entered into an arrangement to which I will now refer. It is an agreement dated May 1, 1911, made between the American company of the first part and the plaintiff company of the second part. It recites that the American company has carried on business as manufacturers of patented crushing and grinding machinery and are the sole owners of certain patents and licences for manufacturing such machines, and that the American company desires to sell its machinery and obtain the assistance of the English company in introducing and securing to itself the retention of such English rights as may be retained under their patents by manufacturing machines protected by such patents in England. Then it recites that the English company desires to manufacture certain machinery in England and to sell certain patented mechanisms and other machinery and to manufacture and sell under various patents and licences used and enjoyed by the American company. Then it recites that the English company carries on business in England and elsewhere and has agreed with the American company to manufacture in England certain patented mechanisms controlled by the American company and to promote the introduction and sale of other machinery. Then the agreement provides that the American company grants to the English company full licences to use and exercise the inventions set out in the schedule. In the first schedule we find the various patents referred to, all of which belonged to the American company. Then it provides that the licence shall continue in force until terminated by at least 6 calendar months' previous notice in writing by either party to the other, such notice not to be given earlier than Dec. 31, 1912. Then it provides for the area in which the two companies are to operate. The English company's sphere of operations were the continent of Europe including Great Britain and Ireland and all islands included in such continent, the American company having the continent of North and South America and the islands included, and the rest of the world is called an open territory.

The result is that the English company has the right to manufacture the goods and machinery which were protected by the American company's patents. They could deal with such machinery in this country as they thought fit. That arrangement remained in existence until 1933. In March of that year it was determined. When the plaintiff company was desirous, as it was, of manufacturing the machinery for itself, it had assistance given it by the American company. The American

company supplied the necessary plant and lent it the assistance of one or two expert men who came over from America. The position was that for many years the English company proceeded to manufacture for itself the various machines which would otherwise have been protected in favour of the American company and to deal with them itself as part of its own property under the name of the Sturtevant Engineering Co., Ltd. Before the agreement was determined, the patents had expired and there was nothing on the determination of this agreement to prevent the English company from continuing the manufacture of the machines. During the period from 1911 to 1933—22 years—there was no question of the American company acquiring goodwill or any benefit of that kind in respect of its business in this country because it was not permitted under that agreement. Therefore the goodwill, so far as there was a goodwill in this business in this country, was the goodwill of the plaintiff company. Although it may be that some of the special machinery for crushing, grinding and screening may have come from America in some few cases, nevertheless the name Sturtevant as used in the trade applied to the English company and was confined to the English company. In my judgment the evidence shows that so far as the engineering trade in this country is concerned there has never been any other person or company carrying on business as a vendor or manufacturer of machinery under the name Sturtevant, and that to all persons connected with the trade the name or word Sturtevant means the plaintiff company and no other person or company. That the word Sturtevant is commonly used in the trade for referring to the plaintiff company is also established in evidence and is only what one would naturally expect. Persons are apt to abbreviate a name which they are frequently using, and it is what one naturally expects and when speaking of a company people use the short title. The name became well known in that way in the trade. Down to 1933 there was no question of any other company in that trade having any goodwill in that business.

In 1935, a gentleman who had been for many years in the employment of the plaintiff company—a Mr. Williams, who had been the salesman and manager of the particular branch of the plaintiff's business which dealt with crushing, grinding and screening machines—ceased to be in their employ. Of course, it was open to him to seek other employment. There is no restrictive covenant preventing him. It was quite open to him to enter other employment, and he did so by getting into communication with the American company. He went to America and saw some of the directors of the American company, and as a result the defendant company was incorporated in this country on Aug. 22, 1935, under the name of the Sturtevant Mill Co. of U.S.A., Ltd. It was incorporated with a small share capital of £100. The American company owned 96 shares, one each belonged to two directors of the American company

and one each to two other persons. Its memorandum of association gives it the widest possible powers of carrying on business in machinery of all kinds, and there is nothing in this memorandum to prevent its making and dealing in any sort of machinery it chooses as well as grinding, crushing and screening machinery. That company was incorporated, but it has not carried on any substantial business up to the present. The promoters desired to have a company registered under the name of the Sturtevant Mill Co., but the registrar objected to that. Finally the registrar accepted the name the company in fact bears.

In those circumstances the plaintiff company commenced this action and the plaintiff company is asking for an injunction to restrain the defendant company from carrying on business under its present name, and the first thing I have to determine is whether the plaintiff company is entitled to such relief. The gist of an action of this kind is damage. That is to say, one person or company cannot complain of another person using the name or the title or a word in a name like that of an existing company unless it can show that the result of so doing has been, or will be, the cause of serious damage to the plaintiff in the action. That has been stated by myself already in the case of *British Legion v. British Legion Club (Street), Ltd.* (1). I should hesitate to refer to a decision of my own but that MAUGHAM, J., as he then was, cited it in *British Medical Association v. Marsh* (2). The passage which I propose to read is taken from the judgment of MAUGHAM, J. :

I think it is clear on the authorities that the basis of an action of this kind is damage ; that is to say that there must be evidence either of damage already committed, or the circumstances must be such as that the court can properly come to the conclusion that there is a serious risk, a real substantial risk, of damage in the future. Further, it must be damage to property in the sense that the plaintiff association must have something which is capable of being damaged.

That was the statement which I made and which was I gather, approved by MAUGHAM, J., and I believe it to be still the correct statement of the law in this matter. So I must be satisfied that the plaintiff company has some property capable of being damaged, and that the effect of what the defendant company is doing is such as to cause either damage to that property or such that there is a real fear of such damage being incurred. So far as the property is concerned, the plaintiff company, partly by the way it has carried on its trade and partly by advertisements, has acquired a goodwill and has a right to use the name Sturtevant in its business. That is a property which the plaintiff company is entitled to have protected. Does the fact that the defendant company has been incorporated under its present name lead to the inevitable conclusion that if it continues to use that name and to trade under it damage will be clearly caused to the property of the plaintiff company ? In my judgment,

apart from certain matters which I will consider in a moment, the answer to that question is in the affirmative. The plaintiff company has a property which will be damaged, and in my judgment the use of this name by the defendant company will inevitably lead to damage to that property. I have already pointed out that it is a common thing in ordinary business parlance to abbreviate words, or a name, or a title, and the plaintiff's name is often abbreviated to Sturtevant's and the company is already referred to as such. So the defendant's name would be abbreviated if it were used and the defendant company would become known as Sturtevant's. That is sufficient to indicate, in my judgment, that there would be confusion. It does not follow that because there would be confusion there must be damage. Take the confusion which has been proved between the plaintiff company and the company which carries on the silver plating business. Letters for the plaintiff company have been delivered to the silver plating company. There has been confusion but the silver plating company has sent the letters to the plaintiff company. The position is obviously one which is capable of being dealt with. If the confusion arises where two companies are carrying on business in the same trade, there would be a confusion which must clearly be a serious damage to the plaintiff company. There would be loss of orders, and also in other ways there would be damage to property. The plaintiff company will have no sort of control over the defendant company. So far as the American company is concerned it does not necessarily follow that it will have a successful career in this country. It may be found that the circumstances are such that it may be necessary that that company should be wound up. That might well cause damage to the plaintiff company, because if there really is, and I think there must be, confusion between the two, there would be damage to the credit of the plaintiff company. There is a serious risk of real damage to the plaintiff company if the defendant company is permitted to carry on business under its present name.

But it has been said that, in the particular circumstances of this case, the plaintiff company is not entitled to succeed. It has been said that there is some equity which ought to prevent the court giving relief in this case. It is said that this is not a common law action but it is an equitable action to which equitable principles apply, and here there is some equity which ought to disentitle the plaintiff company to the relief it seeks. I fail to appreciate the force of this. If the plaintiff company had improperly claimed the benefit and reputation of the American goods in this country so as to have improperly obtained the benefit of their connection with the American company, there might be some sort of equity. But that is not the case. Any benefit which may have accrued to the plaintiff company from the connection with the American company was the result of a voluntary agreement between the plaintiff company

and the American company. What equity disentitles the plaintiff company to relief I confess I am unable to appreciate.

It is then said that if the American company had chosen to comply with the Companies Act, 1929, part 11, relating to foreign companies carrying on business in Great Britain, they could have carried on business in this country in this way, and *Saunders v. Sun Life Assurance Co. of Canada* (3) was cited. I do not propose to go into that because it seems to me to be outside anything which I have to decide. The American company did not attempt to take that course. They have elected to stay outside it. They are not trading in this country in this name and it is needless to consider whether they would be entitled to do so.

Then it is said the defendant company is entitled to use the word Sturtevant because it is the name of real people in America who in America have acquired a goodwill for their goods in America. Whether the American company has or has not, I must look at this case not on the footing upon which Mr. Stone invited me to look at it, that goodwill is something that exists as the same thing all over the world, but on the footing of the goodwill which the plaintiff company has acquired in this country, which is something which is confined to this country, and I cannot treat the American goodwill of the American company as being part of the goodwill of the English company formed in England. The plaintiff company is entitled to protection for its goodwill and I am not entitled to refuse that protection because the American company has acquired a similar kind of goodwill in America. It is said that a man is entitled to trade under his own name, although by so doing he may cause damage and confusion to an already existing company; and *prima facie* the law of this country does not prevent his doing it. Further, if a man so trading liked to turn his business into a limited company, he is entitled *prima facie* to use as part of the name of the company the name he has been using, and here it is said I ought to treat this as being on that footing, the English company being entitled to use the word Sturtevant because it is closely connected with the American company which, holding the larger number of shares in the English company, controls it. That seems to me not to be a sound contention. So far as this country is concerned there never has been any engineering business of this kind carried on under the name Sturtevant, and there is no question of carrying on some existing business under the form of a limited company which has been carried on by private persons. So far as this country is concerned, I am bound to treat the plaintiff company as if the American company did not exist and had no sort of connection with the English company. In my judgment the plaintiff company is entitled to relief and that cannot, in my judgment, be affected by the fact that there is in America a company which has carried on for several years under the title Sturtevant. This is a new business so far as this country is con-

cerned. There is an ample explanation of the desire of the defendant company to use the word Sturtevant and it is a perfectly reasonable desire on their part. It is not suggested that they have deliberately chosen it to get some improper benefit. Nevertheless, the position in law, as it appears to me, is that judgment must be on precisely the same lines as though the defendant company was a new company incorporated in this country for the first time having no connection with any other business in this country. I must disregard the fact that there is a business carried on under the name of Sturtevant in some other part of the world. I must confine my judgment to the business being in this country. The plaintiff company has acquired property in this country and the defendant company would injure that property and the plaintiff company is entitled to the relief it seeks. I will grant an injunction in the terms asked for, omitting certain words, and the defendants must pay the costs of this action.

The injunction was granted restraining the defendant company from carrying on business under the style or title of Sturtevant Mill Co. of U.S.A., Ltd., or under any similar or colourable style or title of which the word Sturtevant forms part or under any such other style as to lead to the belief that the defendant company is in any way connected with the plaintiff company.

Solicitors: *Mills & Morley* (for the plaintiff company); *Fowler, Legg & Co.* (for the defendant company).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

CLUBB v. WIMPEY & CO., LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.),
October 16, 1936.]

AN appeal in this case, reported in the court of first instance in [1936] 1 All E.R. 69, was allowed and a new trial ordered. The court neither approved nor expressly disapproved the decision on the point reported in the court below.

CAFFERATA v. WILSON.

REEVE v. WILSON.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and du Parc, JJ.), **October 20, 1936.**]

Firearms—Dummy revolver—Sale by person not registered as firearms dealer—Firearms Act, 1920 (c. 43), s. 2 (1).

A person, who was not registered as a firearms dealer, sold a dummy revolver, which was similar in appearance to an ordinary revolver, but was fitted with a barrel and cartridge chambers only partially bored. There was a venthole in the barrel for the escape of gasses. It was incapable, as sold, of discharging a missile, but by drilling it could be converted into a weapon capable of killing a man at a distance of 5 feet. Informations were preferred under the Firearms Act, 1920, s. 2 (1) against the seller, charging him with having, when not registered as a firearms dealer under that Act, sold a firearm, and against the wholesaler who had supplied it, for having aided and abetted the sale:—

HELD: the dummy was a firearm within the Firearms Act, 1920, s. 12 (1), or alternatively all the parts other than the barrel were parts thereof within the same subsection, and the charges were well founded.

[EDITORIAL NOTE.] It had been held that a mere toy was not within an earlier similar section (*Bryson v. Gamage, Ltd.*, [1907] 2 K.B. 630; 43 Digest 18, 115), but it was then held that the criterion was whether a missile could be fired from the instrument. The present decision widens the construction of the statutory provision, in that it now includes every instrument that can be easily adapted for use as a firearm. The result is arrived at by a consideration of the words "or any part thereof" in the definition of "firearm."

FOR RESTRICTIONS ON SALE OF PISTOLS, see HALSBURY, 1st Edn., Vol. 27, Trade, pp. 546-548, paras. 1064-1067; and FOR CASES, see DIGEST, Vol. 43, p. 18, Nos. 115-118; and see STONE'S JUSTICES' MANUAL, 1936, pp. 703-714.]

APPEAL by way of case stated by the stipendiary magistrate of the City of Liverpool.

The case stated proved the following facts: On Nov. 23, 1935, Cafferata, who conducted a general shop at Prescott Road, Liverpool, sold a dummy revolver at the price of 7s. 6d. He was not registered as a firearms dealer. The dummy revolver was an article of shape and appearance similar to an ordinary revolver. The "barrel" was solid except for a hole drilled to a depth of three-eighths of an inch from the muzzle. The revolving "cartridge chamber" was also solid except for shallow recesses at the ends of what would ordinarily be the cartridge chambers. There was a venthole for the escape of gas. It was not in that state capable of firing a bullet or other missile. The article could, by drilling for 5 minutes with an electric drill or for 30 minutes with a hand drill be converted into a weapon capable of firing a bullet or other missile, which could kill a man at a distance of 5 feet. When spoken to by a police officer, Cafferata replied: "They are not dear. You have only to bore the barrel and you have a nice little gun. I would do it only I am not allowed to."

Reeve was the wholesale dealer who supplied the article to Cafferata.

Informations were preferred under the Firearms Act, 1920, s. 2 (1) against Cafferata charging him with having, when not registered as a firearms dealer under that Act, sold a firearm; and against Reeve with aiding and abetting in the sale. The stipendiary magistrate convicted both Cafferata and Reeve, both of whom appealed.

Hon. S. O. Henn Collins, K.C., and *E. Hancock* for the appellants: At the time of sale this instrument was incapable of discharging a missile, and the fact of capability of conversion does not bring it within the definition of "firearm" in the Firearms Act, 1920, s. 12 (1). It could not be called any part thereof since it was an article complete in itself and conversion could only be affected by subtraction.

The Firearms Amendment Act, 1936, s. 9 (2), makes it an offence to convert such an article as this into a firearm; therefore it was the intention of the earlier Act to exclude such an article as this from the definition of a firearm. The Firearms and Imitation Firearms (Criminal Use) Act of 1933 contemplates the difference between a firearm and an imitation firearm, imposing a penalty for the use of a firearm or imitation firearm, and this is an imitation firearm.

E. Wooll for the respondents was not called upon.

LORD HEWART, L.C.J.: It is important to see what was sold. It was called a dummy revolver of which the price was 7s. 6d.—a large price for a toy. The appellant himself stated to the police officer that it was only necessary to bore it to have a "nice little gun." Everything turns on the definition of "firearms" in the Act of 1920. At the material time the article was incapable of being fired, but a part of it needed alteration to make it suitable for firing. The magistrate has held that the article as a whole is part of a firearm within the meaning of the definition. That is quite a tenable proposition. If something had had to be added to the dummy to make it into a complete revolver, the dummy might be said to be part of a revolver. It seems to make no difference that the decisive part was not to be an addition but an adaptation of what was already there. It is easier to support the decision from another point of view. The dummy contains everything else necessary for making a revolver except the barrel, and therefore all the other parts of it except those which required to be bored are "parts thereof" within the meaning of the section. The magistrate has not misdirected himself and the appeal must be dismissed.

BRANSON, J.: I agree.

DU PARCQ, J.: I agree.

Solicitors: *W. Timothy Donovan* (for the appellant); *F. Venn & Co.*, agents for *W. Moon*, Town Clerk, Liverpool (for the respondent).

[Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.]

KEARNS v. GEE, WALKER & SLATER, LTD.

[COURT OF APPEAL (Slessor and Scott, L.JJ. and Eve, J.), **October 15, 1936.**]

Negligence—Statutory duty—Breach—Building construction—Electric crane—“Worked by mechanical power”—Protection of workman—“Part of premises in which any person is habitually employed”—Building Regulations, 1926 (S. R. & O., 1926, No. 738), reg. 31.

A workman was employed on a scaffolding, which had been in position for a day and a half, in filling up the steel structure of a building with brickwork, and while engaged in this work he was struck and injured by a brick which fell from a higher part of the building. There was an electric crane on the building, which was used for the purpose of lifting bricks which the workman used for his work. The workman brought an action against his employers for negligence, alleging a breach of the Building Regulations, 1926, reg. 31, which provides that : “Any part of the premises in which any person is habitually employed shall be covered in such a manner as to protect any person who is working in that part from being struck by any falling material or article.” The Building Regulations apply “to all premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building.” The employers set up the defence of common employment and contended (i) that as the crane used was operated by electricity it was not “machinery worked by steam, water or other mechanical power,” and (ii) that “habitually” refers to someone who is stationary in his function and not someone who is habitually peripatetic, and that the Building Regulations, 1926, were not applicable to the present case :—

HELD : (i) the electric crane was “machinery worked by steam, water or other mechanical power,” and the Building Regulations, 1926, applied to this particular building.

(ii) reg. 31 refers to those parts of premises where there are persons habitually employed, and the workman was working in such a place when he was injured. He was therefore entitled to recover from the employers for injury caused by a breach of statutory duty, and the defence of common employment was not available.

[EDITORIAL NOTE. Though the words here construed are only construed in reference to the particular regulations referred to, they are words which are quite generally used in such regulations and commercial transactions, and the consideration of their meaning and effect will be helpful apart from such regulations.

AS TO BREACH OF REGULATIONS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-602, paras. 1130-1146, and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to :

- (1) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402 ; 24 Digest 911, 80.
- (2) *Willmott v. Paton*, [1902] 1 K.B. 237 ; 24 Digest 897, 1.
- (3) *Wrigley v. Bagley & Wright*, [1901] 1 K.B. 780 ; 34 Digest 264, 2249.

APPEAL from a decision of His Honour JUDGE DUMAS given in the Westminster County Court on May 29, 1936.

The appellant, a bricklayer, in the employ of the respondents was working on a scaffold filling in steel construction with brickwork. The scaffold had been in position for a day and a half. Two or more bricks

fell from a wheelbarrow which was being moved on a higher floor and struck the appellant. These bricks had been hoisted by an electric crane and loaded into the barrows and there were no planks upon the scaffold to prevent them falling upon the appellant. The appellant claimed damages for negligence and the defence sought to be set up was that of common employment. To this defence the appellant replied that the respondents were guilty of a breach of a statutory regulation and the doctrine of common employment was not applicable.

J. Alun Pugh for the appellant.

F. W. Beney for the respondents.

SLESSER, L.J. : This appeal succeeds. This is an action brought by Mr. Kearns, a workman, against the firm of Gee, Walker & Slater, Ltd., for negligence. It was alleged by the workman that the employers had been guilty of a breach of a statutory regulation whereby the workman sustained injuries—not very serious ones—and the damages were agreed at £12 13s. 4d. The workman was hit on the head and back by a falling brick. What occasioned the accident was this. He was engaged by the defendants, Gee, Walker & Slater, Ltd., on behalf of John Barnes, Ltd., of Finchley Road, London ; and was still employed in bricking the open part of an iron building, which required to have bricks placed in it. There was a staging erected over the particular part of the building where he was working, extending about 10 or 12 feet. On to that were deposited boxes or skips of bricks, which were to be used in filling up these spaces which had been left after the iron structure had been erected. There was an electric crane on the building, which was used for the purpose of lifting those boxes of bricks. In those circumstances, this man having gone back after lunch to work on this brickwork, a number of bricks fell from a higher part of the building ; and one of them hit him upon the head. It is said that in those circumstances the defendants were guilty of a breach of the Building Regulations, 1926, reg. 31, made by the secretary of state under the Factory and Workshops Act, 1901, s. 79. If this man was injured as the result of a breach of the regulation, then, according to the case of *Groves v. Wimborne* (1), an action would lie with respect to personal injury caused to a workman employed, arising from a breach of duty by his employers under the Factory and Workshops Act ; and the defence of common employment would not be applicable in such a case, if the injury was caused by a fellow servant.

It appears from the evidence in this case that there was a bricklayer employed by the defendants on an upper floor ; and it appears that, for some reason or other, bricks did fall from that higher floor. There is no doubt that one of them—Mr. Fry said 11 bricks—in fact hit Mr. Kearns. It is also found—in fact it is not disputed—that there was, above the place where the plaintiff Kearns was working, no cover to

protect him from being struck by any falling material from above. The whole question in the case, therefore, resolves itself into this : Was there or was there not a breach of regulation ?

The regulation which is relied upon is reg. 31 ; but before I come to that regulation, it is logical first to deal with the opening words which cover all the paragraphs in the 1926 regulations. They are all covered by these words :

[The regulations] shall apply to all premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building, or for the purpose of any addition to the structure of an existing building.

On that, it is interesting to observe in the first place that the mischief to which this regulation was addressed was the danger arising in the case of the construction of a building or the additions to the structure of an existing building. In other words, the regulations contemplate that the actual building will be altered during the process of the work. It is the case of a building which is being constructed or added to ; and, therefore, a building which physically is in a state of change. But it is argued by Mr. Beney that this case does not come within these preliminary words, because it has been found that the crane which was used for this work was operated by electricity ; and, therefore, says Mr. Beney, it is not "machinery worked by steam, water or other mechanical power." He says that the words "other mechanical power" have to be construed *ejusdem generis* with steam or water ; and there is authority, I think, supporting that view. At any rate I accept that view ; and I ask myself how it influences his argument. The cases which support the view that the words "other mechanical power" must be so construed—though not considered in connection with this regulation, but considered in respect to similar words—are *Willmott v. Paton* (2), and *Wrigley v. Bagley & Wright* (3). But as I read the case of *Willmott v. Paton* (2), the question which had there to be considered was whether the work there done was not merely manual work ; or whether, in the sense used in the Factory and Workshops Act, 1878, s. 93, it was mechanical. I think, both on the authority of that case, and on the construction of the language itself, that what the regulation is doing, and what the Act did, is drawing a distinction between machinery worked by mechanical power and machinery worked by non-mechanical or manual power. That is what is intended to be effected. But even if the narrower construction be given, I am not prepared to say that a machine operated by electrical force is not as much worked by mechanical power as one worked by steam or water. It may be that in the case of steam or water it is molecular expansion which produces the power. It may be in the case of electricity, as we are told nowadays, it is some alteration in the structure of the atoms which compose the molecules.

Into these niceties I am not entitled to enter—there is no evidence about it and I cannot take judicial notice of it—but I see no reason for assuming that electrical power is not as much mechanical as steam or water. So far the learned judge has found against Mr. Beney; and I think the learned judge was right in thinking that these were premises on which machinery worked by mechanical power, namely the crane, was temporarily used.

Then we come to the regulation which it is said is broken, which is in the following words. It is reg. 31 :

Any part of the premises in which any person is habitually employed shall be covered in such a manner as to protect any person who is working in that part from being struck by any falling material or article.

In my view, reg. 31 is concerned to define that part of the premises which it is necessary should be covered. Were it not for that definition, it might be that there would be an obligation to cover the whole of the premises. To that extent, it is a regulation in favour of the employer. It is only a part of the premises which has to be covered; and that part is any part in which any person is habitually employed. Taking that view on this evidence, where apparently not only the plaintiff but Mr. Everett and other workmen were employed, either at the moment of the accident or thereabouts, in doing the very work which this regulation contemplated, namely, constructing a building, it is impossible to say that such persons were not habitually employed, and that the part which is the part where the crane was, which crane was there for the very purpose of enabling these persons to carry on their habitual employment in this part, was not a part of the building in which persons were habitually employed. Mr. Beney asks us to say that the word “habitually” there refers to someone who is stationary in his function, rather than someone who is habitually peripatetic, pointing, for instance, to a caretaker or person in charge of a house. I see no reason so to limit the words. These persons are habitually employed in that place in constructing the building. It may be there are other parts of the premises which are not being constructed or reconstructed, where work may be done which is not covered by this regulation. The learned judge in my opinion has taken a view different from that of Mr. Beney. I think Mr. Beney to this extent is right. He is right when he says that what the regulation is doing is defining the part to which it applies. As I say, the learned judge has taken a different view, because the learned judge has asked himself: “Ought I to find, because Kearns—that is the plaintiff—was employed for a day or one and a half days, that he was habitually employed there?” In my view that is an error. The question is not whether the plaintiff was employed there; but the question is, under the regulations, whether “any part of the premises in which any person is habitually employed” has been “covered in such a manner as to

protect any person who is working in that part from being struck." The person who is working in that part need not be "habitually employed." It is sufficient if he is working in that part for him to be entitled to protection "from being struck by any falling material or article."

For these reasons, I am of opinion that the learned judge was wrong, and that this man, having been struck while he was working in a part where persons were habitually employed, was injured as the result of a breach of regulation by the employers, namely, reg. 31. Consequently, it matters not whether his injury was caused through common employment, that is through the negligence of some other person in employment with him, or not, as according to the authority of *Groves v. Wimborne* (1), he is entitled to maintain his action against the employers for the injury done to him. The appeal, therefore, will be allowed with costs.

SCOTT, L.J.: I agree; and I add nothing to what my learned colleague has said on the meaning of the phrase "other mechanical power." It would be ridiculous in these days to suppose that electricity was not included in the list of mechanical powers to which the Factory Acts relate.

With regard to reg. 31, I think the object of the regulation is on the one hand to give protection to persons employed from the risk of falling objects, and on the other hand not to put an unnecessary burden on the employer. For that reason, while imposing an absolute duty, where in the opinion of the secretary of state it is necessary, it does not impose a duty in parts of the premises where, in the opinion of the secretary of state, it is not necessary. The distinction adopted by the secretary of state in framing the regulations (which I observe parenthetically were approved by Parliament as provided in the Act) is this: Where in a factory or premises building operations are going on of the type that brings them within the regulations generally, those parts of the premises where there are persons habitually employed are to be covered. The parts where persons are not habitually employed need not be covered. So that if anybody in employment goes to a part where there are habitually persons employed and is hit, he has his remedy; and the employer will have committed an offence under the regulations. If on the other hand the place where the accident happens is a place where persons are not habitually employed, and it is an entirely exceptional thing, so to speak, if a particular person is in that spot for a moment, then there is no offence, and that particular person would get no right of action for breach of the statutory duty. That seems to me to be the distinction which is adopted. How far it is practicable to apply it in practice, how far it is easy to see whether or not the part of the building in question is one where persons are habitually employed or not, is a matter that

we need not consider. I think that is the distinction which has been adopted by the legislature. In this case the learned judge has misinterpreted the regulations ; and for the reasons already given, which I need not repeat, I agree that this appeal ought to be allowed.

EVE, J. : I have arrived at the same conclusion. In my opinion there has been a breach of reg. 31 ; and in those circumstances the appeal must be allowed. With regard to the regulation, it is as well if one can arrive at a construction which will give effect to all that is to be found in it. In my opinion that follows from the language in which I propose to hold that his regulation ought to be construed : Any part of the premises, wherein any person is habitually employed, must be so covered in as to protect any person working in that part from being struck by any falling material or article. It is quite obvious in this case there had been no such protection afforded ; and in these circumstances in my opinion the appeal ought to be allowed.

Solicitors : *W. H. Thompson* (for the appellant) ; *Barlow, Lyde & Gilbert* (for the respondents).

[*Reported by* FRANK ROWE, ESQ., *Barrister-at-Law.*]

Re POLLOCK, OFFICIAL RECEIVER *v.* J. N. HASLIP, A. S. JACKSON, S. M. HASLIP, AND A. H. JACKSON (Carrying on Business as WILKINSON, BOWEN, HASLIP AND JACKSON).

[CHANCERY DIVISION (Clauson, J.), **October 19, 1936.**]

Bankruptcy—Title of trustee—Payments to debtor's solicitor to prosecute appeal against receiving order.

A debtor made certain payments to the solicitors who were acting for him in bankruptcy proceedings. One payment was made before the receiving order was made, and two payments were made for the purpose of prosecuting an appeal against the receiving order, including £20 in respect of security for costs. The appeal was dismissed and the trustee sought to recover from the solicitors the whole of the payments made to them by the debtor after the date of the receiving order and so much of the first payment as exceeded the amount properly applicable to the costs and disbursements of the bankruptcy proceedings:—

HELD: the sums claimed by the trustee were properly recoverable.

[EDITORIAL NOTE.] In this case it was sought to extend the practice whereby debtors are allowed in effect to charge the cost of defending bankruptcy proceedings out of the estate. The costs sought to be charged against the estate here were those incurred by a bankrupt in appealing against the receiving order. There was no question as to the case being a proper one for appeal, but it was felt that this was not a proper expense to be charged against the estate, and as the sums in respect of costs had actually been paid by the bankrupt to the solicitors acting for him, an order was made that the solicitors should refund such sums.

AS TO TRUSTEE'S RIGHT TO RECOVER PAYMENTS MADE BY BANKRUPT, see HALSBURY, *Hailsham Edn.*, Vol. 2, pp. 244-246, para. 318; and FOR CASES, see DIGEST, Vol. 5, pp. 639-643, Nos. 5749-5774.]

Cases referred to:

- (1) *Re Pollitt, Ex p. Minor*, [1893] 1 Q.B. 455; 5 Digest 642, 5769.
- (2) *Re Chapman, Ex p. Edwards* (1884), 13 Q.B.D. 747; 5 Digest 641, 5761.
- (3) *Re Mander, Ex p. Official Receiver v. Davis* (1902), 86 L.T. 234; 5 Digest 642, 5767.
- (4) *Re Ashwell, Ex p. Salaman*, [1912] 1 K.B. 390; 5 Digest 641, 5763.
- (5) *Re Sinclair, Ex p. Payne* (1885), 15 Q.B.D. 616; 5 Digest 641, 5764.
- (6) *Re Johnson, Ex p. Ellis* (1914), 111 L.T. 165; 5 Digest 641, 5765.
- (7) *Re Spackman, Ex p. Foley* (1890), 24 Q.B.D. 728; 5 Digest 642, 5766.
- (8) *Re White, Ex p. Ward & Afford* (1898), 78 L.T. 25; 5 Digest 643, 5774.
- (9) *Re Vanlohe, Ex p. Dewhurst* (1871), 7 Ch. App. 185; 5 Digest 732, 6346.

MOTION on behalf of the Official Receiver to recover from a firm of solicitors money paid to them by a debtor to prosecute an appeal from the making of a receiving order on the ground that such money should have been paid to the trustee.

C. N. Tindale Davis, for the Official Receiver: The point is whether money paid by the debtor to a solicitor can be recovered by the trustee in bankruptcy, when such money has been paid for the purpose of an appeal against the receiving order. There is no protection under the Bankruptcy Act, 1914, s. 46. [He referred to: *Re Chapman* (2), *Re*

Mander (3), *Re Ashwell* (4), *Re Sinclair* (5), *Re Johnson* (6), *Re Pollitt* (1), *Re Spackman* (7), *Re White* (8).]

Gerald Gardiner, for the respondents: The case is important to all solicitors. The debtor was a married woman, and she was carrying on business. For the purpose of this motion it can be taken that the appeal was not a frivolous one. The Court of Appeal gave a reserved judgment and the matter was widely reported. A person ought to have a reasonable opportunity to prevent his bankruptcy. The court should lean against an application which would have the effect of depriving a debtor of the statutory right which is given to him by the Bankruptcy Act, 1914, s. 108. The legislature did not intend that the right should be a barren one. [He referred to: *Re Vanlohe* (9), *Re Spackman* (7), *Re Sinclair* (5).]

CLAUSON, J.: This is an application by a trustee in bankruptcy against the respondents, a firm of solicitors, who are acting for the bankrupt, to repay the sum of £50, which was paid by the respondent to them on May 3, 1935, before the receiving order was made, the sum of £25 paid by the bankrupt to the respondents on July 29, 1935, and £50 paid to them on Oct. 19, 1935. The date of the receiving order was July 24, 1935.

So far as the first sum of £50 is concerned, the trustee does not desire to claim it, except as to the balance over and above what was properly applicable to the costs and disbursements of the bankruptcy proceedings. So far as the other two sums are concerned, the trustee is not prepared to make any concession. The two payments were for the purpose of prosecuting an appeal against the receiving order, and the sum of £25 was paid to furnish the £20 security which a debtor has to give. It is certainly the case that if this application does not succeed and the solicitors are held entitled to retain the sums obtained by them after the receiving order, the effect will be that the court will be allowing the security for the costs lodged by the debtor out of sums which must of necessity be the moneys of the trustee.

As regards the defence of the debtor in the bankruptcy proceedings, it has been the settled practice to approve the trustee permitting the solicitor, to whom the debtor has paid money, retaining so much of that money as is proper for the purpose. It has been justified by LORD ESHER in the case of *Re Pollitt* (1), as being due to the court's consideration for the debtor in the last struggle before bankruptcy. The question to my mind is whether this practice, which is well settled as regards the costs of opposing bankruptcy proceedings so far as necessary, be justified with regard to the costs of supporting an appeal. Of course, if the appeal is successful, no question arises. Can I see my way to extend this? I think it must be for another court to authorise an extension.

For myself, I think there are grave practical objections to an extension. I have indicated the objections in the observations I have made. They are as regards the security. Accordingly, in my view this application must succeed. There must be an order for the repayment of the sums of £25 and £50 paid after the receiving order and, as regards the payment of £50 before the date of the receiving order, there must be repayment of the balance above the sum properly expended in opposing the bankruptcy proceedings. The order will be to refund the balance over and above the sum which the taxing master allows as costs properly incurred by the debtor with regard to the bankruptcy proceedings up to the receiving order. No proceedings to be taken on the order for 14 days. Costs of the motion to be the trustee's.

Solicitors : *Tarry, Sherlock & King* (for the Official Receiver) ; *Wilkinson, Bowen, Haslip & Jackson* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

WARNER BROTHERS PICTURES INC. v. NELSON.

[KING'S BENCH DIVISION (Branson, J.), **October 14, 15, 16, 19, 1936.**]*Master and servant—Contract of service—Film actress—Negative stipulations—Enforcement by injunction.*

By a contract in the usual form in the industry, a prominent film actress undertook during the term of the employment not to render any services for or in any other photographic stage or motion picture production or business of any other person or engage in any other occupation without the written consent of the producer:—

HELD: (i) where the enforcement of such negative covenants did not amount to a decree of the specific performance of the positive covenants? or to obliging the employee to remain idle or perform the positive covenants, they can be enforced by injunction.

(ii) the granting of such an injunction was discretionary and should be limited to what is reasonable in all the circumstances of the case.

(iii) in the circumstances of this case an injunction to enforce the negative stipulations should be granted limited in area to the jurisdiction of the court and in time to the duration of the contract or 3 years whichever period should be the shorter.

[EDITORIAL NOTE.] This case carries the question of the standard contract between film companies and their star artistes a stage further. In the recent case of *Gaumont-British Picture Corporation, Ltd. v. Alexander* (1) it was held that the contract, though exceptionally stringent in its terms, was not against public policy, and that the various restrictions upon the activities of the artiste during the term of the engagement were not invalid as being in unreasonable restraint of trade. The present case deals with the further question whether the court in the exercise of its discretion will enforce the restrictive stipulations by injunction, and subject to certain limitations the stipulations were so enforced.

AS TO ENFORCEMENT OF CONTRACT OF SERVICE BY INJUNCTION, see HALSBURY, Hailsham Edn., Vol. 22, pp. 169, 170, para. 282; and FOR CASES, see DIGEST, Vol. 28, pp. 445, 446, Nos. 655-663.]

Cases referred to:

- (1) *Gaumont-British Picture Corpn., Ltd. v. Alexander*, [1936] 2 All E.R. 1686; Digest Supp.
- (2) *Doherty v. Allman* (1878), 3 App. Cas. 709; 28 Digest 364, 14.
- (3) *Lumley v. Wagner* (1852), 1 De G.M. & G. 604; 28 Digest 452, 706.
- (4) *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108; 28 Digest 455, 724.
- (5) *Davis v. Foreman*, [1894] 3 Ch. 654; 28 Digest 453, 714.
- (6) *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413; 28 Digest 454, 715.
- (7) *Chapman v. Westerby* (1913), 58 Sol. Jo. 50; 28 Digest 454, 716.
- (8) *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; 43 Digest 55, 564.
- (9) *Ehrman v. Bartholomew*, [1898] 1 Ch. 671; 43 Digest 34, 297.
- (10) *Mortimer v. Beckett*, [1920] 1 Ch. 571; 28 Digest 446, 663.
- (11) *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler*, [1926] Ch. 609; 43 Digest 72, 757.
- (12) *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451; 43 Digest 54, 560.
- (13) *Attwood v. Lamont*, [1920] 3 K.B. 571; 43 Digest 20, 131.
- (14) *Grimston v. Cunningham*, [1894] 1 Q.B. 125; 28 Digest 434, 572.
- (15) *Donnell v. Bennett* (1883), 22 Ch. D. 835; 28 Digest 452, 707.
- (16) *De Francesco v. Barnum* (1890), 45 Ch. D. 430; 34 Digest 41, 171.

(17) *Wolverhampton & Walsall Ry. Co. v. London & North Western Ry. Co.* (1873), L.R. 16 Eq. 433; 28 Digest 453, 713.

(18) *Silver v. Gatti* (1893), 37 Sol. Jo. 776; 42 Digest 913, 86.

ACTION for a declaration and injunction. The defendant, Mrs. Nelson, a film actress, professionally known as Miss Bette Davis, entered into a contract with the plaintiffs, dated Dec. 27, 1934, to appear in films for the plaintiff company. The contract was in the standard form used in the film industry. The plaintiffs alleged that the defendant intended to appear in a film for another company, and they brought an action for a declaration that the contract of Dec. 27, 1934, was a valid contract, and for an injunction to restrain the defendant from acting for any other company in breach of that contract. The defendant, in her defence, alleged that the plaintiffs had committed breaches of the contract and had repudiated it, and that she was entitled to treat it as at an end. An *ex parte* injunction had been granted on Sept. 9 and an *interim* injunction until the trial of the action on Sept. 16, 1936.

Sir Patrick Hastings, K.C., Norman Birkett, K.C., and Frank Gahan for the plaintiff.

Sir William Jowitt, K.C., J. D. Cassels, K.C., and J. L. S. Hale for the defendant.

Sir Patrick Hastings, K.C.: The question is whether the courts will grant an injunction to restrain a person who has entered into a restrictive covenant prohibiting her from working for others during the course of the employment from breaking the provision. The form of contract is a very stringent one, but has been held not to be against public policy (*Gaumont-British Picture Corp., Ltd. v. Alexander* (1)). Clause 9 of the contract, which is a negative stipulation such as the courts will enforce by injunction, is relied upon. In a business of this sort it is essential that the attendance of the artiste at the required time shall be secured and that she shall be required to stay until the scene is finished. It is necessary that the terms and regulations shall be strict. The courts will not grant specific performance of a contract of service; but that has for a long time been subject to the limitation that, when a person engaged by reason of special qualification enters into a contract prohibiting him or her from working for anyone else, the negative stipulation would be enforced by injunction. The only cases where an injunction is refused are those where damages are a sufficient remedy, but that is not so here, for it is impossible to estimate them. [Counsel referred to *Lumley v. Wagner* (3), *Donnell v. Bennett* (15), *Grimston v. Cuninghame* (14), *Ehrman v. Bartholomew* (9), *Mortimer v. Beckett* (10), *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler* (11), *Robinson (William) & Co., Ltd. v. Heuer* (12), *Whitwood Chemical Co. v. Hardman* (8), *Chapman v. Westerby* (7).]

Sir William Jowitt, K.C.: No evidence for the defence being called,

it is admitted that the defendant has broken her contract. The contract is a very stringent one and can be enforced in such a way as to put the artiste in economic difficulty. The term "slavery" has been used in reference to such a contract (*De Francesco v. Barnum* (16), per FRY, L.J., at p. 438). If the contract is not against public policy, still it is such that it ought not to be enforced by injunction. The negative stipulations are only the corollary of the positive and are too wide as prohibiting her from entering any kind of employment whatever. Severance in the present case is impossible and on this point and on the point that the contract is unenforceable, the case of *Attwood v. Lamont* (13) is relied upon. [Counsel referred to : *Lumley v. Wagner* (3), *Wolverhampton & Walsall Ry. Co. v. L. & N.W. Ry. Co.* (17), *Whitwood Chemical Co., Ltd. v. Hardman* (8), *Silver v. Gatti* (18), *Davis v. Foreman* (5), *Ehrman v. Bartholomew* (9), *Robinson (William) & Co., Ltd. v. Heuer* (12), *Kirchner v. Gruban* (6), *Chapman v. Westerby* (7), *Mortimer v. Beckett* (10), *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler* (11).]

BRANSON, J. : The facts of this case are few and simple. The plaintiffs are a firm of film producers in the United States of America.

In 1931 the defendant, then not well known as a film actress, entered into a contract with the plaintiffs. Before the expiration of that contract the present contract was entered into between the parties. Under it the defendant received a considerably enhanced salary, the other conditions being substantially the same. This contract was for 52 weeks and contains options to the plaintiffs to extend it for further periods of 52 weeks at ever-increasing amounts of salary to the defendant. No question of construction arises upon the contract, and it is not necessary to refer to it in any great detail ; but in view of some of the contentions raised, it is desirable to call attention quite generally to some of the provisions contained in it. It is a stringent contract, under which the defendant agrees "to render her exclusive services as a motion picture and/or legitimate stage actress" to the plaintiffs, and agrees to perform solely and exclusively for them. She also agrees, by way of negative stipulation, that :

she will not, during [the term of the contract] render any services for or in any other photographic, stage or motion picture production or productions, or business of any other person . . . or engage in any other occupation without the written consent of the producer being first had and obtained.

With regard to the term of the contract there is a further clause, cl. 23, under which, if the defendant fails, refuses or neglects to perform her services under the contract, the plaintiffs :

have the right to extend the term of this agreement and all of its provisions for a period equivalent to the period during which such failure, refusal or neglect, shall be continued.

In June of this year the defendant, for no discoverable reason, except that she wanted more money, declined to be further bound by the agreement, left the United States and, in September, entered into an agreement in this country with a third person. This was a breach of contract on her part, and the plaintiffs on Sept. 9 commenced this action, claiming a declaration that the contract was valid and binding, an injunction to restrain the defendant from acting in breach of it, and damages. The defence alleged that the plaintiffs had committed breaches of the contract which entitled the defendant to treat it as at an end; but at the trial this contention was abandoned and the defendant admitted that the plaintiffs had not broken the contract and that she had; but it was contended on her behalf that no injunction could as a matter of law be granted in the circumstances of the case.

At the outset of the considerations of law which arise stands the question, not raised by the pleadings, but urged for the defendant in argument, that this contract is unlawful as being in restraint of trade. The ground for this contention was that the contract compelled the defendant to serve the plaintiffs exclusively, and might in certain circumstances endure for the whole of her natural life. No authority was cited to me in support of the proposition that such a contract is illegal, and I see no reason for so holding. Where, as in the present contract, the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiffs and not thereafter, there is no room for the application of the doctrine of restraint of trade. A similar contract came before the courts in the case of *Gaumont-British Picture Corporation, Ltd. v. Alexander* (1) and was upheld by PORTER, J. I respectfully agree with his view.

I turn then to the consideration of the law applicable to this case on the basis that the contract is a valid and enforceable one. It is conceded that our courts will not enforce a positive covenant of personal service; and specific performance of the positive covenants by the defendant to serve the plaintiffs is not asked in the present case.

The practice of the court of chancery in relation to the enforcement of negative covenants is stated on the highest authority by LORD CAIRNS, L.C., in the House of Lords in *Doherty v. Allman* (2), at p. 719. His Lordship says:

My Lords, if there had been a negative covenant, I apprehend, according to well settled practice, a court of equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific perform-

ance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.

That was not a case of a contract of personal service ; but the same principle had already been applied to such a contract by LORD ST. LEONARDS, L.C., in *Lumley v. Wagner* (3). At p. 619, LORD ST. LEONARDS, L.C., used the following language :

Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements ; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other ; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

This passage was cited as a correct statement of the law in the opinion of a strong board of the Privy Council in the case of *Lord Stratheona S.S. Co. v. Dominion Coal Co.* (4), at p. 125, and I not only approve it, if I may respectfully say so, but am bound by it.

The defendant, having broken her positive undertakings in the contract without any cause or excuse which she was prepared to support in the witness box, contends that she cannot be enjoined from breaking the negative covenants also. The mere fact that a covenant, which the court would not enforce if expressed in positive form, is expressed in the negative instead, will not induce the court to enforce it. That appears, if authority is needed for such a proposition, from *Davis v. Foreman* (5), *Kirchner v. Gruban* (6), and *Chapman v. Westerby* (7). The court will attend to the substance and not to the form of the covenant. Nor will the court, true to the principle that specific performance of a contract of personal service will never be ordered, grant an injunction in the case of such a contract to enforce negative covenants if the effect of so doing would be to drive the defendant either to starvation or to specific performance of the positive covenants : see *Whitwood Chemical Co. v. Hardman* (8), where LINDLEY, L.J., said, at p. 427 :

What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement ?

See also *Ehrman v. Bartholomew* (9), where the injunction was refused, first, on the ground that it was doubtful whether the covenant applied at all, and, secondly, on the ground that to grant it would compel the defendant wholly to abstain from any business whatsoever, and *Mortimer v. Beckett* (10), where there was also no negative stipulation.

The case of *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler* (11), which was strongly relied upon by the defendant, falls within the same

category as *Ehrman v. Bartholomew* (9) and *Chapman v. Westerby* (7). RUSSELL, J., as he then was, said on p. 615, after citing those two cases :

It was said on the other side that there were points of distinction. It was said that the covenants in those two cases were so framed that the servant, if the covenants were enforced, could make his living neither by serving nor by carrying on business independently ; whereas in the present case the covenant only prohibited serving. Therefore, it was said, he was still free to start in business on his own account, and it could not be said, if an injunction were granted in the terms of the covenant, that he would be forced to remain idle and starve. That distinction seems to me somewhat of a mockery. It would be idle to tell this defendant, a servant employed at a wage, that he must not serve anybody else in that capacity, but that the world was still open to him to start business as an independent man. It seems to me that if I were to restrain this man according to the terms of the covenant, he would be forced to remain idle and starve.

Had it not been for that view of the facts, I think that the learned judge would have granted an injunction in that case. The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants, the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the court will enforce those negative covenants ; but this is subject to a further consideration. An injunction is a discretionary remedy, and the court in granting it may limit it to what the court considers reasonable in all the circumstances of the case. This appears from the judgment of the Court of Appeal in *William Robinson & Co., Ltd. v. Heuer* (12). The particular covenant in that case is set out at p. 452, and provides that

Heuer shall not during this engagement, without the previous consent in writing of the said W. Robinson & Co., Ltd., . . . carry on or be engaged either directly or indirectly as principal, agent, servant, or otherwise, in any trade, business, or calling, either relating to goods of any description sold or manufactured by the said W. Robinson & Co., Ltd. . . . or in any other business whatsoever.

There are passages in the judgment of LINDLEY, M.R., which bear so closely on several aspects of the present case that I shall refer to them. He begins his judgment on p. 454 by saying that the result at which he is arriving is that justice requires that some injunction should be granted. He goes on to say at pp. 455 and 456 :

This defendant is avowedly breaking his agreement, and the question is whether he should be at liberty to do so.

There was a question raised as to whether that agreement was or was not illegal, and as to that LINDLEY, M.R., says :

There is no authority whatever to show that that is an illegal agreement—that is to say, that it is unreasonable, and goes further than is reasonably necessary for the protection of the plaintiffs. It is confined to the period of the engagement,

and means simply this—"So long as you are in our employ you shall not work for anybody else or engage in any other business." There is nothing unreasonable in that at all.

That seems to me to apply very precisely to the present case. LINDLEY, M.R., continues :

When, however, you come to talk about an injunction to enforce it, there is great difficulty. The real difficulty which has always to be borne in mind when you talk about specific performance of or injunctions to enforce agreements involving personal service is this—that this court never will enforce an agreement by which one person undertakes to be the servant of another ; and if this agreement were enforced in its terms, it would compel this gentleman personally to serve the plaintiffs for the period of ten years. That the court never does. Therefore an injunction in these terms cannot be granted, although the agreement to serve the plaintiffs and give his whole care, time, and attention to their business, and not to engage in any other business during his engagement, is valid in point of law. But the plaintiffs do not ask for an injunction in the terms of that agreement.

Before parting with that case, I should say that the court proceeded to sever the covenants in that case and to grant an injunction, not to restrain the defendant from carrying on any other business whatsoever, but framed so as to give what was felt to be a reasonable protection to the plaintiffs and no more. The plaintiffs waived an option which they possessed to extend the period of service for an extra 5 years and the injunction then was granted for the remaining period of unextended time.

It is said that this case is no longer the law, but that *Attwood v. Lamont* (13) has decided that no such severance is permissible. I do not agree. *Attwood v. Lamont* (13) was a case where the covenants were held void as in restraint of trade. There is all the difference in the world between declining to make an illegal covenant good by neglecting that which makes it contrary to law and exercising a discretion as to how far the court will enforce a valid covenant by injunction. The latter was done in the Court of Appeal in *Robinson v. Heuer* (12) ; the former in *Attwood v. Lamont* (13).

The case before me is therefore one in which it would be proper to grant an injunction unless to do so would in the circumstances be tantamount to ordering the defendant to perform her contract or remain idle or unless damages would be the more appropriate remedy.

With regard to the first of these considerations, it would, of course, be impossible to grant an injunction covering all the negative covenants in the contract. That would, indeed, force the defendant to perform her contract or remain idle ; but this objection is removed by the restricted form in which the injunction is sought. It is confined to forbidding the defendant, without the consent of the plaintiffs, to render any services for or in any motion picture or stage production for anyone other than the plaintiffs.

It was also urged that the difference between what the defendant can earn as a film artiste and what she might expect to earn by any other form of activity is so great that she will in effect be driven to perform her contract. That is not the criterion adopted in any of the decided cases. The defendant is stated to be a person of intelligence, capacity and means, and no evidence was adduced to show that, if enjoined from doing the specified acts otherwise than for the plaintiffs, she will not be able to employ herself both usefully and remuneratively in other spheres of activity, though not as remuneratively as in her special line. She will not be driven, although she may be tempted, to perform the contract, and the fact that she may be so tempted is no objection to the grant of an injunction. This appears from the judgment of LORD ST. LEONARDS, L.C., in *Lumley v. Wagner* (3), where he used the following language on p. 619 :

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect too of the injunction in restraining J. Wagner from singing elsewhere may, in the event—[that is a different matter]—of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre : the injunction may also, as I have said, tend to the fulfilment of her engagement ; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

With regard to the question whether damages is not the more appropriate remedy, I have the uncontradicted evidence of the plaintiffs as to the difficulty of estimating the damages which they may suffer from the breach by the defendant of her contract. I think it is not inappropriate to refer to the fact that, in the contract between the parties, in clause 22, there is a formal admission by the defendant that her services, being “ of a special, unique, extraordinary and intellectual character ” gives them a particular value, “ the loss of which cannot be reasonably or adequately compensated in damages ” and that a breach may “ cost the producer great and irreparable injury and damage,” and the artiste expressly agrees that the producer shall be entitled to the remedy of injunction. Of course, parties cannot contract themselves out of the law ; but it assists, at all events, on the question of evidence as to the applicability of an injunction in the present case, to find the parties formally recognising that which is now before the court as a matter of

evidence, that in cases of this kind injunction is a more appropriate remedy than damages.

Furthermore, in the case of *Grimston v. Cunningham* (14), which was also a case in which a theatrical manager was attempting to enforce against an actor a negative stipulation against going elsewhere, WILLS, J., granted an injunction, and on p. 130 he used the following language :

This is an agreement of a kind which is pre-eminently subject to the interference of the court by injunction, for in cases of this nature it very often happens that the injury suffered in consequence of the breach of the agreement would be out of all proportion to any pecuniary damages which could be proved or assessed by a jury. This circumstance affords a strong reason in favour of exercising the discretion of the court by granting an injunction.

I think that that applies to the present case also, and that an injunction should be granted in regard to the specified services.

Then comes the question as to the period for which the injunction should operate. The period of the contract, now that the plaintiffs have undertaken not as from Oct. 16, 1936, to exercise the rights of suspension conferred upon them by cl. 23 thereof, will, if they exercise their options to prolong it, extend to about May, 1942. As I read the judgment of the Court of Appeal in *Robinson v. Heuer* (12), the court should make the period such as to give reasonable protection and no more to the plaintiffs against the ill effects to them of the defendant's breach of contract. The evidence as to that was perhaps necessarily somewhat vague. The main difficulty that the plaintiffs apprehend is that the defendant might appear in other films whilst the films already made by them and not yet shown are in the market for sale or hire and thus depreciate their value. I think that, if the injunction is in force during the continuance of the contract or for three years from now, whichever period is the shorter, that will substantially meet the case.

The other matter is as to the area within which the injunction is to operate. The contract is not an English contract and the parties are not British subjects. In my opinion all that properly concerns this court is to prevent the defendant from committing the prohibited acts within the jurisdiction of this court, and the injunction will be limited accordingly.

Solicitors : *Denton, Hall & Burgin* (for the plaintiffs) ; *Munton, Morris, King & Co.* (for the defendant).

[Reported by A. KIRKHAM HAMILTON, ESQ., Barrister-at-Law.]

R. v. MINISTER OF HEALTH, *Ex parte* HAMPTON URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C. J., du Parcq and Goddard, JJ.), **October 14, 1936.**]

Local Government—Order adjusting boundaries—Letter adjourning decision on amalgamation—Subsequent order for amalgamation of authorities—Whether second order barred—Local Government Act, 1929 (c. 17), s. 47 (1).

Proposals under the Local Government Act, 1929, s. 46, were submitted to the Minister of Health by the Middlesex County Council. In Aug., 1933, the Minister wrote to the county council saying (*inter alia*) that he could not resist the conclusion on the present evidence that Hampton should be included in a larger area and going on to suggest that the proposals made should be modified by the formation of one large borough. The letter then confirmed certain alterations of the boundaries of Hampton. In Feb., 1934, an order was made in respect of the alteration of boundaries. In Nov., 1935, the Minister gave notice that he intended to make an order amalgamating Hampton with certain other areas:—

Held: in the circumstances the Minister had made no previous decision or order in respect of the proposals made under the Local Government Act, 1929, s. 46, and he was not barred from making an order now by the provisions of sect. 47 (1) of that Act.

[EDITORIAL NOTE.] A first general review of the local government areas is ordered by the Local Government Act, 1929, s. 46, and this is to be followed by subsequent periodical reviews; but it is provided that from the date of the original review there shall be no subsequent review within a period of ten years. The question, therefore, was whether the letter of August, 1933, and the order of 1934 constituted the first review, or whether it was merely a postponement of the review followed by a purely subsidiary order.

FOR THE LOCAL GOVERNMENT ACT, 1929, ss. 46, 47, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 10, pp. 916-918.]

Case referred to:

R. v. Minister of Health, Ex p. Purfleet Urban District Council (1935), 99 J.P. 413; Digest Supp.

APPLICATION to make absolute rules *nisi* for *certiorari* and for prohibition.

On Aug. 31, 1931, the Middlesex County Council after the necessary conferences with the local authorities in accordance with the Local Government Act of 1929, ss. 46 and 47, made a report which contained certain proposals suggesting certain changes in the districts under the county council and which contained, *inter alia*, proposals to amalgamate the urban districts of Teddington and Hampton Wick and the amalgamation of the urban districts of Hampton and Sunbury-on-Thames. Objections were submitted to the Minister of Health by the local authorities affected thereby, including the Hampton Urban District Council. On Aug. 4, 1933, the Minister of Health wrote to the county council the letter set out below, and on Feb. 23, 1934, the Minister made an order which, *inter alia*, provided for a transfer of a small part of the urban district

of Hampton to the urban district of Sunbury-on-Thames. The said order came into force on Apr. 1, 1934.

Consequent to the letter of the Minister of Health of Aug. 4, 1933, the county council on Nov. 1, 1934, put forward proposals expressed to be supplementary to or in substitution for those already made in pursuance of the Local Government Act, 1929, s. 46. Such supplementary proposals proposed to transfer to the borough of Twickenham the urban districts of Hampton, Hampton Wick and Teddington. Objection to these proposals was made by the urban district councils of Hampton and Teddington, and an inquiry was held. At the inquiry the Hampton Urban District Council raised a legal objection that by the Local Government Act of 1929, s. 47 (1), no further proposals and no further order could be made on the grounds that one review shall not follow another at a less interval than ten years. The inquiry proceeded without prejudice to the legal objection. On May 20, 1935, the Minister of Health, by letter to the county council referred to the fact that he had been unable to approve the proposal for the amalgamation of the urban districts of Hampton and Sunbury-on-Thames and that he had referred the matter back to the county council for further consideration. By letter dated Nov. 15, 1935, the Minister of Health informed the county council that he proposed making an order giving effect to the supplementary proposals.

The letter of the Minister of Health to the Clerk to the Middlesex County Council referred to in the judgments, contained, *inter alia*, the following :

LOCAL GOVERNMENT ACT,
MIDDLESEX COUNTY REVIEW.

I am directed by the Minister of Health to state that he has fully considered the proposals submitted by the Middlesex County Council under sect. 46 of the Local Government Act, 1929, for the rearrangement of county districts and parishes, together with the representations and objections made on them and the report of the inspector after the inquiry.

The Minister appreciates that the county council were faced with a difficult task, having regard to the development which has taken place, in bringing about changes which will secure local government units more in accord with the present needs ; but he would have been glad if they had seen their way to reduce further the number of local government areas in the county.

It appears to the Minister also desirable that the county councils of Middlesex and Hertford should consider together whether an alteration of the county boundaries is not desirable for local government and can be agreed. The inquiry indicated that a small adjustment between Middlesex and Surrey may be desirable by the transfer to the latter of Thames Ditton Island.

The decision of the Minister on the detailed proposals of the county council is as follows :—

ALTERATION OF AREAS.
Boroughs.

[The letter here set out a list of boroughs and the alterations to be made.]

Urban Districts.

[The letter having dealt with certain other urban districts then went on.]

Hampton, Hampton Wick, Sunbury-on-Thames, Teddington.

The Minister has carefully considered the evidence submitted on the proposals of the county council relating to these districts. He cannot resist the conclusion, on present evidence, that Hampton should form part of an enlarged urban district, including the Urban Districts of Teddington and Hampton Wick and that it should not be amalgamated with Sunbury-on-Thames.

It appears to him, however, that there is a still larger issue, whether in the interests of local government the right course is not to make one local government unit of the Borough of Twickenham and the three urban districts of Teddington, Hampton and Hampton Wick. He will be glad if the county council will further consider this matter. If this is the right solution of local government areas in this part of the county, and there are strong indications that it is, now is clearly the time to effect it.

As regards the boundary adjustments between these districts and neighbouring urban districts, the Minister confirms the adjustment between Felton, Hampton and Sunbury-on-Thames Urban Districts so that the boundary of the latter district will follow the boundary of the civil parish of Sunbury as proposed by the county council, and (b) the adjustment

[The letter then continued to set out the Minister's findings for other urban districts and for rural districts.]

The Solicitor-General (Sir Terence O'Connor, K.C.), and Valentine Holmes for the Minister of Health.

Arthur Moon, K.C., and A. Willis for the Hampton Urban District Council.

F. J. Wrottesley, K.C., and F. Williams for the Middlesex County Council.

LORD HEWART, L.C.J. : In my opinion this case is too clear for useful argument. These are two rules, one for a writ of *certiorari* and the other for a writ of prohibition, the first to quash what is called a decision of the Minister of Health, and the second to prohibit him from proceeding to make an order, and take other steps. In my opinion the case is clearly within the decision of this court, the Court of Appeal, and the House of Lords, in the reported case of *R. v. Minister of Health, Ex p. Purfleet Urban District Council* (1). The argument there was that upon the proper construction of this part of the Local Government Act, 1929, the minister was *functus officio* when, after a review, he had considered the first set of proposals, and that he had no jurisdiction afterwards to proceed to consider revised or amended proposals. I need not read again any of the passages which have been read from the speeches of VISCOUNT HAILSHAM and LORD ATKIN. They seem to me precisely to cover this case. An effort has been made, and an ingenious effort, to distinguish this case from that case, and the argument, if I follow it, was this : That in the present case what has been done is not to take into account further or amended proposals, but it is to go back

upon a decision already made. That argument depends upon the straining of half a dozen words in a particular letter. I cannot come to the conclusion that the true view is that the minister came to a decision upon the matter which is now embodied in the further proposals. The two entities which were being considered were not the same, and even if they had been the same the language which he uses is not the language of decision ; it is the language of postponement. I think, therefore, that there is no material respect in which this case differs from the *Purfleet* case (1), and that the consequences are obvious.

DU PARCQ, J. : I agree. I think that it is impossible to distinguish this case from the *Purfleet* case (1) decided in the House of Lords. It may be worth while referring once more to the fact that LORD ATKIN said in his speech that he was not completely satisfied with the reason which was suggested in some of the judgments in the courts below that all that the minister did in that case was to adjourn consideration of the proposal with a view to getting further information. It is, I think, a little important to see that LORD ATKIN thought that the Minister had gone beyond a mere adjournment, and that he was not merely desirous, as the learned Lord said, of getting further information, but that he did desire that the county council should, in fact, reconsider their proposals and make fresh proposals. I think that Mr. Moon, if he had been arguing that case, might well have said that if the minister makes it clear that he desires that the county council should reconsider their proposals, and make fresh proposals, it follows that the minister at that time does not approve of the proposals which are being made, and when I find that LORD ATKIN, although he found that the minister had gone beyond the mere adjournment, and had, in fact, expressed a view unfavourable to the proposals then being made, it seems to me that there would have been no ground, certainly in the view of LORD ATKIN, for any distinction between the case with which he was dealing and the case which is now before us. It would be very unfortunate if we were compelled, because of some minute difference of language, to come to a conclusion which would, in substance, be inconsistent with that in the *Purfleet* case (1), and I am glad to find no obstacle in the way of adopting the view expressed in the judgment of my Lord with which I agree.

GODDARD, J. : I agree, and have nothing to add.

Rules discharged with costs.

Solicitors : *Solicitor to the Ministry of Health* (for the Minister of Health) ; *E. Cozens*, Hampton, Middlesex (for Hampton U.D.C.) ; *C. W. Radcliffe* (for Middlesex County Council).

[Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.]

**Re LIDDELL-GRAINGER'S WILL TRUSTS, DORMER v.
LIDDELL-GRAINGER.**

[CHANCERY DIVISION (Bennett, J.), **October 14, 1936.**]

Conflict of Laws—Domicil—English domicil of origin—Residence in Scotland—Intention to continue Scottish residence—Declaration in will—"I have not relinquished and do not intend to relinquish my English residence."

A testator, who died in 1935, declared by his will, which was in English form: "I have not relinquished and do not intend to relinquish my English domicil." The testator's domicil of origin was England, where he was born, but in 1897 he moved with his parents to Scotland, where his father had bought certain property. The testator's father continued to live in Scotland until his death in 1905, when by his will, which was in English form, his residuary estate, including the property in Scotland and other property in England, passed to the testator. With the exception of brief visits to England and an occasional trip abroad, the testator lived in Scotland from 1897 until his death. He had a great love for his property in Scotland and was anxious that after his death it should remain in his family and not be sold. At his own request, the testator was buried in Scotland. The executors of the will took out a summons to determine *inter alia* whether the testator was at the time of his death domiciled in England or in Scotland:—

HELD: as all the evidence showed that the testator's residence was in Scotland and that he intended that such residence should be permanent, the testator was domiciled in Scotland at the time of his death.

[EDITORIAL NOTE.] Long residence is always material evidence upon a question of domicil but it is never essential and rarely decisive, for slight circumstances may serve to show the absence of a settled intention. In the present case the testator sought to avoid the effect of long residence by a declaration in his will. Declarations, however, can carry the matter no further when they can be shown to have been made for other purposes. The declaration here was made to avoid the limitations placed upon testamentary disposition in Scotland and therefore carried little weight.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 6, pp. 204, 205, para. 247; and FOR CASES, see DIGEST, Vol. 11, pp. 319-30, Nos. 80-172.]

Cases referred to:

- (1) *Bowie or Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588; Digest Supp.
- (2) *Re Craignish, Craignish v. Hewitt*, [1892] 3 Ch. 180; 11 Digest 331, 205.
- (3) *Whicker v. Hume* (1858), 7 H.L.Cas. 124; 11 Digest 318, 70.
- (4) *Moorhouse v. Lord* (1863), 10 H.L.Cas. 272; 11 Digest 315, 52.
- (5) *Ross v. Ellison (or Ross)*, [1930] A.C. 1; Digest Supp.
- (6) *Re Steer* (1858), 3 H. & N. 594; 11 Digest 317, 67.
- (7) *Huntly (Marchioness) v. Gaskell*, [1906] A.C. 56; 11 Digest 319, 84.
- (8) *Winans v. A.-G.*, [1904] A.C. 287; 11 Digest 312, 38.
- (9) *King v. Foxwell* (1876), 3 Ch. D. 518; 11 Digest 313, 44.

ADJOURNED SUMMONS for the determination of certain questions arising on the will, dated July 13, 1934, of Henry Herbert Liddell-Grainger, who died on Nov. 3, 1935. The testator's will was proved in the Principal Probate Registry on Jan. 13, 1936, by the plaintiffs herein, three of the executors named in the will, the other executors therein named having renounced probate and disclaimed the trusts.

Such probate was granted on a certificate signed by one of the executors to the following effect :

We are willing to accept the grant as though the domicile of the deceased was English the first paragraph in the deceased's will stating " I have not relinquished and do not intend to relinquish my English domicile " and the question of the deceased's domicile being still *sub judice*.

The question of the testator's domicile was the first question on which a declaration was asked in the summons, and as a result of the learned judge's decision of that question the remaining questions fell to be decided by a Scottish court.

It was agreed that the testator's domicile of origin was English, he having been born on May 24, 1886, at Benton Park, Newcastle-upon-Tyne, Northumberland, the property of his grandparents, with whom his parents were living at the time of his birth. But in 1895 the testator's father purchased Ayton Castle, in Berwickshire, a few miles across the Scottish border, to which, in 1897, he moved with his wife and family, consisting of the testator and two daughters. The testator's father continued to live at Ayton Castle until his death on Nov. 5, 1905. By his will, which was in English form and was proved in the Principal Probate Registry, the testator's father left his residuary estate to the testator, such estate including Ayton Castle and certain property at Newcastle-on-Tyne, and the testator, with his mother and sisters, continued to live at Ayton Castle,

The testator, who had been educated in England, was in 1905 gazetted to the Scots Guards with whom, till 1908, he served in various parts of the world. When not with his regiment he lived at Ayton Castle. In 1908 he went on a world tour and from 1909 to 1914 he lived at Ayton Castle. In 1914 he rejoined the Scots Guards, with whom he served until the end of the Great War, spending his leaves at Ayton Castle, and in 1919 he resigned his commission and returned to Ayton Castle, where he continued to reside, with the exception of a short visit to Canada in 1920. On Jan. 20, 1922, the testator married Lady Muriel Felicia Vere Bertie, and on Jan. 18, 1922, he executed a marriage settlement in English form. After the marriage he continued to live at Ayton Castle until his death, paying a brief visit to London in the spring of each year, when he took a furnished house for the season, but he disliked town life and was always anxious to return to Ayton Castle, of which he was very fond. He also went for one fishing holiday to Norway and paid a visit to India and Ceylon, and on various occasions went for fishing and shooting holidays to the north of Scotland. He was a member of six English clubs and of the New Club in Edinburgh. In 1927 the testator was responsible for the incorporation of Grayton Estates, Ltd., a private company, which was registered in England, and to which he agreed to sell his Newcastle property and the Ayton estate for £100,000,

which was to be satisfied by 20 debentures of £5,000 each. He then leased from the company Ayton Castle and the shooting rights attached thereto for a lease of 50 years, terminable by him at the end of any 3 years.

Previous to his last will the testator executed three other wills dated respectively Jan. 16, 1918, Jan. 20, 1922, and July 9, 1929, each of which contained a declaration that he had not relinquished his English domicile. In the instructions given by him to his solicitors for the preparation of the 1929 will the testator stated that Ayton Castle was to go first to his surviving sister, and if she should die in his lifetime to his mother, and if both should die in his lifetime to a friend, the reason for his wife being left out of his will, except for the provision of an annuity, being that she did not really appreciate Ayton Castle, thinking that it was too far north, and if it was left to her he felt that she would only sell it, which he would hate as he had a great love for it.

On Jan. 26, 1930, a son, David Ian Liddell-Grainger, was born to the testator, and on July 13, 1934, he made his last will, which was also in English form and which contained the declaration above set out as to domicile. On Nov. 3, 1935, the testator died and was buried, pursuant to a wish expressed in the will, at Ayton Castle. By his will the testator bequeathed the contents of Ayton Castle and all jewellery, personal ornaments and wearing apparel to trustees upon trust for his son on his attaining the age of 25 years, and left the residue of his estate in trust for him.

E. G. Eardley-Wilmot, for the plaintiffs, the executors of the testator's will, stated the facts.

H. Wynn Parry, K.C., and *Roger Turnbull*, for the first defendant, Lady Muriel Liddell-Grainger, the testator's widow : For a definition of domicile, see *Re Craignish, Craignish v. Hewitt* (2). The sole point is whether, on the facts, the testator gave up his domicile of origin and acquired a domicile of choice in Scotland, the onus of proof being on those who say he changed his domicile. But the authorities show that it is easier for a person domiciled in one part of the British Isles to obtain a domicile of choice in another part of the British Isles, than it is for such a person to obtain a domicile of choice in a foreign country : see *Whicker v. Hume* (3), and *Moorhouse v. Lord* (4). The two points which it is necessary to prove to establish that a domicile of choice has been acquired are : (i) residence by the testator in Scotland, and (ii) intention of remaining there indefinitely. Length of residence, though very important is not conclusive. The residence must answer a qualitative as well as a quantitative test : see *Ramsay v. Liverpool Royal Infirmary* (1). But the facts of that case are clearly distinguishable from those of this case.

As to declarations of intention, see *Ross v. Ross* (5). The declaration in the will does not carry the matter any further. It was made by the

testator in order to avoid the consequences of the Scottish law, in accordance with which he would not have had the same power to dispose of his property in favour of his son as he had under English law. See also *Re Steer* (6). Something more than a declaration is necessary.

J. N. Daynes, K.C., and *G. P. Slade*, for the second defendant, David Ian Liddell-Grainger, the testator's son : For a definition of domicile, see DICEY'S *CONFLICT OF LAWS*, 5th Edn., p. 65. A change of domicile involves not only residence in another country and intention to remain there indefinitely, but also intention to abandon the domicile of origin, and the question of giving up a domicile of origin does not necessarily mean the same thing as giving up a home, since a man's domicile of origin need not be his permanent home. When this testator made his marriage settlement his domicile remained English, although he had given up his English home : see *Huntly v. Gaskell* (7). For a long time he lived at Ayton Castle without acquiring a new domicile and it is not possible to say that any actual change of residence was made by him with the intention of acquiring a new domicile : see *Winans v. Attorney-General* (8).

As to the necessity for proving intention to abandon the domicile of origin, see LORD BUCKMASTER in *Ramsay's* case (1), at p. 591, and VISCOUNT DUNEDIN at p. 594.

BENNETT, J. : But if a man intends to make a place his permanent home, then he must be presumed to intend the consequences of his act. See LORD MACMILLAN's judgment in *Ramsay's* case (1).

Daynes, K.C. : It was not necessary for LORD MACMILLAN in that case to say anything about abandoning the domicile of origin, because sufficient had not been done to establish a domicile of choice. *King v. Foxwell* (9) supports the proposition that it is not enough to show that the testator resided for a long time in another country as his home.

As to the testator's intention to reside permanently in Scotland, the evidence shows that from 1927, when the company was formed, he contemplated that he might not be able to go on living at Ayton Castle, as he made provision to enable him to give up the lease at the end of any three years. The inference from that appears in a letter of the following year from the testator to his solicitors stating that financial difficulties were likely to prevent him carrying on much longer.

L. M. Jopling (R. F. Roxburgh, K.C., with him), for the third defendant, the sister of the testator, whose interest was the same as that of the testator's son : If it is enough to prove residence with intention to make that residence a permanent home for the rest of the testator's life, it is difficult to explain the language used by VISCOUNT DUNEDIN in *Ramsay's* case (1), at p. 594. What he is there referring to is animus of change of domicile, not of permanence of residence. There is a much stronger declaration in this case than there was in *Ramsay's* case (1) to show what was the testator's state of mind.

BENNETT, J. : The first question on this summons is whether the testator was at the time of his death domiciled in England or in Scotland, and all the parties to the summons are desirous that that question should be determined upon the materials now before the court. In my judgment, upon those materials, at the date of his death this testator was domiciled in Scotland. He was born in the year 1886, on May, 24, at Benton Park, Newcastle-upon-Tyne, Northumberland. In the year 1895 his father purchased Ayton Castle, which is in Scotland, in the county of Berwick, and is an estate consisting of some 3,100 acres. The testator's father continued to live at Ayton Castle from 1897 until his death in 1905. By the will of the testator's father the Ayton estate passed to the testator absolutely, subject to an annuity to his widow and legacies to various beneficiaries, and from the time of the testator's father's death to his own decease, there is no doubt but that Ayton Castle was the testator's home in the sense in which that term is usually understood. The testator's domicile of origin was English and the burden is upon those who assert that his domicile of origin was changed to prove that in place of his domicile of origin he acquired a domicile of choice. That is proved in the words of LORD MACMILLAN in *Ramsay v. Liverpool Royal Infirmary* (1), at p. 597 :

from the concurrence of evidence of the physical fact of residence with evidence of the mental fact of intention that such residence shall be permanent.

Of the physical fact of residence there is no question. The testator lived at Ayton Castle from 1897, as far as one can know, down to the time of his death, with the exception of short periods spent in London and on visits to Norway and the north of Scotland for shooting and fishing. There is no question at all about the physical fact of residence. As to the mental fact of his intention that his residence at Ayton Castle should be permanent the evidence seems to me all one way. The most conclusive piece of evidence is to be found in the testator's own instructions in 1929, for his will, which made it plain beyond doubt that, so far as he was concerned, it was his intention permanently to live at Ayton Castle, and his desire that his son afterwards should live at Ayton Castle. That is clear also from a letter which the testator wrote to his solicitor at a time when, owing to the burden of taxation, he was contemplating that in future it might be necessary for him to let Ayton Castle. I do not think it is possible, in face of this evidence of his state of mind with regard to Ayton Castle, to find otherwise than that he intended that that should be his permanent home, and it seems to me that, upon proof of the physical fact of residence, and proof that that was his state of mind, the conclusion is reasonably clear that Scotland was his place of domicile and I so decide. There will be liberty to apply with regard to questions 2 and

3 if necessary. Costs of all parties as between solicitors and client to come out of the estate.

Solicitors: *Dawson & Co.* (for the plaintiffs and all the defendants other than the first defendant, Lady Muriel Liddell-Grainger); *Norton, Rose, Greenwell & Co.* (for the first defendant, Lady Muriel Liddell-Grainger).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

CHANDLER BROS., LTD. v. BOSWELL.

[COURT OF APPEAL (Greer and Greene, L.JJ., and MacKinnon, J.),
October 15, 16, 1936.]

Building Contracts—Sub-contract—Notice to remove sub-contractor—Implied term as to impossibility of performance—Implication of terms in sub-contracts—Quantum meruit.

The defendant, a contractor, had contracted to divert a road for a county council, and, as incidental to that purpose to make a tunnel. The work of excavating for the tunnel was sub-contracted to a firm called Chandler Bros. This firm was later turned into a limited company and a receiver was appointed by the debenture holders. The receiver elected to complete the sub-contract, but, hampered by lack of money, he was unable to proceed with the work at the speed the contract required. The head contract contained a clause giving the engineers of the county council, if they were dissatisfied with any sub-contractor, power to require his removal. The sub-contract which contained many provisions in similar terms to those in the head contract, contained no clause providing for the contingency of the engineers giving a notice under the above clause. The engineers served such a notice :—

HELD : (i) as the parties had the head contract before them when they entered into the sub-contract, they must be taken to have had in contemplation the possibility of the engineers giving such a notice, and a term could not be implied in the sub-contract giving the contractor power, as between him and the sub-contractor, upon such a notice being given, to put an end to the sub-contract.

(ii) a recital that the sub-contractor had agreed to carry out the work in accordance with the terms of the principal contract did not, where other clauses were expressly included, incorporate the clause of the principal contract here in question.

(iii) the effect of the giving of the notice was to give the sub-contractor the right to sue for breach of contract or upon a *quantum meruit* basis. He was not obliged to wait until the date of completion arrived and then sue on a breach of contract.

[EDITORIAL NOTE. This case while dealing with a doctrine that must be applied in every case according to the special circumstances of the case, lays down a general rule of much practical interest and importance. The rule is this, that where parties with a principal document before them sit down to draw up a subsidiary document, incorporating clauses to repeat or provide for the various clauses in the principal document, it cannot be said that any clause of the principal document, or the possible result of action being taken under any such clause, was not present to the minds of the parties and in their contemplation. The result is that no term can be implied in the subsidiary document to provide for any result that may ensue from the clauses in the principal document, and, in particular, no action taken under such a clause can lead to an impossibility of performance. The case, too, is of much practical interest as it deals with a common clause in building and engineering contracts : the clause providing for the dismissal of a sub-contractor by the contractor at the request of the principal contracting party.

AS TO IMPLICATION OF TERMS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451 ; and FOR CASES, see DIGEST, Vol. 12, pp. 607-613, Nos. 5028-5066.]

Cases referred to :

(1) *Horlock v. Beal*, [1916] 1 A.C. 486 ; 12 Digest 384, 3166.

- (2) *F. A. Tamplin S.S. Co. Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397 ; 12 Digest 612, 5056.
- (3) *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435 ; 12 Digest 391, 3198.
- (4) *Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38 ; 41 Digest 517, 3471.
- (5) *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 ; 12 Digest 339, 2835.
- (6) *Appleby v. Myers* (1867), L.R. 2 C.P. 651 ; 12 Digest 618, 5103.

APPEAL from the decision of the Official Referee dated July 6, 1936, giving judgment in favour of the plaintiffs upon two preliminary issues.

In Oct., 1930, a contract was entered into between the Carnarvon county council and the defendant Boswell for the diversion of a main road, including the making of a tunnel. In Dec., 1930, the defendant sub-contracted with Chandler Bros. for the excavation necessary for the tunnel. In Oct., 1931, the plaintiff company was formed and took over the sub-contract from Chandler Bros. In Apr., 1932, a receiver was appointed for the debenture holders of Chandler Bros., Ltd., and he carried on the contract, which was approaching completion. For financial reasons he was unable to proceed with the work as quickly as the contract required and, acting under a clause in the contract, the engineers to the county council in July, 1932, ordered the defendant to remove the plaintiffs, which they did. The defendant then completed the work himself. In July, 1934, the receiver issued the writ in the present action, claiming for work done upon a *quantum meruit* basis. The action was referred to an official referee, who had to determine two preliminary points : (a) whether the agreement between the plaintiffs and the defendant was wrongfully determined and repudiated by the defendant ; (b) whether the plaintiffs were entitled to sue upon a *quantum meruit*. The official referee determining both these points in favour of the plaintiffs the defendant appealed.

The clauses of the agreements so far as material are set out in the judgment of GREER, L.J.

G. R. Blanco White, K.C., and *H. J. Phillimore* for the appellants.

E. J. Rimmer and *M. Hoare* for the respondents.

GREER, L.J. : This is an appeal from the decision of an able and experienced official referee. I suppose that applies to all the official referees, but it certainly applies to this official referee, an able and experienced official referee, who had to determine certain preliminary points. They were these : “ (a) whether the agreement between the plaintiffs and the defendant was wrongfully determined and repudiated by the defendant, and (b) whether the plaintiffs are entitled to sue upon a *quantum meruit*.” Those are the two preliminary questions which he had to decide. The matter is complicated, and one argument has been presented to this court with considerable force which does not appear to have been dealt with by the learned official referee. We are satisfied,

from the note that was read to us, that it was in fact made, and it is a matter with which we have to deal.

The main contention, I think, on behalf of the appellants is this, that in the circumstances of this case, by reason of certain events, the further performance of this contract as between the contractor and the sub-contractor had come to an end, by reason of an implied term in the contract, and that therefore the plaintiffs and the defendant were left in the position that neither was liable to the other in respect of accrued causes of action. That is a principle that is well settled where there is such an implication in the contract. In the case of *Horlock v. Beal* (1) and in the *Tamplin* case (2) the matter was thoroughly discussed in the Court of Appeal. It was pointed out in that case that the court does not exercise of its own power any right to determine contracts between parties. I suppose that is subject to the exception of the case of contracts which are contrary to public policy, but subject to that exception the court does not put an end to contracts except where it can find, either expressly or impliedly, that the parties have agreed, in the events that have happened, that the contract shall come to an end. That is very clearly expressed by EARL LOREBURN in *Tamplin's* case (2) in these words, at p. 403 :

In order to decide this question it is necessary to ascertain the principle of law which underlies the authorities. I believe it to be as follows : When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.

Then further on he says, after referring to *Horlock v. Beal* (1) :

Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded.

Later on, on p. 404, he says, after quoting a passage from LORD BLACKBURN'S judgment :

That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions.

Now, the circumstances in the present case are most peculiar. The defendant was a contractor who had undertaken to do certain work on behalf of the Carnarvonshire county council by diverting a highway, and, as incidental to that purpose, making a tunnel through a hill, which is mentioned in the judgment by a name I find it a little difficult to pronounce. The name does not matter. In the head contract there was a special clause to this effect (cl. 54) under the head of "sub-contractors," which said: "If the engineer shall at any time be dissatisfied with any sub-contractor or other person similarly employed or engaged by the contractor upon or in connection with the works, the contractor shall, if required in writing by the engineer to do so, forthwith remove him or them and put an end to his or their employment or engagement." Now, it is quite clear that a contractor may undertake, as between himself and the head employer—in this case the Carnarvon county council—something against which he may fail to guard himself in his contract with his sub-contractor, and in order to find out the rights as between the contractor and the sub-contractor we have got to look at the sub-contract. In the sub-contract it seems to me perfectly clear that both parties, the contractor and the sub-contractor, when they entered into their contract in Dec., 1931, I think, had before them the contract which had been made, or was about to be made, between the head contractor and the county council, and they contemplated that they had clauses in it which would have the result of putting the contractor and the sub-contractor into a difficult position, and under those circumstances, knowing that that might happen, or that there might be a decision by the engineer of the head contractor that a sub-contractor should be ordered to cease work and to be no longer admitted on to the work to continue his job, the question we have to determine is whether in this sub-contract, having regard to what I have called, and I think rightly called, an express omission of any reference to cl. 54, we can imply a term that in the event of the engineer calling upon the contractor to dismiss a sub-contractor, there is an implied term in the contract that in that event the contractor shall be entitled, as between him and the sub-contractor, to put an end to the sub-contract.

Now, so far from thinking that any such contract is implied, I have come to the conclusion quite definitely that, having regard to the circumstances and the terms of the said contract, it is impossible to imply any such term. We are not here concerned with the question as to whether a term should be implied if an order of the government puts an end to the contract, or in some other way which was not contemplated by the parties at the time they entered into the contract, the agreement should come to an end. We have nothing to do with any contention of that sort. The question here is whether, in the events which have happened, namely, a requirement of the engineer under the head contract that the

services of the sub-contractor shall be dispensed with, the parties had impliedly contracted that in that event there should be no remedy by either the sub-contractor or the contractor, and that they should both be in the same position as in the case of *Horlock v. Beal* (1), where something happened which was not within the contemplation of the parties. But here the thing which is said to have happened which justified the contractor putting an end to the sub-contract is something that was contemplated by the parties. What happened was this : unfortunately, Messrs. Chandler, who were the contracting parties, assigned their business to a company, and there was a novation in which the company was accepted in place of the original firm. Then a receiver for the debenture holders of that company was appointed, and it is common ground that no objection was taken to his stepping into the shoes of the company and continuing the work, subject, of course, to the terms of the contract. Naturally, not being as well provided with funds as he might have been, he was not as rapid in going on with his work as he ought to have been. Thereupon, the engineer of the county council was dissatisfied, and he served a notice under cl. 54 of his contract, which was not part of the contract as between contractor and sub-contractor.

Now, we have had references to a number of cases, but, after all, the surrounding circumstances differ from time to time ; they are never the same, and it is not always possible to transpose words used in reference to a contract where the circumstances are different and make them apply to a case which is under discussion. I should, however, like to call particular attention to what is said in the case of *Bank Line, Ltd. v. Arthur Capel & Co.* (3), to which GREENE, L.J., has referred. It is a passage cited by LORD SUMNER, at p. 459, with approval from what LORD WATSON said in *Dahl v. Nelson, Donkin & Co.* (4), at p. 59 :

There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon, if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

It is not possible to say that the event that happened in this case was not actually present to the minds of the parties at the time of making it, because it seems to me quite clear that they had before them, and used for the purposes of the sub-contract, clauses by transposition which were in the original contract, and they omitted to include cl. 54, showing quite clearly that they had in their contemplation, as I take it, all the clauses of the head contract and intentionally refrained from making any reference to what was to happen if cl. 54 were put into operation by the head engineer.

For those reasons I have come to the conclusion that the argument based on an implied contract that the parties should be excused in the events which have happened in this case, namely, the exercise of his powers by the engineer, cannot be imported into this contract, and, as the whole matter depends upon an implied contract, that disposes of the question of the first point in the argument based upon impossibility. It would have been quite simple for the parties, if they had thought right, to insert a provision dealing with what was to happen in the event of the engineer exercising his powers under the head contract. They did not choose to do so, though they had in their contemplation the whole of their contract, which is shown by the fact that they did put into the contract quite a number of the terms, and put them in rather unskillfully, so as to make it a little difficult to interpret them. Cl. 3 of the sub-contract is in these terms :

If in the opinion of the employers' engineers the contractor fails to proceed with the works with reasonable rapidity or does not execute them in a satisfactory manner or in accordance with this or the principal contract.

I think that means with the speed and skill which was contemplated by the principal contract—

or refuses or neglects to make alterations as the said engineers may require, the said engineers—

which I think means the contractors' engineers, and not the engineers to the council—

may serve the contractor with written notice in that behalf, and if in the opinion of the said engineers—

that is, the contractors' engineers—

the contractor neglects or fails to set right the matter complained of in such notice within seven days from the service of such notice, the said engineers may certify in writing to the employer that the contractor has, in his opinion, so neglected or failed, and thereupon the employer may, by a written notice, determine this agreement, and may enter upon the said works.

That is a clause expressly defining the circumstances under which the contractor may put an end to the sub-contract. Similar provisions to those which appear in cl. 58 of the conditions are imported into the sub-contract. Cl. 58 says :

If the sub-contractor, in the opinion and according to the determination of the contractor [does not do a variety of things,] the contractor after twenty-four hours' notice duly given and served on the sub-contractor or his agent, shall have power, and notwithstanding any previous waiver [etc.] at the sub-contractor's expense upon the certificate of the engineer that some one or more of the foregoing events has or have happened or is or are happening, to determine the contract, except as to the rights and powers of the engineer and the council thereunder.

Now it is admitted in this case that the conditions precedent to the exercise of that power never in fact happened, and the power provided for by cl. 58 of the contract was never in fact exercised by the contractor. It may well be that he had the right to exercise those powers in accordance with the sub-contract if he had thought it wise to do so. That concludes what I have to say in regard to the main point of impossibility that was argued.

Then it was suggested that cl. 54 was really imported into the contract by reason of the recital that the sub-contractor had agreed to carry out the work in accordance with the terms of the principal contract. In my judgment, that does not mean in this contract, taking the whole contract together, that he agreed to a term which was expressly excluded when they came to recite the terms which were to apply in the sub-contract. It only means that he was to provide work of the quality and with the despatch which was stipulated for in the head contract.

Then thirdly, it is said that quite apart from any implied term of the particular kind which is suggested here, there was a slowing down of the work by the sub-contractor at this time as would in itself be enough to justify putting an end to this contract. With regard to that point, I entirely agree with what is said in the very clear and forcible judgment of the official referee. It is not right for everybody to do with speed that which the contract requires a contractor to do with speed. It is not every small breach of contract which justifies putting an end to the contract at common law, that is to say, without relying upon an implied term. The leading case on that subject is the case of *Mersey Steel & Iron Co., Ltd. v. Naylor, Benzon & Co.* (5). This is stated in the head-note as being what was held by the court :

Held, affirming the decision of the Court of Appeal, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery.

That is not relevant to the point I am on now, but the second portion of the statement is :

that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance.

I see nothing in the evidence which is stated in the pleadings to show that the plaintiffs had acted in such a way as to show an intention to repudiate the contract so as to release the contractor from further performance. I agree with the finding of the learned official referee. I am not at all sure that it is not a finding of fact, but, if it was a finding of fact, I think it was right.

Now, the next point that was made is this : It was said that the sub-contractor was presented with a situation which gave him an option to

hold his hand until the period for the completion of his contract had arrived, and, when that had arrived, if he had not been allowed to complete his contract, to say his contract was broken, and he would have damages, and that in this case he had treated the contract as still alive. Well, that is true up to a certain point, but after that point it is quite clear that he was treating the contract as having been broken and repudiated. In those circumstances he could, right up to the time that he brought his action, decide whether he would sue on a *quantum meruit* basis or whether he would sue for damages for breach of contract. He decided, I suppose, because it seemed to be in his interests or he was so advised, as the amount and the result can only be settled when the proceedings are over, to claim on a *quantum meruit* basis. I think he was entitled, at the time he brought his action, either to claim damages for breach of contract or to claim on a *quantum meruit* basis. That question has led to some discussion in some cases, especially in commission cases, but it has long been well settled that the plaintiff whose contract is broken is entitled, if he so choose, to claim damages or claim on a *quantum meruit* basis. I think the right is established in the present case, and no fault is to be found with the nature of the claim because it was a *quantum meruit* claim and not a claim for damages for breach of contract.

For those reasons I agree that the learned official referee rightly decided all the points in this case, though I should have liked to have had the assistance of his judgment on the question of the contract having become impossible. I do not find it there. However, I have dealt with it in what I consider to be the right way, and in the result I have come to the conclusion that this appeal ought to be dismissed with costs.

GREENE, L.J. : I agree, and were it not for the fact that the learned official referee's judgment does not deal with the main point of the argument before us, I should have contented myself by expressing my agreement with it ; but, with deference to the argument that has been presented, I would like to add a few words of my own on that point. The implication of terms into contracts is a thing which can only be done with the very greatest caution, and when the court is compelled to imply a term which by the force of the circumstances attending the contract was apparent on the face of it. In the present case it was said that it was competent to the court, and in fact that the court was compelled, to imply into this bargain a term making a provision for a particular event, namely, the event of the county council, through its engineer, ordering the removal of the sub-contractor from the job. I find it quite impossible to imply any such term into this contract. It is to be observed that all the cases to which we have been referred, in which what I might conveniently call the principle of *Appleby v. Myers* (6), one of

the earlier cases, has been applied, are cases where the particular event to provide for which the court found itself entitled to imply a term was one the possibility of which was not within the contemplation of the parties to the contract. Indeed, when the foundation of the decision is considered, it is not surprising. I need only refer to one sentence from the speech of LORD PARKER OF WADDINGTON in the case of *F. A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co., Ltd.* (2), at p. 422 :

It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions.

Now, in the present case the parties on the face of this contract have stated that the possibility in question was one which they contemplated. I say "possibility" advisedly, and not "probability," because in my opinion probabilities have nothing to do with the matter. The contracting parties have referred to the head contract. They said that they were informed of the terms of it, and it is impossible, to my mind, to say of this contract that the parties did not contemplate the possibility of an exercise by the council of its power to eject a sub-contractor. That being so, and the parties having stated their knowledge of this possibility, when they go on to provide for the operative part of the contract, they make no provision for it. They provide for a number of other matters in respect of which the sub-contract is liable to be affected by things done under the head contract, but this particular thing they make no provision for. In those circumstances it appears to me to be contrary to all principle to apply a doctrine which Mr. Blanco White said ought to be applied, because the court is confronted with this, that two contracting parties, contemplating a particular possibility, and saying in terms that they know of it, have not chosen to make provision for it. To imply a term making such provision in such a case would be to do the very thing which the court has no right to do, that is to make a fresh contract for the parties, inserting in it what the court thinks would be a reasonable term. That is not the function of the court at all. It is very important, to my mind, that the limits of the court's power or the court's duty to imply terms in contracts should be scrupulously regarded. In my opinion, to imply a term in the contract in the present case to deal with an event, the possibility of which the parties contemplated and did not provide for, would be contrary to the whole principle upon which this branch of the law is founded. With regard to the other matters, I entirely agree with everything that has fallen from my Lord, and I need add no more.

MACKINNON, J. : I agree, and upon the merits of the argument I desire to add nothing. I cannot help thinking that in the discussion

which has taken place before us we have been dealing on these preliminary questions more with a matter of form than with the substance of the rights of the parties. It is said that the sub-contractor failed to fulfil his obligations under the contract, and inasmuch as the contractors did not take the necessary steps under cl. 58 of their contract, he has not the right to say that he would put an end to the contract ; but if the sub-contractor did fail to fulfil his contract, the contractor in this litigation has a counterclaim, and it is pleaded as a counterclaim, and when his rights under that counterclaim are ascertained, I imagine one ground of his damages may be that such was the conduct and failure on the part of the sub-contractor that it resulted in action by the county council under cl. 54 of their contract, a matter quite clearly within the contemplation of the parties, and damages for which, therefore, presumably the contractor will be able to recover on his counterclaim. That is why it seems to me, though I am expressing no opinion on those matters, that probably we are dealing more with the matter of the form of the rights of the parties than the substantial result to the litigants.

Solicitors : *Maude & Tunnicliffe*, agents for *Dallow & Dallow*, Wolverhampton (for the appellant) ; *Kenneth Brown, Baker, Baker* (for the respondents).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

OLDING v. OLDING.

[PROBATE DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Langton, J.), **October 14, 1936.**]

Divorce—Summary jurisdiction—Maintenance order—Summons for arrears—Counter-summons issued and made returnable on day of hearing—Particulars of adultery.

A summons by a wife for arrears of maintenance had been twice adjourned by reason of a statement by the husband that he intended to take counter-proceedings for the discharge of the order on the ground of the wife's adultery. Upon the summons coming on again the husband took out his counter-summons returnable on that same day and the case was then heard. The wife was offered an adjournment, which she refused. The summons merely charged adultery by the wife in general terms, not specifying with whom the adultery was committed, or any time or place; but a letter was handed to the wife with the summons stating that she was accused of committing adultery with a named person and had been living with him for 4 years:—

HELD: (i) there is no specified length of time for a return to a summons issued by a court of summary jurisdiction, and it is a common practice when a party is before the court to issue a supplemental summons returnable on that day.

(ii) it is very desirable that a summons should state particulars of adultery, but it is not bad in law if it does not do so.

(iii) any irregularity there might have been had been waived by the party continuing the case before the justices.

(iv) in all the circumstances and in view of the serious charge made against the wife and the alleged adulterer, an order should be made for a further hearing, but the wife should have no costs of the appeal.

[EDITORIAL NOTE.] The time fixed in a summons for the appearance of the defendant to answer the charge must be a reasonable time to allow the defendant to appear, but the justices themselves are the judges of what is reasonable. Hence, if the defendant is already before the court and has had notice of the allegations proposed to be made, it is reasonable to make the summons returnable on the day of its issue. An application for adjournment could in such circumstances hardly be refused, and in this case it was offered and almost pressed upon the wife.

AS TO TIME FOR RETURN TO SUMMONS, see HALSBURY, Hailsham Edn., Vol. 21, p. 603, para. 1048; and FOR CASES, see DIGEST, Vol. 33, pp. 330, 331, Nos. 428-437.]

Case referred to:

(1) *Boston v. Boston* (1928), 138 L.T. 647; Digest Supp.

APPEAL from an order of the justices of the petty sessional division of Bedwellty in Monmouthshire, sitting at the police court at Abertillery, dated Aug. 19, 1935, discharging a maintenance order on the ground of the wife's adultery. The matter first came before the justices this year on the wife's summons for arrears, which was adjourned on the statement that the husband proposed to prefer charges of adultery. The husband's cross-summons was not in fact taken out or served until the day of the adjourned hearing, at which it was considered. The wife now asked for a rehearing on the grounds, *inter alia*, (i) that a summons was not returnable on the day it issued; (ii) that she

should have been furnished with full particulars of the allegations made against her in conformity with the judgment of LORD MERRIVALE, P., in *Boston v. Boston* (1).

E. R. Guest for the appellant wife.

R. J. A. Temple for the respondent husband.

SIR BOYD MERRIMAN, P.: In this appeal, apart from the point of substance, there are two technical points about which I had better say a word first because they come first in logical order. It is a case in which a summons was issued by the wife to enforce arrears of maintenance, which summons had been adjourned at least twice on the statement in open court that the husband intended to take counter-proceedings on the ground that she had committed adultery. When her summons came on and on the day on which it came on, the husband took out his counter-summons for revocation, and it was served only on that day. Mr. Guest, who has argued this case extremely clearly and well, has taken the point that this appeal was badly launched, because there was no provision in the law for so short a return as the day of issue of the summons, and he has also taken the point that the summons was bad in form inasmuch as it merely charged adultery in general terms without specifying either the time, place or person with whom adultery had been committed. In my view, as points of law both those points are bad. It is admitted that there is no authority for any specified length of return of a summons by a court of summary jurisdiction. It is common knowledge, and Mr. Guest does not seek to deny, that in fact with the defendant there in person before the court summonses are constantly issued supplemental it may be to a summons which has already been issued on the return day, and the statute of 1848 itself shows by the procedure which is laid down to protect a man against too short a service of the summons from the danger of the case being heard in his absence with no opportunity of attending, that the legislature was not thinking of the length of the return but thinking of the service of the summons, giving the man an opportunity of appearing. In this particular case there is no doubt whatever that the woman was before the court on her own application, and she was served with this summons, and in my opinion it would therefore be impossible for us, without upsetting the whole summary jurisdiction of the country, to lay down as a matter of law that no summons can be made returnable on the day on which it is issued.

Similarly with regard to the point of form. It is proved that the summons merely says that she has committed adultery since the making of the original order. I think that that form is in too common use, having regard to the decision of this court in *Boston v. Boston* (1) in 1928, where LORD MERRIVALE, P., laid down in no uncertain terms that proper

particulars ought to be given. It is one thing to say that proper particulars ought to be given and it is another thing to say that the summons is bad in law for lack of those particulars. In this particular case, with the summons a letter was handed to the wife making it quite clear, as indeed she already knew from her statement in open court, that she was being charged with adultery with George Sutton, she was being charged not with adultery on a particular day, but with habitual adultery with George Sutton, beginning some 4 years before and going on down to the present date. As we have often had occasion in this court to lay down, however much you particularise the instances which you are going to give in support of the adultery the charge still remains one of adultery. If the particular instance falls to the ground no doubt the charge falls with it, but the finding of adultery is never a finding of adultery on a particular day, it is a finding of adultery or no adultery. I should find it quite impossible to say that a summons which gave the particulars contained in this letter was bad for want of particularity. Of course, if the party desires further particulars and the circumstances are such that the demand is reasonable other provision ought to be made by the court for the furnishing of them. That is one thing. But it is quite impossible to say that this summons is bad on the face of it because of want of particularity, and I should be inclined to think that any irregularity, if it was an irregularity, had been waived. So I am against Mr. Guest on the questions which he has raised about the invalidity of the summons.

The circumstances to which he has called attention, namely, service on the day of issue and some generality in the particulars are both circumstances which are very important on the point of substance which he has made. This woman was found guilty of adultery on evidence which related to her association with the man Sutton, back to a date before the separation from her husband, and which culminated in evidence of their association in her house or his or both on a date two or three days before the hearing. The substance of the matter was that they were alleged to be living together, although not necessarily under the same roof, but in and out of each other's houses the same time, whereas her case before the justices was that she was simply his housekeeper. Adultery is a very serious issue, whether in this court or whether put forward before the justices as a ground for terminating an order for maintenance. Although I have already said that it is impossible to say that there is any irregularity in the matter of law in making the return the same day as the issue of the summons, I think that in so grave a matter justices should hesitate before allowing a summons to be issued at all in that way. But, in this case, I am bound to say that I think the justices, and indeed the husband's advisors, acted most properly when once that initial error of judgment had been made, because, first of all,

the husband's advisors suggested, and the clerk of the court asked, the wife not merely at the beginning of the proceedings, but while the case was being heard and after the evidence had been developed, whether she would not desire an adjournment in order that she might answer the case fully. Nothing more in that way could have been done. In taking the course that we are taking in this case, it must not be thought that we are making any sort of reflection on the fair-mindedness of the justices concerned. She declined this offer and she said she wanted the case decided that day, that is to say, her own claim for arrears and the counterclaim of her husband, and so it was disposed of, and disposed of against her. Now it comes to this court by way of appeal. She assures the court through her counsel that she is anxious to call the man with whom she is alleged to have committed adultery. Manifestly she had no opportunity of doing so on that particular day, although she could have had an adjournment. She wishes to have a further chance of establishing her innocence of the charge made against her. I think she has done everything possible to put herself in the wrong in this application, but as I have already said this is a serious charge, and I feel quite sure that the justices will feel as this court feels, that if on reflection, though she was given every opportunity at the time, she feels that she wishes to have a further opportunity of putting her defence more fully before the court the justices will welcome an opportunity of hearing the case fully.

In those circumstances and on the assurance that she intends to call fresh evidence and to develop her defence fully, I think this case should be remitted to the justices for further hearing, but I think also that as the wife is entirely to blame for the way in which the thing has happened, saving that it was unwise to make the return day so short, she should not have any costs of this appeal.

The appeal will be allowed and the case remitted to the justices, but without costs.

LANGTON, J. : I agree, and I would only add a few words, because we are taking in this case a very unusual course. I repeat what my Lord has already said that in taking this course we intend no reflection at all on the action of the court below in trying the case as and when they did, and no criticism upon the conduct of the case by the husband's advisors. Still less are we passing or pretending to pass any judgment upon the value of the testimony adduced on behalf of the husband. The course we are taking, we are taking because we feel that owing to the action which the wife very unwisely took, it is impossible not to feel some real doubt as to whether her case was fully and properly presented. Feeling that there is this doubt upon a matter of very grave importance to her and also to another party, I feel, as my Lord feels, that it would

be fair and right that she should have an opportunity of having that case fully and properly presented before the magistrates.

I agree *in toto* to the terms which my Lord has proposed, and it is only upon those terms that this indulgence ought to be granted.

Solicitors: *C. P. Gartside*, Abertillery (for the appellant); *Collyer-Bristow & Co.* for *D. Granville West*, Newport, Mon. (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Considered. WHITESIDE v. WHITE-
SIDE. [1949] 1 All E.R. 755.

JERVIS v. HOWLE

Approved and distinguished. WHITE-
SIDE v. WHITESIDE. [1949] 2 All E.R.
913.

[CHANCERY DIVISION (Clauson, J.), **October 15, 1936.**]

Mistake—Rectification—Covenant to pay sum “free of tax”—Words used ineffectual to secure result.

In a deed intended to secure a royalty on coal, the royalty was reserved thus: “together with a royalty of 3d. per ton on all coal sold by the lessee, such royalty to be paid free of tax.” It was proved that the intention of both parties was that a clear sum of 3d. should be received as royalty in respect of each ton of coal. Under the Income Tax Act, 1918, such an agreement not to deduct tax upon such a payment is void and the plaintiff asked that the deed might be rectified to read “a royalty of such an amount that after deduction of income tax at the standard rate from time to time shall leave a sum of 3d. per ton” :—

HELD: this was a proper case for rectification and an order for rectification in the terms asked for should be made.

[**EDITORIAL NOTE.** The previous case upon which this decision is based, *Burroughes v. Abbott* (1) is not quite on all fours with the present position, since there the court had ordered a deed to be drawn to secure a payment free from tax, and the deed had been wrongly drawn by one of the conveyancing counsel to the court. In such a case, the court could hardly refuse rectification, where it was required to secure the enforcement of its own order. But, as was pointed out in that case, an error in law is not necessarily a bar to rectification (*Stone v. Godfrey* (1854), 5 De G.M. & G. 76; 35 Digest 92, 21) and where equity requires it the court will make the order. The mistake here in question is one of common occurrence, and it is well that, in a proper case, it can be rectified and that arrears of the annual sum secured can be recovered.

AS TO RELIEF IN CASE OF MISTAKE IN LAW, see HALSBURY, 1st Edn., Vol. 21, Mistake, pp. 4, 5, paras. 6, 7; and FOR CASES, see DIGEST, Vol. 35, pp. 91-93, Nos. 11-26.]

Case referred to:

(1) *Burroughes v. Abbott*, [1922] 1 Ch. 86; 35 Digest 92, 17.

ACTION for the rectification of a lease dated June 3, 1932, and for the recovery of £86 13s. 1d. arrears of royalties payable under the said lease. In 1931, the plaintiff verbally agreed with the defendant George Howle to lease to him certain land at Talke in the county of Stafford for the term of 21 years from June 3, 1932, at a rent of £8 per acre and subject to a royalty of 3d. per ton on all coal sold by the said George Howle, such royalty being expressed to be payable free of all deductions

whatsoever including income tax. It was further agreed that the said verbal agreement should be embodied in a formal lease which should be executed by the parties to it.

The plaintiff contended that in pursuance of the said agreement he was entitled to receive a royalty of 3*d.* per ton on all coal sold by the defendant George Howle free of all deductions including income tax, and contended that on the true construction of the agreement he was entitled to have a provision inserted in the lease in such terms as would give legal effect to that agreement, the lease having been engrossed and executed in a form which failed to do so. The lease was assigned by the defendant George Howle to the other defendants, the Talke Colliery Co., Ltd., on May 5, 1933.

The royalties were paid to the plaintiff from time to time under the said lease without deduction for income tax until Mar. 25, 1935.

The defendants, the Talke Colliery Co., Ltd., now claimed that they were entitled to deduct income tax from the royalties becoming due under the lease on the ground that the provision in the lease for payment in full without deduction of income tax is contrary to the provisions of the Income Tax Act, 1918.

On Mar. 25, 1935, the Talke Colliery Co., Ltd., deducted from the royalties payable on that date, amounting to £116 9*s.* 3*d.*, the sum of £86 13*s.* 1*d.*, which represented income tax on the whole of the royalties payable under the lease from the time of its commencement until Mar. 25, 1935.

H. L. A. Hart for the plaintiff.

E. J. Heckscher for the defendants.

CLAUSON, J.: In this case, Mr. Jervis and Mr. Howle, both of whom I have seen in the box, were minded in the month of Oct., 1931, to enter into certain arrangements in regard to a shop and some land surrounding the shop which belonged to Mr. Jervis and which Mr. Howle desired to use for the purpose of access to some minerals of which Mr. Howle had obtained a lease from the mineral owner. After some preliminary discussion they came to terms. The royalty was to be 3*d.* per ton for all coal sold, free of tax. It is quite clear from their evidence that it is perfectly clear what they meant. They meant that Mr. Jervis should get his 3*d.* and he should not have to bear any part of the tax.

The parties having come to that arrangement, it was embodied in a document which Mr. Jervis signed on Oct. 20, 1931. It had been typed out by Mr. Howle, and Mr. Jervis added in his own handwriting "free of tax." A solicitor was called in—Mr. Griffiths—who proceeded to prepare a draft lease.

That draft was altered so as to provide the royalty and the words were written in the draft "together with the royalty of 3*d.* per ton on

all coal sold by the lessee, such royalty to be paid free of tax." I have seen Mr. Griffiths, who dealt with the matter very properly. He was not then thinking about income tax, and it did not occur to him that a point might be raised about the operation of the agreement if it were framed in these terms.

Everything went on well for 3 years. Mr. Howle then assigned his interest in the minerals to a company called the Talke Colliery Co., Ltd., who are the other defendants. Mr. Howle is the managing director of this company and holds half the shares. As the royalties fell due they were paid, without any deduction of income tax, to Mr. Jervis. Apparently Mr. Howle had not paid the tax. The income tax authorities then intervened and he then paid the income tax, and the next time the payment became due, instead of paying the royalty in full, he deducted, not only the tax on that particular payment, but also the tax for the 3 previous years. It is admitted now that there is no basis on which he could do that.

It is admitted that that must be paid. But it is suggested that he is entitled to deduct the tax from the Mar., 1935, payment, and will be entitled to deduct any tax from any future payment during the continuance of this lease granted by Mr. Jervis. In these circumstances, Mr. Jervis brings this action against Mr. Howle and the company for rectification of the lease, and for rectification by omitting the words "of 3d. per ton free of tax" and inserting the words "a royalty of such an amount that after deduction of income tax at the standard rate from time to time shall leave a sum of 3d. per ton." The plaintiff's case is that that alteration will bring the document into the precise form of what was the intention of both the parties. I find as a fact that that will be so.

In these circumstances I am bound to direct the rectification as asked. There is an authority precisely in point decided by my learned brother, P. O. LAWRENCE, J.—the case of *Burroughes v. Abbott* (1). The facts are not precisely similar. In that case a separation aimed at carrying out a judgment of the Divorce Court and it directed a certain annuity to be secured free of income tax. That judgment of the Divorce Court played the same part as the memorandum in this case. It is quite clear what was intended to be done. P. O. LAWRENCE, J., held that the parties executed the deed in the full belief that it had the effect of securing a payment free of income tax. In this case I hold that the parties executed the deed in the full belief that Mr. Jervis would get his royalty in full and not have to pay any tax.

I am bound to follow P. O. LAWRENCE, J., and direct rectification in this case. The result will be this. There must be judgment against the defendant for what was wrongly deducted from the payment of Mar., 1935, namely the sum of £26 4s. 2d. which was the tax on that particular payment of royalty, and also in respect of the previous tax

of £60 8s. 11d., making a total of £86 13s. 1d. as appears in the particulars. £65 9s. 7d. has been paid into court and that must be paid out. There will be an order for the rectification of the lease as asked for in the amended statement of claim and an order for costs of the action.

Solicitors: *Waterhouse & Co.*, agents for *Sherratt, Nelson & Mason*, Kidsgrove (for the plaintiff); *Maude & Tunnichiffe*, agents for *Frederick Griffiths*, Kidsgrove (for the defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re SENIOR, SENIOR v. WOOD.

[CHANCERY DIVISION (Bennett, J.), **October 15, 1936.**]

Infants—Maintenance—Expenditure of private income by guardian—Statutory power of maintenance—Reimbursement of guardian—Conveyancing Act, 1881 (c. 41), s. 43.

A testator by his will bequeathed to his trustees a certain sum upon trust to invest it and to accumulate the income thereof for 21 years and thereafter to pay one third of the income of the sum and the accumulations to his son E. during his life and after his death or from the expiration of the 21 years if E. should have died before the expiration thereof upon trust for such one or more of E.'s issue as he should by deed will or codicil appoint, and in default of such appointment upon trust for all his children as should attain 21, and if more than one in equal shares, provided that notwithstanding the trust for accumulation the trustees might out of the income, investments or accumulations pay in respect of the maintenance or education of E.'s children for the time being under 21 any amount not exceeding £100 per annum. The testator died on Feb. 10, 1915. E. married in 1913 and had two sons, born respectively in 1916 and 1922. E.'s wife obtained a divorce in 1928 and was granted custody of the children, and by orders for permanent maintenance E. was directed to pay a certain annual sum to his wife and £150 and £100 per annum free of tax in respect of the two children. E. died in 1935 without having exercised his power of appointment. After E.'s death his wife paid for the maintenance of the children out of her own income. The trust for accumulation having come to an end on Feb. 10, 1936, the children issued a summons asking that £350 per annum free of tax might be allowed by the surviving trustee for the maintenance and education of each of the children as from that date, and by amendment the summons further asked whether the trustee had power under the Conveyancing Act, 1881, s. 43, to apply the income of each child's contingent interest in the trust fund in respect of the moneys expended in the past by their mother for the children's maintenance. The trustee in his discretion was not prepared to pay as much as £350 per annum in respect of each child:—

HELD: (i) no order should be made in respect of allowances for the children's maintenance.

(ii) there was no power under the Conveyancing Act, 1881, s. 43, for the trustee to recoup the mother for the money expended out of her own income for the children's maintenance.

[EDITORIAL NOTE.] As to the payments to be made in respect of the children's maintenance, the court again refuses to interfere with the discretion of the

trustee. The trust having come into operation before 1926, it is necessary to consider the Conveyancing Act, 1881, s. 43, and not the Trustee Act, 1925, s. 31, but both sections deal only with the application of money in favour of infants.

FOR MAINTENANCE OF INFANTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 640, 641, para. 1355; and FOR CASES, see DIGEST, Vol. 28, pp. 222-241, Nos. 812-996; FOR THE CONVEYANCING ACT, 1881, s. 43, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 15, p. 141.]

Cases referred to :

- (1) *Bruin v. Knott* (1845), 1 Ph. 572; 28 Digest 237, 932.
- (2) *Re Alford, Hunt v. Parry* (1886), 32 Ch. D. 383; 28 Digest 224, 828.
- (3) *Re Thatcher's Trusts* (1884), 26 Ch. D. 426; 28 Digest 249, 1057.

ADJOURNED SUMMONS raising questions as to the maintenance of infant beneficiaries under the will, dated July 21, 1913, of James Senior, who died on Feb. 10, 1915.

By his will the testator appointed two other persons since deceased and the defendant herein executors and trustees, and gave and bequeathed to his trustees the sum of £120,000 second mortgage debentures in Seth Senior & Sons, Ltd., upon trust to retain the same in its existing state of investment or to invest the same in the investments thereby authorised, and to accumulate the income thereof by investing the same as thereby authorised for the period of 21 years from his death and after the expiration of such period upon trust to pay one third part of the income of the said sum of £120,000 and the accumulations thereof therein referred to as "the accumulated fund" to his son Edward Senior during his life and after his death or from the expiration of the said period of 21 years, if the said Edward Senior should have died before the expiration thereof upon trust for such one or more of his issue as the said Edward Senior should by deed, will or codicil appoint and in default of such appointment upon trust for all the children of the said Edward Senior, who should attain the age of 21 years, and if more than one, in equal shares, provided always, that notwithstanding the said trust for accumulation his trustees might pay in respect of the maintenance or education of any grandchild of him, the testator, for the time being under the age of 21 years, any amount not exceeding £100 per annum with power to pay the same to the guardian or guardians of such infant child or children for the purposes aforesaid out of the general income of the said sum of £120,000 or investments representing the same or out of any accumulations which might for the time being have been made.

The testator's son, the said Edward Senior, in 1913 married Gertie Jaggard and there were two sons of the marriage, the plaintiff Derek Senior, born on Oct. 7, 1916, and the plaintiff, Brian Senior, born on May 9, 1922. In 1928 Mrs. Gertie Senior obtained a divorce from Edward Senior and was given custody of the plaintiffs. By orders for permanent maintenance Edward Senior was directed to pay to Mrs. Senior absolute maintenance at the rate of £1,241 per annum, subsequently reduced to

£560 free of tax, and £150 free of tax for Derek Senior and £100 free of tax for Brian Senior. Edward Senior died on July 4, 1935, without having exercised by deed, will or codicil the power of appointment given him by the will of the testator, and the plaintiffs therefore each became contingently entitled, on their attaining respectively the age of 21 years, to a one sixth share of the accumulated fund under the testator's will.

The order for maintenance of the plaintiffs having ceased to be effective on the death of Edward Senior, Mrs. Senior had paid for the same out of the small arrears of maintenance due at the said date and out of her own income. At the date of the issue of the summons herein the sums so paid amounted approximately to the sum of £310. She therefore applied to the defendant, the sole surviving trustee of the testator's will for an allowance for the maintenance of the plaintiffs, and the defendant made a payment of £100. The trust for accumulation in the will having come to an end, the defendant's statutory discretion under the Conveyancing Act, 1881, s. 43, the trust having been created before Jan. 1, 1926, as to the payment of maintenance came into operation, and the plaintiffs, by their mother as their next friend, issued the present summons, which in its original form asked that the sum of £350 per annum (free of income tax) might be allowed by the defendant for the maintenance and education of each of the plaintiffs as and from Feb. 10, 1936, and for the time to come during their respective minorities or until further order. By amendment a further question was included, asking whether the defendant had power under the Conveyancing Act, 1881, s. 43, to apply such income in respect of the moneys expended in the past by Mrs. Senior as aforesaid for the maintenance of the plaintiffs. The defendant was of opinion that the sums of £350 asked for by the summons were excessive, but was prepared to pay to Mrs. Senior for the maintenance of the plaintiff Derek Senior, £300 per annum, and in addition to pay his doctor's and dentist's bills and to meet any exceptional expenditure which might from time to time be reasonably necessary. As to the plaintiff Brian Senior, he was prepared to pay all his school fees and extras at school and doctor's and dentist's bills for the time being, in addition to paying to Mrs. Senior for his maintenance the sum of £130 per annum.

W. S. Norwood, for the plaintiffs, stated the facts: On the question of the reimbursement of the widow, I am asking that that should be done out of the income of each child's contingent share (i) under the Conveyancing Act, 1881, s. 43 (1), or (ii) under the inherent jurisdiction of the court. In *Bruin v. Knott* (1), where the share of the infant there concerned was held to be contingent, it was decided that there was power to recoup under the section.

BENNETT, J.: But does that section enable a trustee to recoup a guardian who has expended her own money in the past?

Andrew Clark, for the defendant : The position is that a trustee can recoup a guardian who has spent his own money, provided that the expenditure took place during a time when the section was applicable. But in this case, although the section applies now, it did not come into operation until Feb. 10, 1936. Subsect. (3) of the section says that it is only to take effect when there is no contrary intention in the will, and in the circumstances of the case the section did not come into operation until Feb. 10, 1936, when the trust for accumulation came to an end. Until that date the will limited the amount of maintenance to be paid to the children to £100 each per annum.

BENNETT, J. : A direction that income shall be accumulated is not such a contrary intention.

Andrew Clark : A mere provision for accumulation would not be sufficient. But when there is an overriding trust for an accumulation, that is a prior interest and that does exclude the operation of the section ; see *Re Alford, Hunt v. Parry* (2). The first gift in this will is an overriding trust to accumulate the whole of the income which is not even to be divided into shares until after that trust is over. That trust to accumulate coupled with the provision to maintain to the extent of £100 each together amount to an expression of a contrary intention.

BENNETT, J. : In *Re Alford* (2) the plaintiff got his allowance.

Andrew Clark : But he was absolutely entitled after the termination of the trust for accumulation, whereas the plaintiffs here are only contingently entitled on their attaining 21, and there must have been some very special circumstances in that case : see p. 387.

BENNETT, J. referred to *Re Thatcher* (3).

Andrew Clark : That is quite a different case. There the trust was to accumulate the income of the infant's share, which is quite a different thing from a trust as here to accumulate the whole income of the fund. That is a prior trust.

On the first two questions in the summons in my submission this is not a case in which the court ought to interfere with proposed exercise of the trustee's discretion. He is desirous of exercising his power for advancement under the Conveyancing Act, and he is a man of experience in bringing up boys, having six sons of his own, and he was a great friend of the testator and of the plaintiffs' father.

Norwood, in reply : The only contrary intention in the will applies to the whole settled fund. The contrary intention envisaged by the Conveyancing Act must be a contrary intention with regard to the infant's share.

BENNETT, J. : I am not prepared to make any order on this summons. I will make no order on the first question, and as regards the question added by amendment, I decide that under sect. 43 there is no power to

recoup the mother. The costs of all parties as between solicitor and client to be paid out of the accumulations of income.

Solicitors : *Richard Brooks & Son*, agents for *Owen, Bailey & Hulme*, Huddersfield (for the plaintiffs) ; *Jaques & Co.*, agents for *Armitage, Sykes & Hinchcliffe*, Huddersfield (for the defendant).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

COLLINGWOOD v. HOME AND COLONIAL STORES, LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.), **October 20, 1936.**]

Nuisance—Adjoining premises—Fire caused by fault in electric lighting circuit—Damage to adjoining premises by water—No negligence.

In premises adjoining those of the plaintiff a fire originated, due to some unknown defect in the electrical wiring. The plaintiff's premises were damaged by the water used for extinguishing the fire :—

HELD : in the absence of any proof of negligence by the defendants in the installation or the maintenance of the electrical wiring, they were not liable in damages to the plaintiff. The doctrine of *Rylands v. Fletcher* (2) does not apply to the use of water, gas or electricity for ordinary domestic purposes, which must be distinguished from the handling of them in bulk in mains or reservoirs.

[EDITORIAL NOTE.] This case includes a full discussion of the question whether the doctrine of *Rylands v. Fletcher* (2) can be extended to the ordinary domestic use of electricity and a clear distinction is drawn between its domestic use and its transference in bulk along mains. The former use is held not to be within the doctrine since it is part of the ordinary user of property.

FOR THE DOCTRINE OF *Rylands v. Fletcher*, see HALSBURY, 1st Edn., Vol. 21, Nuisance, pp. 525-530, paras. 887-897, and FOR CASES see DIGEST, Vol. 36, pp. 187-192, Nos. 311-330.]

Cases referred to :

- (1) *Filliter v. Phippard* (1847), 11 Q.B. 347 ; 36 Digest 54, 334.
- (2) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, 311.
- (3) *Musgrove v. Pandelis*, [1919] 2 K.B. 43 ; 36 Digest 54, 339.
- (4) *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A.C. 108 ; Digest Supp.
- (5) *Green v. Chelsea Waterworks Co.* (1894), 70 L.T. 547 ; 38 Digest 23, 125.
- (6) *Rickards v. Lothian*, [1913] A.C. 263 ; 36 Digest 194, 353.
- (7) *Blake v. Woolf*, [1898] 2 Q.B. 426 ; 36 Digest 93, 615.
- (8) *Midwood & Co., Ltd. v. Manchester Corpn.*, [1905] 2 K.B. 597 ; 20 Digest 212, 76.
- (9) *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772 ; 36 Digest 189, 315.

APPEAL from a judgment of GREAVES-LORD, J., delivered on Jan. 27, 1936, dismissing with costs an action brought by the plaintiff in which he claimed damages for injury to his goods and business, caused by

the negligence of the defendants in permitting a fire to break out upon their premises causing damage to the premises occupied by the plaintiff.

The plaintiff was the lessee of shop premises at 120, High Street, Barnet. His shop had two rooms over it and adjoined a cinema. On the other side of the cinema were the defendants' grocery stores. Above the cinema and the grocery stores was a flat occupied by the cinema manager. The grocery stores had a basement which was used as a storeroom and was connected with the shop by a lift. The defendants' premises were lighted by electric light for which current was supplied by the local undertaker. The leads entered the front of the basement, where the main switch was fixed, and the current was then carried to two pendant lights suspended from the ceiling, one a few feet from the main switch and the other a short distance from the hole in the floor of the shop through which the lift travelled. There was conflict of evidence on the method of wiring, but the learned judge found that the wiring was enclosed partly in lead cable and partly in wooden casing. He found some ground for saying that some of the wiring was ordinary black and red twin flex, which ran across the basement and from opposite the lift opening to the lamp near the main switch. Fire broke out about 7 a.m. on June 22, 1934, in the basement and spread up to and destroyed the shop, the cinema, and the manager's flat; and the plaintiff's shop was so saturated with water that it was rendered unsafe and had to be rebuilt. The plaintiff claimed damages, alleging in his particulars that the fire was caused by the electric wiring in the basement of the defendants' grocery store being permitted to remain in a dangerous and defective condition after the defendants' manager had been warned by one Bryant, the captain of the local fire brigade, about June, 1933, that the wiring was inefficient and dangerous. The defendants denied that a fire had broken out, and alternatively said that the fire began accidentally and without any negligence on the part of themselves, their servants or agents, and that they would rely on the Fires Prevention (Metropolis) Act, 1774, s. 86. The plaintiff also alleged, in further and better particulars, that the electric wiring in the cellar close to the lift consisted of flex tacked on to bare boards without any protective covering.

The learned judge in his judgment (reported in [1936] 1 All E.R. 74) concluded that the fire originated in the basement and was in some way connected with the electrical wiring. He found no proof of how the fire started and could not say whether it was the result of faulty wiring or of some conditions that caused a leakage of current. He was not satisfied that any warning had been given in 1933. Although there was some doubt whether the installation was in accordance with modern requirements, he could not find the omission to bring it up to date to be negligence, in view of the fact that public authorities made no require-

ment to that effect. Nor was there, he found, any evidence that any skilled person found the installation defective, although on at least two occasions since 1930 the wiring was tested by the usual tests employed by experts, namely, for short-circuits as between poles and for leakage anywhere in the system, and was found to be all right.

After reviewing the authorities he came to the conclusion that he must dismiss the action with costs. The plaintiff appealed.

H. D. Samuels, K.C., and *G. J. Paull* for the plaintiff.

J. G. Trapnell, K.C., and *H. G. Willmer* for the defendants.

Samuels, K.C.: At common law a person on whose premises fire starts is responsible for damage caused by its spread. The Fires Prevention (Metropolis) Act, 1774, s. 86, removed liability for fire accidentally started but not for fire caused by negligence: *Filliter v. Phippard* (1). In *Musgrove v. Pandelis* (3), where fire broke out in the carburettor of a motor car and, through the negligence of a servant in failing to put it out, spread to adjoining premises, it was held that an occupier who brought a dangerous thing on to premises was not protected by the 1774 Act, and that a motor car was a dangerous thing. Electricity brought on to premises is equally likely to do damage if it is not kept in control. *Rickards'* case (6) merely laid down that when land is used in the ordinary way and damage happens to adjoining property without negligence or default in the occupier, he is not liable within the rule in *Rylands v. Fletcher* (2). In *Midwood & Co. v. Manchester Corporation* (8) nuisance was held to have been committed when premises were blown up through the agency of electric lighting. In the present case the system of electric lighting used was an old and out-of-date one. If a person keeps upon his premises an old and out-of-date system of wiring, in the circumstances dangerous, he is just as guilty of negligence as if he had performed a negligent act. The 1774 Act does not protect the defendant if he has committed negligence, or if his liability is within the rule in *Rylands v. Fletcher* (2). It was held in the *Northwestern Utilities* case (4) that gas was a *Rylands v. Fletcher* (2) object, but that, if it escaped without negligence, the occupier was not liable. Electricity is not within the same principle as gas and water. It is known to be dangerous in itself; it gives no warning of its escape, and it only escapes through some defect in the installation. If it escapes, there is no defence under the Act or at common law. This case is covered by *Musgrove's* case (3) and is *a fortiori*.

Trapnell, K.C., was not called upon.

LORD WRIGHT, M.R.: This is an appeal from a judgment of GREAVES-LORD, J., in a case of some interest, and in which Mr. Samuels has very ably put his argument in favour of the appeal being allowed; but I am of opinion that the decision of the learned judge is not one which

this court would be disposed to interfere with. So far as his findings of fact are concerned I want to make it quite clear that the practice of this court in non-jury cases will not be to attempt to re-try the issues of fact which the learned judge has decided, and, *prima facie*, his decision will be accepted by this court. That does not, of course, mean that the court will not fulfil its statutory duty to re-try the case, but it will always remember that the learned judge has had the benefit of seeing and hearing the witnesses, and where there is anything in the nature of technical evidence he has had the advantage of seeing and examining photographs and plans, and material of that sort, which cannot be dealt with in this court.

In the present case the question arises in this way. The defendants were occupiers of premises, 124, High Street, Barnet. There was a basement to those premises, and above the basement was the ground floor, the front part of which was a shop, and behind the shop was the warehouse. The only access to the basement was down a rough sort of lift which came up into the warehouse. Above the warehouse and the shop, and without any connection from the ground floor to the first floor, there was a flat occupied by a gentleman who was employed in the adjoining cinema. The structure of the flat itself was somewhat flimsy. The plaintiff was the occupier of the premises, 120, High Street. There were, I think, some adjoining premises, and there were premises in between, but they may be disregarded for this purpose. The trouble was that one morning, I think a Sunday morning, at 7 o'clock, the gentleman who occupied the flat, and who was asleep along with his wife in the flat, was disturbed and discovered that the premises were on fire. He managed to escape with his wife, and the police appeared, and the fire brigade, and the fire was eventually got under; but it spread from the defendants' premises and the flat to the plaintiff's premises and did a certain amount of damage there, and it is in respect of that damage that the plaintiff brings his action.

In his pleadings he seeks to avoid the application of the Fires Prevention (Metropolis) Act, 1774, s. 86. That section provides in effect that no action shall be brought against any person in whose house, chamber, or other building any fire shall accidentally begin, any law, usage, or custom to the contrary notwithstanding. That Act, as is well known, changed the law, because before that Act if a fire spread from a man's premises and did damage to adjoining premises, he was liable in damage on the broad ground that it was his duty at his own peril to keep any fire that originated on his premises from spreading to and damaging his neighbour's premises. The protection of the section is limited by the word "accidentally." The meaning of that is discussed in *Filliter v. Phippard* (1), where it was held that the section did not apply to a fire due to the negligence of the defendant or his servants. It may be in

some cases a matter of some difficulty to reconcile the word "accidentally" with the idea that there should be no negligence. It is not, however, necessary to discuss that here. I shall refer a little later to another case in which some further qualification seems to have been imposed upon the effect of the statute; but for the moment I shall be content with stating the effect of that decision, which has always been regarded as a leading case.

Now, in the statement of claim the pleader, who was, of course, aware of the statutory protection, sought to evade it by anticipation. In para. 4 of the statement of claim he says:

The fire referred to in the last preceding paragraph was caused by the negligent acts or omissions of the defendants, their servants or agents,

and in the particulars:

The fire was caused by the electric wiring in the basement of the said premises occupied by the defendants being permitted to remain in a dangerous and defective condition after the defendants' manager had been warned by one Bryant, captain of the Barnet fire brigade in or about the month of June, 1933, that the said wiring was inefficient and dangerous.

Then some particulars of the alleged defect in the electric wiring are given a little later, and it was said that the warning was oral, and was orally given by John William Restall at the same time as it was given by Captain Bryant. That being the issue raised by the statement of claim, it is only necessary to refer to one paragraph in the defence, wherein the defendants said that the fire

began accidentally and without any negligence on the part of themselves or their servants or agents, and they will if necessary rely on the Fires Prevention (Metropolis) Act, 1774, s. 86.

The learned judge has dealt with the issues in his judgment, and he has found that the fire was accidental. Occurring, as it did, in the middle of the night, or in the very early hours of the morning, how it occurred can only be a matter of inference; but the learned judge finds that the fire must have started in the basement. It is a little curious. There were traces of a fire in the basement, and the lift had been burnt, and the underside of the floor of the lift, and the scorching along the wire in the basement also pointed to the basement as the place where the fire had originated. The learned judge comes to that conclusion, and he also finds that the fire was in some way connected with the electrical wiring, but he is not able to say precisely how the fire started. He goes on to find—I will read the short passages from the judgment, because they show conclusively and concisely what his conclusion of fact was. He says, at p. 76:

It may have been by a fusing of the wiring, but what caused the wire to fuse? Was it a result of faulty wiring, or of some conditions that caused a leakage of

current in the basement? I am unable to say. It is said the wiring was defective and that a warning to that effect was given in 1933. [That relates to the pleadings.] I am not satisfied that any warning relating to the basement wiring was given in 1933. I am inclined to the view that there is some confusion by reason of the fact that a warning referring to some other matter was given in 1933, but that was confined to the warehouse and had long before been remedied. No other head of negligence is suggested, and although there is some doubt as to whether the installation was in accordance with the modern requirement, I cannot find the omission to bring it up to date to be negligence, in view of the fact that public authorities make no requirement to that effect. Nor is there any evidence that any skilled person found the installation defective, although on at least two occasions since 1930 the wiring was tested by the usual tests employed by experts, namely, for short circuits as between poles and for leakage anywhere in the system, and was found to be all right.

The learned judge adds that a short-circuit might be caused by rats or by water escaping, and in other ways. His conclusion, therefore, is on the facts that the fire was an accidental fire.

Mr. Samuels has drawn our attention, very properly, to the evidence; but it is quite impossible, in my opinion, to say that there was no evidence on which the learned judge could find as he did, or that his conclusions above set out are not reasonably justified by the evidence that there was before him. I accept, therefore, his conclusion that the fire was an accidental fire, and that no proof of negligence has been adduced to justify setting aside what the learned judge has decided in the passage which I have just quoted. Mr. Samuels, however, has raised a point of somewhat general importance. His argument is that the statute does not apply in a case where the event has occurred by reason of the defendant doing some acts which bring the case within the well known rule in *Rylands v. Fletcher* (2)—a rule often referred to. His argument is that the statute does not protect the defendants, even if the fire was accidental, and even if there is no negligence, if in fact they have brought or maintained on their premises something which is, I was going to say a dangerous article within the ruling in that case; but I hesitate to use any adjective. So many adjectives have been used, and so many adjectives have been criticised, that I prefer not to run the risk of an erroneous or inadequate statement. But Mr. Samuels has relied very strongly upon certain language used in *Musgrove v. Pandelis* (3). In that case the fire originated in a motor car. The plaintiff occupied furnished rooms over a garage. Part of the garage was let to the defendant; his chauffeur started the engine of the motor car and for some reason, without negligence on his part, the petrol in the carburettor caught fire. That in itself would have done no harm; the fire would have burned out at once if the tap had been promptly turned off, but the servant did not do so; the fire spread, and eventually having burned the car in the garage, set fire to the plaintiff's rooms and furniture. It was sufficient ground for the particular decision that the fire, that is to

say the substantial fire, which actually caused the damage, was not caused without negligence. The fire which caused the damage was that which flowed from the original innocuous fire spreading, through the fault of the chauffeur, to the petrol in the tank, and that was clearly due to an act of negligence and, therefore, the protection of the statute did not apply. That was enough for the decision of the case. It was, however, said, I think by all three members of the Court of Appeal, that the state of the law before the earlier statute was that a man was liable at common law for damage done by fire originating on his own property, (i) by the mere escape of fire—that was the old rule ; (ii) if the fire was caused by the negligence of himself or his servants, or by his own wilful act ; and (iii) on the principle of *Rylands v. Fletcher* (2). That having been laid down, the Court of Appeal proceeded to hold that the principle of *Rylands v. Fletcher* (2) would apply here. The view was expressed that the motor car was dangerous within that principle ; it had been brought by the defendant upon his premises and, simply on that ground, the defendant was responsible for the fire which resulted, and was not within the protection of the statute. Well, I certainly have no desire to criticise in any way the actual decision in that case so far as it is based on the view that the real and substantial and destructive fire was the result of negligence. I confess, however, I find some difficulty about the other ground on which the decision was based, though, if it were necessary, I should follow the ruling of the Court of Appeal and apply it here if the case came within the scope of that ruling. But I do not think it does. I do not think for one thing that the ruling which was there applied to a motor car would necessarily in any event apply to the facts here of the defective electric wiring of these premises, and that would be enough. But in my judgment the principle of *Rylands v. Fletcher* (2) in any case does not apply to the position here. I am going to avoid anything like an affirmative statement of all that is covered by that famous case, and still less will I attempt to define the various qualifications which have been superimposed upon it, and which are illustrated in the most recent case on the point, the case of the *Northwestern Utilities, Ltd. v. London Guarantee & Accident Company* (4). I will only quote from that, one passage, a quotation from the expressions of LINDLEY, L.J., in *Green v. Chelsea Waterworks Co.* (5), at p. 549, in respect to *Rylands v. Fletcher* (2), in which he said :

That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision.

The particular limitation, which is all I want to refer to here, is this, that the principle does not apply to what may be described as the reasonable or ordinary use of premises. That qualification is very well illustrated by the decision of the Judicial Committee of the Privy Council

in *Rickards v. Lothian* (6). There were many questions raised in that case, and I only want to refer to one particular matter which is dealt with in the report on p. 280 and onwards. LORD MOULTON there says, giving the judgment of the Privy Council :

It is not every use to which land is put that brings into play [the principle of *Fletcher v. Rylands* (2)]. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

LORD MOULTON then referred to a decision of WRIGHT, J., in *Blake v. Woolf* (7), where the question was whether a leakage of water from the ordinary house-pipe in the defendant's premises brought into effect the principle of *Rylands v. Fletcher* (2), and WRIGHT, J., there said, at p. 428 :

The general rule as laid down in *Rylands v. Fletcher* (2) is that *prima facie* a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps upon his land. That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him. The bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were ; and, therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern, I do not think that he is liable for any damage that may ensue.

LORD MOULTON approved of that and he goes on to say later in his judgment at p. 282 :

In such matters as the domestic supply of water or gas it is essential that the mode of supply should be such as to permit ready access for the purpose of use, and hence it is impossible to guard against wilful mischief. Taps may be turned on, ball-cocks fastened open, supply pipes cut, and waste pipes blocked.

I should prefer to add there, "and any of these pipes, either gas or water, might leak"—I was going to say automatically, but, "might leak without any apparent cause and without any negligence." LORD MOULTON goes on :

Against such acts no precaution can prevail. It would be wholly unreasonable to hold an occupier responsible for the consequences of such acts which he is powerless to prevent, when the provision of the supply is not only a reasonable act on his part but probably a duty. Such a doctrine would, for example, make a householder liable for the consequences of an explosion caused by a burglar breaking into his house during the night and leaving a gas tap open. There is, in their Lordships' opinion, no support either in reason or authority for any such view of the liability of a landlord or occupier. In having on his premises such means of supply he is only using those premises in an ordinary and proper manner, and, although he is bound to exercise all reasonable care, he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons.

I think that these words apply precisely to the electric wiring which everybody, or most people, nowadays have in the houses which they occupy whether for domestic use, or for purposes of trade as the defendants did. There is nothing in the installations of such wiring which, to my mind, brings this case within the principle of *Rylands v. Fletcher* (2). It is perfectly true that electricity, like gas and water, may be regarded from one point of view as a dangerous thing, and the principle of *Rylands v. Fletcher* (2) has been applied to persons who carry, in their property or in their mains, gas, water or electricity. It would be easy to give instances. I refer to one case of electricity—*Midwood & Co., Ltd. v. Manchester Corporation* (8), and the case of water illustrated by the *Charing Cross Electricity Supply Company v. Hydraulic Power Company* (9), and gas is illustrated by the *Northwestern Utilities* case (4), to which I have already referred. But in all these cases there was nothing comparable to the ordinary domestic installation of electric wiring for the ordinary comfort and convenience of life. In all these cases these dangerous things were being handled in bulk and in large quantities; they were being carried in mains, and, in the words in the *North Western Utilities Company* case (4), at p. 118, “the gas”—or the other substances—“constitutes an extraordinary danger created by the appellants for their own purposes,” and it followed that they acted at their own peril. There was a carriage or an accumulation of the dangerous thing. These cases undoubtedly come within the principle of *Rylands v. Fletcher* (2), but they seem to me to be very different in principle and in result from the case of the ordinary domestic pipes for gas or water or for wiring electricity, and on that ground I think that the argument which Mr. Samuels has put forward so strenuously fails, and that the judgment of the learned judge should be upheld. That ground is that on which the judge himself put his decision, and I think he was right in doing so and, therefore, the appeal fails and should be dismissed with costs.

ROMER, L.J.: I agree with the judgment of LORD WRIGHT, M.R., both as to his conclusion and the reasons that he has given for arriving at that conclusion.

I only desire to add this. I think at some time it will be desirable if the House of Lords would consider the case of *Musgrove v. Pandelis* (3), so far as the decision in that case was based upon *Rylands v. Fletcher* (2). Of course the rule in *Rylands v. Fletcher* (2), as is well known, is a rule which relates to the escape from somebody's premises of a dangerous animal or thing brought by the owner upon those premises, and does not relate to a case like the present, or a case like the Court of Appeal had to deal with in *Musgrove v. Pandelis* (3), where there had been an escape of nothing from the defendant's premises. But the rule in *Rylands v. Fletcher* (2), as has frequently been pointed out, is based upon a much

wider principle, namely, the principle "*Sic utere tuo ut alienum non laedas*," and there is no doubt in *Musgrove's* case (3) the Court of Appeal were referring to *Rylands v. Fletcher* (2) as being based upon that wider principle. But what will have to be considered is whether *Musgrove v. Pandelis* (3), so far as it purports to be based on that larger principle, can be supported seeing that the decision involves these two propositions, (i) that a motor car is—I am quoting from the judgment of BANKES, L.J., a dangerous thing to bring into a garage, and (ii) that the use of one's land for the purpose of erecting a garage and keeping a motor car there, is not an ordinary and proper user of the land—two propositions which, but for that authority, I should myself respectfully have doubted.

MACNAGHTEN, J.: I agree with both the judgments that have been delivered, and have nothing to add.

Appeal dismissed with costs.

Solicitors: *Lucien Fior* (for the appellant); *William Hurd & Son* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

GLAMORGAN COUNTY COUNCIL v. AYTON.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson, and du Parcq, JJ.), **October 20, 1936.**]

Local Government—Expenses—Members of council—“Expenses necessarily incurred in travelling”—Local Government Act, 1933 (c. 51), s. 294 (1).

The expenses permitted to be defrayed by a county council under the Local Government Act, 1933, s. 294 (1), which provides that “a county council may defray any expenses necessarily incurred by members of the council in travelling to and from meetings of the council,” are limited to expenses of actual conveyance or transport and do not include expenses incurred by members for the purpose of bodily subsistence required by them by reason of absence from home on account of travelling to and attending meetings and returning therefrom.

[**EDITORIAL NOTE.** This case is purely one of the construction of a statutory provision which provided for the expenses “incurred in travelling” of county councillors. It was attempted without success to make such expenses include “subsistence” expenses.

FOR THE LOCAL GOVERNMENT ACT, 1933, s. 294 (1), see HALSBURY COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 462. The London County Council (General Powers) Acts referred to, though local Acts, are included in Vol. 11 of that work under the title, METROPOLIS.]

SPECIAL CASE STATED by the Minister of Health under the Local Government Act, 1933, s. 229 (3).

The finance committee of the appellant county council, by a minute of Sept. 10, 1935, resolved to recommend that any of their members when attending meetings of the council or of its committees, might draw, in addition to travelling expenses, subsistence expenses at the rate of not more than 3s. for five hours or over, and not more than 5s. for nine hours or over. A number of members subsequently drew subsistence expenses amounting to £11 18s. 0d. By direction of the Minister of Health, the district auditor, Mr. W. A. Ayton, respondent to the appeal, held an extraordinary audit of the appellant council's accounts, for the period Apr. 1, 1935, to Oct. 31, 1935, and disallowed this amount, holding that the Local Government Act, 1933, s. 294 (1) does not authorise the payment of such allowances. This subsection reads :

Subject to the provisions of this section, a county council may defray any expenses necessarily incurred by members of the council, or of any committee thereof to which this section applies, in travelling to and from meetings of the council or committee, or in travelling by direction of the council or committee for the purpose of carrying out any inspection necessary for the discharge of the functions of the council or committee.

The council appealed to the Minister of Health under sect. 229 (1) of the Act, which governs appeals from district auditors, and requested him to state a question of law in the form of a special case for the opinion

of the Divisional Court. The Minister, after setting out the facts, put the following questions :

(i) Whether among the expenses premitted by the Local Government Act, 1933, s. 294, to be defrayed by a county council are included expenses incurred by members of the council or any committee thereof for the purpose of bodily subsistence required by them by reason of absence from home on account of travelling to and attending meetings and returning therefrom.

(ii) Whether the expenses permitted to be defrayed as aforesaid are limited to expenses of actual conveyance or transport.

(iii) Whether the respondent was correct in disallowing the aforesaid payments totalling £11 18s. 0d.

St. John Micklethwait, K.C., A. W. Cockburn & L. K. A. Block, for the appellant council.

Sydney Turner, K.C., and *Erskine Simes*, for the auditor.

W. N. Stable, K.C., and *Leslie Davy*, for the Public Economy Association of South Wales and Monmouthshire.

Micklethwait, K.C. : If all the words of the section are taken together, they give power to allow small sums incidental to travelling which are necessary in addition to the mere costs of travelling. The London County Council (General Powers) Act, 1911, s. 17, lays down that :

It shall be lawful for the council to pay the reasonable travelling expenses incurred by any committee or sub-committee of the council in the performance of duties entrusted to such committee or sub-committee in pursuance of a resolution of the council.

In 1926, presumably because the L.C.C. had been allowing expenses for subsistence, it had been found necessary to amend that provision in the London County Council (General Powers) Act, 1926, s. 37 (1) :

Sect. 17 (Travelling expenses of committees and sub-committees of council) of the London County Council (General Powers) Act, 1911, should be deemed to include and always to have included power for the council in connection with any of their services to defray (if they think fit) the reasonable travelling and subsistence expenses of individual members of committees and sub-committees of the council . . .

The council, therefore, considered for 15 years that they were entitled to pay subsistence, and Parliament thought fit to regularise their custom. "Expenses of travelling" would be limited to the bare cost of transport, but the expression in the Local Government Act, 1929, is "any expenses necessarily incurred in travelling."

Turner, K.C. : The section means what it says : the council may pay only those expenses which have actually been incurred, have been necessarily incurred, and have been incurred in travelling. *Per contra*, many other statutes, e.g., the Local Government Act, 1933, s. 267 :

A local authority, other than a parish council, may, in such cases and subject to such conditions as may be prescribed, pay any reasonable expenses incurred

by members or officers of the authority or of any committee thereof, in attending a conference. . . .

That section does not limit payment to travelling expenses. Until 1929 a local authority had no power to pay travelling or any other expenses, but in that year in the same session, Parliament passed two Acts, one governing England and the other Scotland. The Local Government Act, 1929, was repealed and re-enacted by the Local Government Act, 1933. The Local Government (Scotland) Act, 1929, s. 17, has very different phraseology :

It shall be lawful for a county council to incur expenditure in paying allowances at rates not exceeding those set out in the fourth schedule to this Act in respect of travelling and other personal expenses necessarily incurred and time necessarily lost from ordinary employment by members of the council or of any committee or sub-committee thereof in attending meetings of such council, committee or sub-committee.

One Act provides for the payment of travelling expenses, the other clearly distinguishes between travelling expenses and other expenses. It is obvious that in the English Act the phrase "necessarily incurred in travelling" includes nothing more than the actual expenses of transport.

When Parliament has had the choice of two or more phrases, it must be presumed to have chosen the most apt phrase to express its intention. In the Ministry of Agriculture and Fisheries Act, 1919, s. 7 (5), members of county agricultural committees may have "travelling expenses and subsistence allowances." The Education Act, 1921, s. 126, makes similar provision for education conferences : "reasonable expenses incurred in connection with conferences," and "travelling expenses and subsistence." The National Health Insurance Act, 1924, s. 84, provides for members of insurance committees an allowance for travelling expenses and subsistence allowance, and compensation for loss of remunerative time. The Rating and Valuation Act, 1925, s. 53 (2), allows "travelling and subsistence expenses" to persons attending conferences of county valuation committees.

If Parliament had intended to include subsistence allowances in the Local Government Act, 1933, it would have said so.

Stable, K.C. : The section is not only limited to expenses necessarily incurred in travelling, but the travelling must be "to and from meetings of the council." The allowance covers only such travelling expenses and nothing else.

Micklethwait, K.C., in reply : The phrase includes any expense necessarily incurred during a particular operation.

LORD HEWART, L.C.J. : This is a special case stated by the Minister of Health, under the Local Government Act, 1933, s. 229 (3), and it

raises an individual point upon the construction of a few words in sect. 294 (1) of the Act. Those words are :

Subject to the provisions of this section, the county council may defray any expenses necessarily incurred by members of the council, or of any committee thereof to which this section applies, in travelling to and from meetings of the council or committee. . . .

The question is whether those words include not merely the actual cost of transport or conveyance, but include also some allowance for subsistence. It seems to me that Mr. Turner is right when he says that these words simply mean what they say, "expenses necessarily incurred in travelling," and there seems to be point in Mr. Stable's observation that the words are not merely "in travelling," but "in travelling to and from meetings of the council or committee." If those words had been intended to include any allowance for subsistence, it would have been perfectly easy for the legislature to have expressed its meaning in simple language, and indeed it has done so. Where subsistence is meant it has been expressed again and again in the statutes to which our attention has been directed ; and indeed in this very Act one finds in sect. 267 a provision with regard to conferences of local authorities, where it is provided that "the local authority may pay any reasonable expenses incurred by members or officers of the authority in attending a conference," words which are wider than these. I cannot think that when Parliament said, "incurred in travelling," it meant to say, "in and in the course of travelling" ; and it is by no means without interest to observe that, when the finance committee of this county council brought its minds to bear upon this very question, it recommended in para. 32 that "in addition to the travelling expenses allowed in the minute of the council . . . the following subsistence expenses necessarily incurred be paid," a clear distinction being drawn between travelling expenses on the one hand, and subsistence expenses on the other.

The questions which are asked us are really the same question expressed three times over :

(i) Whether among the expenses permitted by the Local Government Act, 1933, s. 294, to be defrayed by a county council are included expenses incurred by members of the council or committee thereof for the purpose of bodily subsistence required by them by reason of absence from home on account of travelling to and attending meetings and returning therefrom.

I think the true answer to that question is : No.

(ii) Whether the expenses permitted to be defrayed as aforesaid are limited to expenses of actual conveyance or transport.

I think the answer is : Yes.

(iii) Whether the respondent was correct in disallowing the aforesaid payments totalling £11 18s. 0d.

It follows that the answer to that question is : Yes.

BRANSON, J. : I agree. I would only add this : Mr. Micklethwait tells us that had the expression been " expenses of travelling," or " travelling expenses," his point would have been unarguable, and I respectfully agree with him. But I cannot see the distinction for my own part between the expression " travelling expenses " or " expenses of travelling " and the expression used in this section, namely, " expenses necessarily incurred in travelling." It seems to me that what he is trying to do is to substitute the word " whilst " for the word " in." I agree with the decision of my Lord.

DU PARCQ, J. : I agree.

Solicitors : *Torr & Co.*, agents for *D. J. Parry*, Solicitor, Glamorgan County Council (for the appellant council) ; *Sharpe, Pritchard & Co.*, agents for *T. D. Windsor Williams*, Neath (for the auditor) ; *Willis & Willis*, agents for *Gilling & Goodfellow*, Cardiff (for the Public Economy Association).

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

EATON-TURNER v. McKENNA (H.M. INSPECTOR OF TAXES).

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **October 15, 1936.**]

Income Tax—Resident in the United Kingdom—Earnings arising wholly from employment abroad—Whether earnings chargeable to income tax—Income Tax Act, 1918 (c. 40), s. 1, sched. D, case II, sched. E., r. 6—Finance Act, 1922, (c. 17), s. 18.

The appellant, who at all relevant times was a person residing in the United Kingdom for the purposes of the Income Tax Acts, was employed by an English company at the company's mines in West Africa, and the whole of his duties were performed outside the United Kingdom. The greater part of his remuneration was paid in London, and the remainder was paid abroad. The appellant, having been assessed to income tax under sched. E of the Income Tax Act, 1918, as amended by the Finance Act, 1922, s. 18, in respect of the remuneration arising from his employment, contended that under the Acts there was no liability for income tax upon the profits of an employment carried on wholly outside the United Kingdom, and that his employment was not an employment of profit in the United Kingdom for any of the years of assessment within the meaning of sched. E, r. 6, which provides that "the tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom. . . ."

HELD : (i) the appellant in the circumstances was assessable to income tax in respect of his earnings under sched. E, as his case clearly fell within sched. D, case II, which the Finance Act, 1922, s. 18, transferred to sched. E.

(ii) there was no case for the liberal construction applied in *Colquhoun v. Brooks* (1).

(iii) sched. E. must be widened in its scope to relate to the employments which were the subject of the transferred sub-paragraph.

[EDITORIAL NOTE.] This is an attempt to apply the method of construction adopted in *Colquhoun v. Brooks* (1), which applied to a trade carried on outside the United Kingdom, to the case of an employment outside the United Kingdom. In the earlier case the precise meaning of the words of the statute could not be adopted owing to a defect in the machinery of taxation. That defect has been removed, and the difficulties that led to the decision in *Colquhoun v. Brooks* (1) do not now exist, with the result that the words of the schedule must be given their precise meaning and the income here in question is chargeable to tax. One other point also arises in the case. Sched. E is in terms made to apply only to public offices and employments of profit within the United Kingdom, but certain employments outside the United Kingdom having been expressly transferred from sched. D by statutory enactment the words of sched. E restricting it to the United Kingdom must not be read literally, but widened so far as is necessary to transmit the transferred sub-paragraph.

AS TO INCOME TAX CHARGED UNDER SCHED. E, see HALSBURY, Hailsham Edn., Vol. 17, pp. 209-211, paras. 427-429, and FOR CASES, see DIGEST, Vol. 28, p. 85, Nos. 484-489, and note, p. 88, No. 516, which was overruled by the statutory provision and is now finally overruled by this case.]

Cases referred to :

- (1) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493 ; 28 Digest 79, 433.
- (2) *Foulsham v. Pickles*, [1925] A.C. 458 ; 28 Digest 25, 131.

APPEAL from an order of the Court of Appeal (LORD HANWORTH, M.R., ROMER and MAUGHAM, L.JJ.) dismissing an appeal by the appellant from an order of SINGLETON, J., whereby an appeal by the respondent upon a case stated by the commissioners for the special purposes of the Income Tax Acts was allowed and the decision of the Commissioners reversed.

The facts and the arguments fully appear from the judgment of LORD ATKIN.

Raymond W. Needham, K.C., and Cyril L. King for the appellant.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondent.

LORD ATKIN : My Lords, this is an appeal from an order of the Court of Appeal which dismissed an appeal by the appellant from an order of SINGLETON, J. SINGLETON, J., had allowed an appeal by the Crown on a case stated by the special commissioners, who had decided in favour of the appellant. There are several assessments in question, in respect of years beginning with the year 1926-27 and ending with the year 1931-32.

The appellant was employed by the Ashanti Goldfields Corporation, Ltd., as their manager. He began as assistant manager, and he was employed under written contracts under which his duties as far as he was concerned were, as found by the special commissioners, to be wholly performed outside the United Kingdom, namely, in West Africa. A condition of the contracts was that payments were to be made as he directed, and he did in fact direct that payments should be made in this country. The greater part of the payments were, therefore, in fact made by his employers to him in this country ; but for the purposes of this case, in the view which your Lordships are taking of it, that, I think, is probably irrelevant. The appellant is assessed under sched. E, and he is assessed under that schedule by reason of a provision in the Finance Act, 1922, which, by sect. 18 (1), provides :

Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under sched. D [other than certain exceptions] shall cease to be chargeable under that schedule and shall be chargeable to tax under sched. E, and the rules applicable to that schedule shall apply accordingly subject to the provisions of this Act.

Therefore the question which arises is whether or not these profits or gains were profits or gains which would be chargeable to income tax under sched. D of the Act of 1918. Sect. 1 of the Act of 1918 provides :

Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked

A, B, C, D, and E, contained in the first schedule to this Act and in accordance with the rules respectively applicable to those schedules.

Then one comes to sched. D, which provides as follows, by para. 1 :

Tax under this schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing—(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere ; and (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere.

Then by para. 2 it is provided that :

Tax under this schedule shall be charged under the following cases respectively ; that is to say,— . . . case II. Tax in respect of any profession, employment, or vocation not contained in any other schedule.

The reference there is, no doubt, to employments of a public nature which were originally taxed under sched. E.

The appellant in this case has carried on his employment outside the United Kingdom, and upon the finding of the commissioners exclusively outside the United Kingdom, and he says that he is not properly taxable under sched. D, or at any rate not under sched. D, case II, in respect of profits or gains arising from the employment ; and he says that he is not so chargeable because his employment was not an employment within the United Kingdom, but was an employment exclusively outside the United Kingdom. Now, the answer to that is obvious on the plain statement of the words, because the Act says that tax shall be charged “ to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere ” ; and the appellant was, as is found, resident in the United Kingdom during the whole of this period. It would therefore look as though there were a very heavy onus on the appellant to show why he should not be charged in accordance with what would seem to be the plain meaning of the Act. But he says he can show that, because he says that the words in para. 1 (ii) of sched. D (which relates to any person residing in the United Kingdom), “ from any trade, . . . whether . . . carried on in the United Kingdom or elsewhere,” were considered in the well-known case of *Colquhoun v. Brooks* (1) in the year 1889. In that case Mr. Brooks resided in the United Kingdom, and he derived profits from a trade which was carried on in Australia, in which he was a partner. It was held that he could not be assessed upon the whole of the profits arising from that trade, but only from so much as was remitted to this kingdom. The appellant here says, by analogy, that inasmuch as the House of Lords, affirming the Court of Appeal, decided that you must put a limit on those extensive words in respect of trade, so you must

put a limit on the words in respect of employment. That has involved a consideration of the case of *Colquhoun v. Brooks* (1). Now when that case is looked at, it is plain from the language of the learned members of this House who delivered opinions that the principle upon which they went was this. They all of them pointed out that the appellant was obviously within the meaning of the charging words, but they pointed out also that general words of that kind might have to be cut down, because you cannot construe general words in one part of a section or one part of an Act without having regard to all that is contained in the Act, and they pointed to a series of considerations which led them to the view that in respect of trade these words ought to be cut down. They first of all pointed out that the machinery was defective, and hopelessly defective, for charging a person in respect of a trade which was carried on wholly abroad. LORD MACNAGHTEN says at p. 515:

When one tries to apply the rules and provisions of the Act relating to profits and gains from trades to a trade carried on exclusively abroad one gets into hopeless difficulties.

He then pointed out that in respect of a partnership business the return had to be made by the senior partner resident in Great Britain, and that the return bound all the other partners, and no other partner could make a separate return at all. He pointed out that the computation of the duty was to be exclusive of profits arising from lands occupied, a rule which would be very difficult to apply to a trade carried on abroad. He also pointed out that every person engaged in trade was chargeable by the commissioners acting for the parish or place where the trade was carried on, and that was obviously inapplicable to a case where the trade was carried on in Australia. Then, and conclusively in the view of the learned Lords, they came to the conclusion that the particular profits were really charged under case V, which deals with tax in respect of income arising from possessions out of the United Kingdom; and having found that the machinery was inapplicable to a trader who derived profits here from trade carried on abroad, and having found that there was a case which expressly charged him in respect of his interests in that trade abroad, they came to the conclusion that there was sufficient ground, and clear ground, for cutting down those general words. That decision has been followed ever since, and neither this House nor any member of this House is likely to say anything in criticism of that decision.

But how does that reasoning apply to the present case? We have sought to extract from counsel for the appellant, who have, as usual, said everything that could be said on behalf of their client, some statement of what are the provisions in the present Act which would appear to be inconsistent with the intention to charge the holder of an employment in respect of an employment which was exercised abroad; and,

my Lords, there are none. The provision about machinery does not apply. There was a time when it did, and when this schedule was first passed no doubt there would have been, or might have been, a difficulty in charging a person in respect of profits derived from an employment which was carried on abroad, because the person would have to be assessed at the place where the business or employment was in fact conducted. But that was remedied as long ago as 1915, and there is now no such difficulty. And while it is perfectly true that a deficiency in the machinery for collection is an element to be taken into account, when you are construing an Act of Parliament and trying to see whether you are to give words their plain meaning, or whether you are to cut them down, at the same time it is by no means conclusive. There may very well be cases where there was an intention to charge, but where the legislature have failed, through some neglect or improvidence, to provide the necessary machinery. The machinery has now been provided, and in the Act of Parliament as now passed there is no difficulty at all about the machinery. But the other and conclusive element in *Colquhoun v. Brooks* (1) is entirely lacking. There is no case at all to which this matter can be referred. In *Colquhoun v. Brooks* (1) it was the case dealing with foreign possessions which induced the members of the House of Lords to say that there was a case applicable to the matters before them, and therefore the mere general words were not to be relied on, but in the present case it is sufficient to say that by common consent this is not a case of a foreign possession.

I need not discuss the case of *Foulsham v. Pickles* (2) which was decided by this House, and which expressly held that an employment exactly on all fours with the employment here could not be said to be a "foreign possession"; therefore I do not discuss any difficulties that might arise from the conception of an employment being a "possession" at all. Therefore, inasmuch as there is no difficulty about the machinery and there is no alternative case and the words are absolutely clear on the face of them and as wide as they can be, and expressly refer to employment outside this country as well as employment within the country, I for my part find insuperable difficulty in seeing that the appellant here ought to succeed in his contention that he has shown that the wide words of the Act are necessarily to be cut down.

There is one other matter that arises on the case. It is said that the Finance Act, 1922, s. 18, which I have read, transfers the profits or gains chargeable under sched. D to sched. E, and says that the rules applicable to that schedule shall apply accordingly; and then it is said that when you look at the rules applicable to sched. E you will find rule 6, which says that "the tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom," and therefore it is said that those rules cannot apply, and that sched. E cannot apply, and

although you may have transferred this employment from sched. D to sched. E, you have not found a home for it in sched. E, and it must wander between earth and heaven because apparently it is not in sched. D, neither is it in sched. E. My Lords, I think that is much too technical a view, and an incorrect view of the construction. I think the rules of sched. E are intended to be applied so far as they are applicable. Once you have found, as I venture to think your Lordships must find, that this particular profit was chargeable under sched. D, then I think it is transferred to sched. E, and the assessment is properly made in those circumstances. Therefore I think that the opinions of the learned judges below, which I think express exactly the view which I have put before your Lordships, were right, and I suggest to your Lordships that the appeal should be dismissed.

LORD THANKERTON : My Lords, I concur in the reasons which have just been given by my noble and learned friend on the woolsack and also in the conclusions at which he has arrived, and I have very little to add.

The main argument of the appellant in this case is based on the decision of the case of *Colquhoun v. Brooks* (1), but when properly examined it appears to me that *Colquhoun v. Brooks* (1) really is sufficient to decide the case against the appellant, and for these reasons. *Colquhoun v. Brooks* (1) was a case first of all of a trade, and a trade carried on exclusively in Australia. This is the case of an employment ; but in that respect I doubt whether there is so much distinction as regards the argument. But, secondly, in *Colquhoun v. Brooks* (1) it was held by this House that the case could possibly fall under case V, and it is expressly conceded in the present case that it cannot fall under case V. That is the first distinction. Further, in *Colquhoun v. Brooks* (1) this House, as expressed in the opinions which were delivered, was very clearly of opinion that the language of case I was apt to cover the case there unless on a consideration of the whole provisions of the statute there were reasons found why the full meaning should not be attributed to case I ; and their Lordships then went on to consider the other provisions. Both LORD HERSCHELL and LORD MACNAGHTEN gave three reasons, and the same three reasons, why a more limited construction should be applied to case I, and case V should be preferred. As my noble and learned friend has pointed out, not one of those three reasons applies in the present case. The first two reasons, which were founded on the fact that it was a trade with a partnership, do not apply to an employment at all, and the third reason, which related to the place at which the person might be assessed, has been superseded as regards the present case, not, as assumed by the judgments in the Court of Appeal, by the provision of sched. D, misc. r. 4 (1) (b), but by sched. E, r. 18 (5).

That, however, is a mere matter of detail; both these rules were amended by the Finance (No. 2) Act, 1915, s. 32, at the same time and in the same section.

That being the case, it does seem to me, my Lords, that the initial view of their Lordships in *Colquhoun v. Brooks* (1), namely, that you must give effect to the clear words of the case—in this case, case II and not case I—unless you find reasons elsewhere in the statute for a more limited construction, applies in the present case, and that no adequate reason has been produced in the present case for applying that more limited construction. Consequently I agree with the conclusion at which my noble and learned friend on the woolsack has arrived. On the second point, as to the construction of sect. 18 of the Act of 1922, I have nothing to add.

LORD RUSSELL OF KILLOWEN : My Lords, I agree with the motion proposed, and I have nothing to add.

LORD MACMILLAN : My Lords, I also agree.

LORD ROCHE : My Lords, I also agree.

Appeal dismissed with costs.

Solicitors : *Dawson & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

CHABOT v. DAVIES AND ANOTHER.

[CHANCERY DIVISION (Crossman, J.), **October 13, 14, 21, 22, 1936.**]

Copyright—Infringement—Reproduction—Plan of shop-front—Shop-front itself—Design—Copyright Act, 1911 (c. 46), s. 22.

The plaintiff sent to the defendants, at their request, a blueprint plan and elevation of a shop-front and an estimate for the work. No order was given to the plaintiff for the erection of the shop-front. The shop-front was, however, erected for the defendants by a firm which worked on a tracing of the plaintiff's plan and elevation. The plaintiff brought an action against the defendants for infringement of his copyright by authorising the reproduction of the plan. The defendants contended that a plan could not be reproduced by a shop-front:—

Held : (i) the shop-front was a reproduction of the plan, and as the plan was an original literary work within the Copyright Act, 1911, the defendants, by authorising the reproduction, had infringed the plaintiff's copyright in the plan.

(ii) the plan was not a design within the meaning of the Copyright Act, 1911, s. 22.

[**EDITORIAL NOTE.** The case of *Burke v. Spicers Dress Designs* (5) is here considered, and is, in effect, confined to the particular circumstances of the case. That case is not to be taken to mean that everything evolved from a design or a sketch is not a reproduction of the design or sketch and, in particular, it is here decided that a building (in the present case, a shop-front) is a reproduction of a

plan. Such a plan is not a design so as to be taken out of the Copyright Act, 1911, by sect. 22 thereof.

AS TO COPYRIGHT IN PLANS, see HALSBURY, Hailsham Edn., Vol 7. pp. 540, 541, para. 842, and FOR CASES, see DIGEST, Vol. 13, pp. 169, 170, Nos. 66-70.]

Cases referred to :

- (1) *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601 ; 13 Digest 166, 42.
- (2) *Hanfstaengl v. Empire Palace, Ltd.*, [1894] 2 Ch. 1 ; 13 Digest 210, 457.
- (3) *Bradbury, Agnew & Co. v. Day* (1916), 32 T.L.R. 349 ; 13 Digest 210, 459.
- (4) *Hanfstaengl v. Baines & Co.*, [1895] A.C. 20 ; 13 Digest 210, 460.
- (5) *Burke & Margot Burke, Ltd. v. Spicers Dress Designs*, [1936] Ch. 400 ; [1936] 1 All E.R. 99 ; Digest Supp.
- (6) *Dover, Ltd. v. Nurnberger Celluloidwaren Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25 ; 43 Digest 251, 914.
- (7) *Ware v. Anglo-Italian Commercial Agency Ltd.* (No. 1) (1917-23), MacG. Cop. Cas. 346.

ACTION for damages for infringement of copyright. The facts are fully set out in the judgment.

Hon. S. O. Henn Collins, K.C., and *G. H. Lloyd-Jacob*, for the plaintiff : The question is whether a reproduction in three dimensions can be an infringement of a two-dimensional plan. The sole object of the plan was to enable a three-dimensional reproduction to be made. If the defendant's case is right, an architect has no protection whatever for his skill.

E. J. Macgillivray, and *A. J. Irvine*, for the defendants : The plaintiffs are seeking to obtain under the Copyright Act the same protection that they would have if the design were capable of registration and had been registered under the Patent and Designs Act.

There is a radical difference between the two forms of protection. The Copyright Act gives an exclusive right to reproduce a work and there is, in general, no infringement, without reproduction. The Patent and Designs Act protects the idea behind the work. It is sought to be said that this plan has been infringed by applying the idea contained in it to the building. A reproduction of a plan must be in the nature of a plan. In so far as the *tableaux vivants* cases decide the contrary, they are wrong. The plan is capable of registration. It is not the original work but the design that is registered—an idea simply ; and that is quite a different right from copyright. If it is objected that the Board of Trade Rules are against this, then those rules are contrary to Copyright Act, 1911, s. 22. The design has been multiplied by the industrial process of building. [Counsel referred to *University of London Press, Ltd.*, v. *University Tutorial Press, Ltd.* (1), *Bradbury, Agnew & Co. v. Day* (3), *Burke & Margot Burke, Ltd. v. Spicers Dress Designs* (5), *Hanfstaengl v. Empire Palace, Ltd.* (2), *Dover, Ltd. v. Nuremberger Celluloidwaren Fabrik Gebrüder Wolff* (6), *Ware v. Anglo-Italian Commercial Agency, Ltd.* (No. 1) (7).]

CROSSMAN, J. : In this case the plaintiff, Mr. Charles James Chabot, claims by his writ damages for infringement of copyright. By para. 1 of the statement of claim, which I think is substantially admitted, it is alleged that he is "a designer and fitter of shop-fronts and the like, and carries on business at 2, Portland Road, Holland Park, in the county of London." The defendants—the second defendant has been added by amendment—are partners who "carry on business as purveyors to the public of cooked fish and vegetables at 68, Camden High Street, in the County of London."

The facts, as far as they are material, are comparatively short. On Aug. 27, 1935, the plaintiff sent to the defendant, Murray Gilbert Davies, a blue print, which is exhibited here, marked "P. 1," which is a plan and elevation for a shop-front at No. 68, Camden High Street. This was sent to Mr. Davies at his request by Mr. Chabot, as he wished a new shop-front erected on this shop, which he was just about to open as what is known as a fish and chip shop. With this print Mr. Chabot sent a letter in which he says to Mr. Davies :

We have pleasure in handing you blue print and specification of proposed works at the above premises [68, Camden High Street, N.W.]. We estimate the cost of those works to be £325. Should you desire to increase the floor area, the extra cost will be £8.

That is followed by a detailed specification of the work on the shop-front. A little later on, a specification of further works was sent to him. The estimate of the first works amounted to £325; and on Sept. 13 there was sent a further estimate for works amounting to £81 7s., which were to be part of the same shop-front, 68, Camden High Street. Nothing appears to have come out of that, so far as concerns Mr. Chabot; and no order was given him. But in October he saw the shop-front erected at 68, Camden High Street by a firm of Hickman (1928), Ltd. The photograph of that shop-front is exhibit "P. 2." Mr. Chabot, the plaintiff, took the view that the erection of this shop-front was an infringement of his copyright in the plan and elevation "P. 1"; and this action is the result. The defendants admit that the plan and elevation "P. 1" was handed to the firm of Hickmans; and they also admit that they, the defendants, authorised the construction of the shop-front as shown in exhibit "P. 2." Looking at the photograph of the shop-front, I should in any event be forced to the inference that Hickmans, judging from the structure of this, had had the design of the plaintiff before them when they did the work. But the plaintiff has in fact proved that Hickmans actually worked on a tracing of the plan and elevation "P. 1." "P. 1" was handed by Mr. Davies to an employee of Messrs. Hickman and was, I think, possibly by some error or by mistake, traced or copied by Hickmans, or by an employee of Hickmans, and the work was simply done on the basis of that; so that

one is bound to come to the conclusion that it was practically as if Hickmans had worked on Mr. Chabot's original design. The defendants admit also that Mr. Chabot is the author of the plan and elevation "P. 1"; and the owner of the copyright, if any, in it. The question is: Is there any copyright in it? That is the first question I have to determine. The second question is: If there is any copyright in it, have the defendants infringed it by authorising the construction of the shop-front as in "P. 2"?

The material sections of the Copyright Act, 1911, on which this depends, are as follows. The first is sect. 1, which provides:

(1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary work. . . . (2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever.

At the end of subsect. (2) are these words: "and to authorise any such acts as aforesaid." That is, the authorisation of a production or reproduction of the work or any substantial part thereof in any material form whatsoever is an exercise of copyright. Sect. 2 (1) of the Act defines the infringement of copyright, and says:

Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.

If, therefore, the defendants in this case authorised the production or reproduction in any material form whatsoever of any substantial part of a literary work of the plaintiff without the consent of Mr. Chabot, that involves an infringement of Mr. Chabot's copyright, if any, in that work. I do not think any of the provisos of subsect. (2) are material for this purpose. Sect. 35 contains the definitions; and subsect. (1) is:

In this Act, unless the context otherwise requires, "Literary work" includes maps, charts, plans, tables, and compilations.

So that a plan would be a literary work for this purpose. I think, therefore, there is no question that this plan "P. 1" is a literary work within the meaning of the Copyright Act, 1911.

Then the next question is whether this is an original literary work; because it must be that for copyright to subsist in it. I have come to the conclusion that this plan is an original literary work. I am guided as to how I should arrive at the meaning of "original" by the judgment of PETERSON, J., in the case of *University of London Press, Ltd. v. University Tutorial Press, Ltd.* (1). The learned judge is discussing there the question of examination papers, the question being whether examination papers were original literary work. The learned judge says on p. 608:

Assuming that they are "literary work," the question then is whether they are

original. The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.

In the present case I find on the evidence that this plan and elevation originated from the plaintiff, Mr. Chabot; and I hold that it is an original literary work within the meaning of the Copyright Act.

The next question which arises is whether it is taken out of the Copyright Act by the Copyright Act, 1911, s. 22, which says:

(1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process. (2) General rules under the Patents and Designs Act, 1907, s. 86, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

Rules have been made under the Patents and Designs Act, 1907, s. 86; and in effect they provide:

When the design is reproduced, or is intended to be reproduced in more than 50 single articles, unless all the articles in which the design is reproduced, or is intended to be reproduced together form only a single set, as defined by rule 5 of these rules.

The position, therefore, is that in order to take this out of the Copyright Act altogether, and prevent copyright arising in it under sect. 22, I shall have to find, first of all, that the design is capable of being registered; and, secondly, that it is "used, or intended to be used, as models or patterns to be multiplied by any industrial process." Mr. Macgillivray, who has argued this case on behalf of the defendants with very great force and ability—I am very much indebted to him for the way he has assisted me in the matter—says that the building of this shop-front was a multiplication of the design by an industrial process; and therefore the fact that it was multiplied by an industrial process brings it within the second part of subsect. (2). I think this would involve a very strained construction of sect. 22. I cannot believe that such could have been the intention of the section. I find as a fact on the evidence that the plan was not intended to be used as a model or pattern to be multiplied by any industrial process; and certainly not within the meaning of the Board of Trade rule "in more than 50 single articles." I find in fact it is neither used nor intended to be used within the meaning of the section; and therefore it is not necessary for me to determine whether the plan was a design capable of being registered under the Patents and Designs Act; because in my view both conditions must apply before sect. 22 can take it out of the Act.

Then I am left only to determine the question: Is the shop-front a reproduction of a substantial part of the work, that work being this blue print, "P. 1," "in any material form?" If this case had come before the court in the year 1910, I think it is quite clear that I should have been bound by the decision in *Hanfstaengl v. Empire Palace* (2), to hold that this was not an infringement of the plaintiff's copyright; and that the words used in the Act then in force, the only Act which would have applied to it, did not cover this. I think that *Hanfstaengl v. Empire Palace* (2) is quite clear in that way. It amounts to this: that what one may call in the common use of the term a reproduction in another medium altogether of a work is not an infringement. The question is whether the alteration in language which has been used in the Act of 1911 has made a difference, and made a particular act an infringement which would never have been an infringement under the earlier Act. As regards that, fortunately I am assisted by a decision which has taken place since the Act of 1911, which refers expressly to the *Hanfstaengl* case (2). That is the case of *Bradbury, Agnew & Company v. Day* (3). Mr. Macgillivray's point on this part of the case is that the plan cannot be said to be reproduced by the shop-front, because you can only reproduce a plan by something in the nature of a plan, or something of the character of a plan. There seems to me to be a great deal to be said for that contention as a possible contention, though it might perhaps have very unsatisfactory results. But the case of *Bradbury, Agnew & Company v. Day* (3) was very much on the same lines as the present case. In that case the claim was by Messrs. Bradbury, Agnew & Co., the proprietors of "Punch," against the defendant, Harry Day, a music-hall agent, and the proprietor of revues, for damages for infringement of Messrs. Bradbury, Agnew & Co.'s copyright in "Punch" cartoons. The important one, and the best known to everybody, was the well known cartoon "Dropping the Pilot," which was a cartoon of Bismarck being given up by the late Emperor of Germany. What happened was that the defendant reproduced "Punch" cartoons, including that one, as *tableaux vivants* in the revue "Business as Usual," while it was on tour in the country. Then, as it is stated in the report, he also on other dates reproduced in the same revue colourable representations or imitations of the cartoons. In that case COLERIDGE, J., gave judgment in the following terms. He said, at p. 349, that the question

was a mixed one of law and fact. The law of copyright had been extended from time to time in the interests of authors or owners. The Fine Arts Copyright Act, 1862—

that is the Act under which the *Hanfstaengl* (2) case was decided—

by sect. 1 vested "the sole and exclusive right of copying, engraving, reproducing and multiplying" a drawing and the design thereof in the author, and sect. 6 pro-

hibited the repetition, copying, or colourable imitation of the work or the design thereof. The Copyright Act, 1911, repealed those sections and substituted for the language of sect. 6 the following words.

Then he reads sect. 1 (2), which I have read already :

For the purposes of this Act "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever.

Then the learned judge proceeds :

That had the effect of making living pictures possible subjects of infringement of the copyright in a picture, and remedied the effect of the decision of the Court of Appeal in *Hanfstaengl v. Empire Palace* (2), especially as the House of Lords in *Hanfstaengl v. Baines & Co.* (4) had thrown some doubt upon the former decision. The Act also extended the protection of copyright to the reproduction of any substantial part of the original work, thereby extending in favour of the owner of copyright the language used in the repealed sections of the Act of 1862. The Act of 1911 did not, however, disturb the existing definitions of what were the works which were the subject of copyright, though it enlarged them. A cartoon was a work of art, and although it need have no artistic merit to entitle its author to protection, yet it must consist of two essentials—an idea and a design, or an embodiment of that idea. Before 1911 the law protected the design, which meant the particular form in which the idea was embodied ; and since 1911 the law had protected that embodiment, whatever be the medium in which it was expressed. But it was the embodiment which was the subject of copyright, for though the idea was not original, if the embodiment of the idea or any substantial part of it was copied, copyright was infringed ; whereas the idea might be adopted, even if it was original, but if the embodiment of such idea, or a substantial part thereof was not copied, no copyright was infringed. The question of fact which he had to decide was whether the living pictures or any of them were reproductions in a material form of the whole or a substantial part of the original cartoons. His Lordship dealt with the evidence and discussed the cartoons and the corresponding living pictures complained of. He held that except in one case—the living picture "Desolation," which was alleged to be based on the cartoon "The World's Enemy"—there had been no infringement of copyright between May 3 and July 2, and that after Aug. 30 no infringement took place. His Lordship assessed the damages at £61 10s., including a sum paid into court, for the infringement admitted by the defendant, and granted an injunction restraining the defendant with regard to the cartoon "The World's Enemy." Judgment for the plaintiffs was accordingly entered with costs.

It seems to me that, having regard to that decision, I ought not to accede to Mr. Macgillivray's contention when he says that a plan cannot be reproduced by the shop-front which it was meant to represent. It is true the word "represent" is not used there ; but it seems to me that, in the ordinary sense of the term, to produce or reproduce, that this plan and elevation, particularly the elevation, as I can see from the photograph, is a production or reproduction of the plaintiff's plan and, therefore Mr. Davies, by authorising that, has infringed the plaintiff's copyright.

The defendants relied to some extent upon the recent decision of CLAUSON, J., in the case of *Burke & Margot Burke, Ltd. v. Spicers Dress Designs* (5), where the question arose of whether a frock made by the defendants or by their authority was an infringement of a picture of a lady in a similar frock, the copyright of which was in the plaintiff. It has been suggested in this case that the decision of CLAUSON, J., may be contrary to what I am now deciding; but after reading the judgment very carefully, and after speaking to the learned judge on the subject of his decision, I have no doubt that what was decided there was not that reproduction could not be an infringement, but that this particular reproduction was not. The learned judge found at p. 406 :

When I look at the frock *qua* frock, either spread out on a table or held up to my view, it seems quite impossible for me to hold that that frock *qua* frock is a reproduction of the sketch "M.L.B.1."

If the learned judge had meant to say it could never be a reproduction, it was unnecessary for him to put it in the way in which he has put it there. I have no doubt that what he decided there was that as a matter of fact it was not a reproduction. As regards this particular case, I find as a fact that, looking at the photograph of the shop-front and the plan, it is a reproduction if it can be one—if the word "reproduction" is sufficient. Holding, as I do, that "produce or reproduce" is capable of including such a case as this, I come to the conclusion that there has been infringement of the plaintiff's copyright, for which the plaintiff is entitled to damages.

The only question which remains for me to decide, as the parties wish me to assess what I consider the damages should be, is what would be fair damages in this case. I have had very great difficulty in arriving at those fair damages. It seems to me if one were to stretch a point, one might find a very large sum of damages in this case. Damages presumably are at large in such a matter. But I think I am bound to consider this: What is the remuneration which the plaintiff would fairly have got for his plan if the defendant had applied for his leave and licence to use it? I think I ought not to give beyond what I have come to the conclusion on the evidence would be a reasonable remuneration to the plaintiff for his work. In arriving at that, I do not limit myself to what is the precise amount of the commission which an architect under the scale of the Royal Institute of British Architects, exhibited in this action as "D. 13," would be entitled to. If I confined myself to that, on the basis of the work done, which he would have been entitled to take as the basis on which the percentage is founded, his remuneration would work out at about £52. But having heard the plaintiff's evidence, and having considered the matter, I think that the sum which he himself put forward of 100 guineas is a fair remuneration. I assess the damages

at that sum ; and give judgment for the plaintiff for 100 guineas, with the costs of the action.

Solicitors : *Braby & Waller* (for the plaintiff) ; *Thorp, Saunders & Thorp* (for the defendants).

* [Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law*.]

DOLBY v. HALMSHAW.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and du Parcq, JJ.), **October 21, 1936.**]

Game—Licence—Coursing—Greyhounds chasing and killing hare—No organised meeting—Game Licences Act, 1860 (c. 90), s. 5 (3).

H. was riding in a field with the owner's permission and had with him two greyhounds. No other persons were present. The greyhounds chased and killed a hare, which H. collected. H. had no licence to kill game :—

HELD : the chasing and killing of the hare was "coursing" within the Game Licences Act, 1860, s. 5 (3), and no offence had been committed against sect. 4 of that Act.

[EDITORIAL NOTE. The Game Licences Act, 1860, s. 4, makes it an offence to kill game without a licence, and by sect. 5 certain exceptions to that requirement are made, and the question here is whether the exception in subsect. 3, "Coursing with greyhounds," means only such organised coursing as may be seen at a sporting meeting for the purpose ; or whether it includes coursing hares with just one greyhound. Contrary to the view taken by the courts in Northern Ireland, the Divisional Court held that the latter was the correct view.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 15, pp. 452, 453, para. 838 ; and FOR CASES, see DIGEST, Vol. 25, pp. 386, 387, Nos. 359-375 ; and FOR THE GAME LICENCES ACT, 1860, ss. 4 and 5, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, pp. 1086, 1087.]

Case referred to :

(1) *R. (Nevin) v. Clarke*, [1930] N.I. 174 ; Digest Supp.

APPEAL by way of case stated by justices of the peace for the Parts of Lindsey in Lincolnshire.

On Nov. 9, 1935, Halmsshaw was riding his horse in a field which was the property of a Mr. Dewey who had given Halmsshaw permission so to do. With him Halmsshaw had two greyhounds which he kept for coursing and sport. The greyhounds chased a hare and killed it, whereupon Halmsshaw collected the hare. Halmsshaw had no licence to kill game. Dolby, a revenue officer, preferred an information against Halmsshaw charging him with having killed certain game, namely, a hare, he not then being in possession of a licence to kill game, contrary to the Game Licences Act, 1860, s. 4. Sect. 5 (3) of the Act exempts from sect. 4 :—"The pursuing and killing of hares respectively by coursing with greyhounds or by hunting with beagles or other hounds." Before

the justices, Halmshaw contended that his acts on Nov. 9, 1935, came within the scope of sect. 5 (3) of the Act. The revenue officer, contended that these facts did not constitute coursing. The justices were of opinion that Halmshaw was coursing with greyhounds within the meaning of sect. 5 (3) and dismissed the information. The revenue officer appealed.

T. N. Winning for the appellant : The Act gives protection if the main object is the matching of dogs, but not if the main object is for game. The main object of coursing is the comparative trial of dogs, and not the catching of the hare pursued.

W. T. Monckton, K.C., and *C. L. Henderson* for the respondent were not called upon.

LORD HEWART, L.C.J. : This appeal in my opinion ought to be dismissed. It raises a short and simple point whether the justices were in law entitled to come to the conclusion to which they came in a prosecution of the respondent for unlawfully killing a hare when he had no licence to kill game. The answer which was made on behalf of the respondent was that he came within one of the exceptions to be found in sect. 5 of the Act of 1860, namely, exception (3) which provides for : "The pursuing and killing of hares respectively by coursing with greyhounds, or by hunting with beagles or other hounds." The justices were of the opinion upon the facts that the respondent came within that exception.

The facts are very simple. The respondent on the day mentioned was riding his horse in a field and had two of his greyhounds with him. There were no other persons and no other dogs present. The two greyhounds chased a hare in the field, overtook it and killed it, and the respondent then went across to the place where the dogs were and picked up the hare. The contention on behalf of the appellant was that those facts did not constitute coursing within the meaning of the statute, and that, on the other hand, the exception applies only to organised coursing meetings. The respondent for his part contended that "coursing" meant any hunting of hares with greyhounds and was the sport of hunting with greyhounds by sight, and that coursing need not be at an organised meeting to be within the meaning of the exception. The opinion of the justices was that :

coursing within the meaning of the exception meant the pursuing of hares by greyhounds not solely at coursing meetings, but also for sport other than that of a man going out with a single greyhound to pick up what game he could get, and also by way of training the greyhounds ; and that the acts of the respondent were consistent with his testing one dog against the other, and that the respondent was coursing with greyhounds within the meaning of the exception.

Our attention has been directed to a case in Northern Ireland, *R. v. Clarke* (1), where the defendant, it was said, coursed a hare with a single

greyhound with the written permission of the owner of the land so to do. MOORE, L.C.J., said at p. 180 :

The words " coursing with greyhounds " refer to the well-known sport of coursing. I do not think that it applies to a man going out with a greyhound, picking up what he could get. If that was the meaning of coursing, viz., going out with a single dog, why should not all other dogs be included also, such as a lurcher ? The owner of the greyhound must be employed in the sport of coursing.

With all due respect to that judgment, I find it a little difficult to reconcile the scheme of sect. 5 of the statute which sets out a series of exceptions and exemptions. Leaving aside the exemptions which refer to persons, the exceptions are :

- (1) The taking of woodcocks and snipes with nets or springes in Great Britain ;
- (2) The taking or destroying of conies in Great Britain by the proprietor of any warren ;

and then the exception with which we are at the moment concerned,

- (4) The pursuing and killing of deer by hunting with hounds ; (5) The taking and killing of deer in any enclosed lands by the owner or occupier of such lands or by his direction or permission.

I find it a little difficult to perceive why this third exception should be restricted to a well known sport. Now what is meant by " a well known sport " ? I think the matter is put, if I may say so, perfectly clearly by the other learned judge in the Irish court, BROWN, J., who says at p. 181 :

In my opinion such coursing as has been disclosed was not within the exception, which refers to the coursing of hares in an organised way.

Where does one find any language indicating some organised way in this exception ? If the legislature had intended to limit the coursing which was excepted to a coursing in an organised way, nothing would have been easier than to say so. I am not at all sure that the justices in troubling their minds with questions as to which was the subordinate art and which was the master art, and other questions of that kind, have not gone further than they need. I am not at all sure that it is necessary to find " that the acts of the respondent were consistent with his testing one dog against the other."

It seems to me that on these facts the justices were entitled to say that what had taken place was the killing of a hare by coursing with greyhounds, and that they rightly acquitted the respondent.

BRANSON, J. : I agree.

DU PARCQ, J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Taylor, Jelf & Co.*, agents for *Eric W. Scorer*, Lincoln (for the appellant) ; *Ellis & Ellis*, agents for *W. Bains*, Brigg (for the respondent).

[Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.]

BROOKS v. JEFFERIES.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and du Parcq, JJ.), **October 20, 1936.**]

Street Traffic—Traffic signs—"Halt at major road ahead"—Part of sign only seen by motorist—Obedience to order as seen—Failure to comply with whole order.

A motorist was approaching certain cross-roads when he passed a road sign which read: "Halt at major road ahead." The word "Halt" was in large letters fitted with reflecting lenses, the other words being in small letters without reflecting lenses. It was dark at the material time and the motorist could reasonably see only the word "Halt." He had, however, passed the sign previously in daylight. The motorist halted at the sign and then slowly approached and turned into the major road. The construction of the sign conformed with the directions for such signs in the regulations and orders issued by the Minister of Transport:—

HELD: the motorist failed to conform to the indication given by the sign and thereby committed an offence against the Road Traffic Act, 1930, s. 49 (b).

[**EDITORIAL NOTE.**—This case would appear to make the provisions of the Road Traffic Act, 1930, s. 49b, absolute in character and an unintentional breach of the duty imposed by the section would appear to be an offence thereunder. The only obstacle to such a deduction from the present case is that the defendant admitted he had passed the sign on a previous occasion in daylight and it may be that he must, therefore, be taken to have knowledge of the direction upon it. It is essential under the section that the sign conforms in every respect with the orders and regulations relating to such signs.

AS TO NEGLECT OF TRAFFIC DIRECTIONS, see HALSBURY, 1st Edn., Supp. Vol. 27, Street Traffic, para. 583; and FOR THE SECTION, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 647; and STONE'S JUSTICES' MANUAL, 1936, p. 1704.]

APPEAL by way of case stated from a decision of the justices of the peace of Swindon.

In the evening of Feb. 13, 1936, the respondent Jefferies, at Stratton Saint Margaret, Wiltshire, was driving a car along a minor road towards a major road crossing at a cross-roads known as Lower Stratton cross-roads. On the minor road and 20 yards before its junction with the major road was a sign erected on the near side of the minor road. The sign conformed with the directions for such signs in the regulations and orders of the Minister of Transport, the word "Halt" being in large letters fitted with reflecting lenses, while the remaining letters were smaller and not fitted with lenses. The respondent had previously passed the sign in daylight, but, at the time of the acts complained of it was dark. At this time the only word he could reasonably see was the word "Halt," and this was the only indication he received. Accordingly he stopped his car at or near the sign and then slowly and cautiously approached and turned into the major road.

Information was preferred against the respondent under the Road Traffic Act, 1930, s. 49 (b) charging him with having failed to conform with the directions as ordered by the sign. At the hearing of the information it was contended for the respondent that under the conditions the only indication given to him by the sign and which could reasonably be conveyed to him was to halt, and that he had done so. The appellant had contended that the car should have been stopped at the intersection of the minor with the major road and not at an earlier position. The justices held that the respondent had complied with the indication he had received and dismissed the information.

J. T. Molony for the appellant.

Laurence Vine for the respondent.

LORD HEWART, L.C.J. : This case is too plain for argument. The justices did not find that the sign was erected in such a way that it did not comply with the statutory orders. They found that the respondent omitted to do something which he was obliged to do and that he did something he was not told to do. The respondent admitted having on a previous occasion passed the sign in daylight. In my opinion there is nothing at all in the case and it must go back with a direction to find the offence proved.

BRANSON, J. : I agree.

DU PARCQ, J. : I agree.

Solicitors : *Watson, Sons & Room* (for the appellant) ; *Amery-Parkes & Co.* (for the respondent).

[*Reported by* HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

ELECTRIC AND MUSICAL INDUSTRIES LTD. AND
BOONTON RESEARCH CORPORATION *v.* LISSEN LTD.ELECTRIC AND MUSICAL INDUSTRIES LTD. AND
BOONTON RESEARCH CORPORATION *v.* G. KALIS
(Trading as ANDY'S RADIO SUPPLIES) (CONSOLIDATED).[CHANCERY DIVISION (Luxmoore, J.), **October 13, 15, 1936.**]*Patent—Infringement—Order for delivery up—Infringement by particular user only.*

The plaintiffs had been successful in an action against the defendants for infringement of their letters patent, and the registrar had made an order (*inter alia*) for delivery up as prayed in the statement of claim—the judgment being silent as to the form of order to be made. The defendants applied to the court to have the registrar's order varied so as to exclude delivery up, on the ground that the infringement proved was by user only:—

HELD: as the valve was capable of use without infringement and the set without the valve was not an infringement, no order for delivery up ought to be made.

[EDITORIAL NOTE] The making of an order for delivery up of infringing articles is a matter for the discretion of the court. In the present case the valve as an article was not an infringement of the patent, it was only that it was possible to use it in one particular way which was an infringement. The only ground therefore upon which any claim could be based was that there was a temptation to break the injunction not to use the valve in a way that infringed the plaintiffs' rights. It must, of course, be assumed that the court's order will be obeyed, and there was no case for an order to deliver up anything.

AS TO ORDERS FOR DELIVERY UP OF INFRINGING ARTICLES, see HALSBURY, 1st Edn., Patents, Vol. 22, p. 224, para. 458; and FOR CASES, see DIGEST, Vol. 36, p. 826, Nos. 3094-3102.]

Case referred to:

- (1) *Mergenthaler Linotype Co. v. Intertype Co., Ltd.* (1926), 43 R.P.C. 381; 36 Digest 826, 3094.

ON June 21, 1934, the plaintiffs brought an action against the defendants for infringement of their letters patent No. 376,737 entitled: "Improvements in electric wave amplifying apparatus." Claim 1 of the specification read as follows:

In an amplifier circuit including an electric discharge tube, wherein alternating current energy is relayed through the control action of a grid electrode upon an electron current in the vacuous space of the tube, the method of adjusting the transmission through said amplifier which comprises the steps of controlling by different amounts the portions of the said electron stream flowing through different regions of said vacuous space by a special design of the tube electrodes, impressing upon said control grid a steady polarising voltage, and adjusting said polarising voltage to a value substantially different from that at which the total electron current falls to zero.

It was held in the action that claims 1, 2, 5 and 6 were valid and that claim 1 had been infringed, and the plaintiffs were granted an injunction against the defendants. The registrar then made an order granting the

relief asked for in the prayer of the statement of claim, paragraph 3 of the prayer being as follows :

Delivery up or destruction upon oath of all articles in the possession, custody or control of the defendants constructed in infringement and/or constructed so as to operate in infringement of the said letters patent.

The defendants applied to the court to have the order of the registrar varied so as to exclude delivery up.

Trevor Watson, K.C., and *Basil Drewe* for the plaintiffs.

G. H. Lloyd-Jacob and *Lionel Heald* for the defendants.

Lloyd-Jacob : The registrar has made the order in the form asked for in the prayer to the statement of claim, nothing having been said in the judgment as to the form of order. The claim was construed so as only to be infringed by user, and there ought not to be any order for delivery up in this case.

Trevor Watson, K.C. : What is claimed here is a method of operating and it is said that an object cannot infringe. The remedy of delivery up was devised to prevent a defendant from disposing, after a patent had expired, of infringing articles made during the life of the patent. In *Mergenthaler Linotype Co. v. Intertype Co., Ltd.* (1), a portion of a machine which did not infringe *per se* was ordered to be delivered up. It is submitted that where you have an article which is a standing temptation to the user to infringe, then it should be delivered up. There is no other purpose in providing for a large grid bias in a wireless set except for use with a valve in order to infringe ; in fact, if a listener wants to listen in to a near station he must infringe. Here is a set which is a potential infringement and which can hardly be used except to infringe ; that is a case where the plaintiffs are entitled to some protection.

LUXMOORE, J. : I do not think that I ought to order delivery up of anything in this case. So far as I understand, the infringement which was complained of and has been proved is a method of using a set with a particular kind of valve and with a particular part designed to allow the user of negative grid bias beyond that which was used before the patent was granted. It is admitted that the delivery up of the valve itself cannot be claimed, because the valve is capable of being used without any infringement at all. If the valve is not used, it is also admitted that the other part of the set is innocuous so far as the patent is concerned. That being the case, an injunction having been granted to restrain infringement of the patent, I do not think that it would be right and, in the exercise of my discretion, I refuse to order the delivery up of anything, or the alteration of the sets in any way, because the only ground on which Mr. Trevor Watson really asks me to make the order is that the defendants, who have been placed under an injunction, might be tempted to break the injunction. I do not think that that in itself

is a sufficient ground, having regard to the nature of the receiving set, the nature of the monopoly which the plaintiffs have and the fact that infringement consists solely in the method of using the set with the particular valve. I think that there must be no order for delivery up of anything in this case.

Lloyd-Jacob : I gave an undertaking, on behalf of my clients, to keep an account, and the wording of that followed the wording of the part which your Lordship has just considered : " And the defendants by their counsel undertaking to keep an account of all articles constructed in infringement and/or constructed so as to operate in infringement of the said letters patent." Your Lordship sees the words " all articles." I wanted to tell your Lordship that, of course, what my clients have done has been to keep an account of every possible thing which it could ever be said related to this piece of apparatus.

LUXMOORE, J. : I think that the words " constructed in infringement and/or " should be struck out of the undertaking.

Solicitors : *Broad & Son* (for the plaintiffs) ; *Bentleys, Stokes & Lowless* (for the defendants).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Re SYMM'S WILL TRUSTS, PUBLIC TRUSTEE v. SHAW.

[CHANCERY DIVISION (Bennett, J.), **October 14, 15, 22, 1936.**]

Powers—Survivorship of power—Construction—Will—Power to trustees or assigns—Public Trustee.

Perpetuities—Will—Power to distribute residue—Discretion of trustees—Among such of the descendants of testator's brothers and sisters in such shares and at such proper times as the trustees should determine.

By his will a testator, who died in 1887, appointed four named persons as the executors and trustees of his will and gave his real and personal estate to them upon trust that they and the survivors and survivor of them and the heirs, executors or administrators of such survivor their or his assigns, each and all of whom were intended to be included in the term " my trustees " thereafter used, should distribute the net residue of his estate to and among such of the descendants of his brothers and sisters in such shares, proportions or amounts and at such proper times as the trustees, in whom he " placed full confidence," in their absolute and uncontrolled discretion should determine. Two of the trustees died in 1902, one retired in 1907, when another was appointed who retired in 1923 in favour of yet another. In 1934 the two remaining trustees retired and the Public Trustee was appointed in their place. In a summons to determine the effect of the will, it was argued by the testator's next of kin that : (i) the gift of the residuary estate was void, because there was no longer anybody who, in accordance with the terms of the will, was entitled to exercise the power of selecting the descendants of the testator's brothers and sisters who were to take, and (ii) the gift was void as infringing the rule against perpetuities, because the descendants of the testator's brothers and sisters might be selected by persons

ascertained outside the limit fixed by the rule against perpetuities, and might themselves be persons who took outside that time :—

HELD : (i) the Public Trustee, as an assign, came within the definition of "my trustees" in the will and was entitled to exercise the power of selection.

(ii) the gift was void as infringing the rule against perpetuities.

[EDITORIAL NOTE.] In the will here construed the question is raised whether a power given to "my trustees in whom I have complete confidence" is given to the trustees personally or whether it can be exercised by the Public Trustee, who ultimately became trustee of the trusts of the will. The Public Trustee was held to be able to exercise the power as being within the definition of trustees which included the then trustees or their assigns.

FOR THE LAW ON THIS POINT, see HALSBURY, 1st Edn., Vol. 28, Trusts, pp. 153-155, paras. 316, 317; and FOR CASES, see DIGEST, Vol. 43, pp. 872-875, Nos. 3163-3191.]

Cases referred to :

- (1) *Re De Sommery, Coelenbier v. De Sommery*, [1912] 2 Ch. 622; 37 Digest 107, 414
- (2) *Re Blew, Blew v. Gunner*, [1906] 1 Ch. 624; 37 Digest 79, 192.

ADJOURNED SUMMONS for the determination of questions arising on the will dated Oct. 24, 1885, of Joshua Robinson Symm, who died on July 19, 1887, and whose will and a codicil thereto not material to the present proceedings were proved by all the executors named in the will in the Principal Probate Registry on Sept. 17, 1887.

The testator after appointing four named persons as the executors and trustees of his will gave, devised, and bequeathed all his real and personal estate to them upon trust that they and the survivors and survivor of them and the heirs, executors or administrators of such survivor, their or his assigns (each and all of whom were intended to be included in the term "my trustees" thereafter used) should sell and convert such parts thereof as should not consist of money and after payment of his debts and funeral and testamentary expenses and various legacies should distribute the net residue of his estate to and among such of the descendants of his brothers and sisters in such shares, proportions or amounts and at such proper times as the trustees, in whom he "placed full confidence," in their absolute and uncontrolled discretion should determine. The questions which arose on these provisions of the will were : (i) whether the discretion given to the trustees to distribute the residuary estate of the testator among the descendants of his brothers and sisters was exercisable by the trustees for the time being of the will or whether such discretion was given only to the original trustees of the will, the trusteeship having devolved, in the manner set out in the judgment herein, on the Public Trustee, and (ii) whether the gift of the testator's residuary estate was wholly or to any and what extent void as infringing the rule against perpetuities or otherwise.

J. Neville Gray, for the plaintiff, the Public Trustee, stated the facts.

G. P. Slade, for the first defendant, was not interested in these questions in the summons.

E. Milner Holland, for the remaining defendants who represented the next of kin of the testator : The power is void as offending against the rule against perpetuities since the will contemplates that it may be exercised at times other than the death of the testator. The donee of the power and the occasion on which it can be exercised may both be in existence beyond the limits of the rule : see JARMAN ON WILLS, 7th Edn., Vol. 1, p. 279, para. 3, and p. 281, last paragraph, and *Re Blew, Blew v. Gunner* (2).

If your Lordship is against me on the perpetuity point I say that there is no one now in existence who comes within the description of "my trustees," who can exercise the power. The Public Trustee is not an "assign" within the meaning of the word in this will, and as he is not an assign of the survivors or a survivor of the four named persons.

BENNETT, J. : Is a new trustee appointed by the court in whom the whole property has vested an assign ?

Milner Holland : In my submission, no. And the use by the testator here of the words "in whom I place full confidence" shows that he was limiting the discretion to the originally named trustees.

Neville Gray : This is a good power given to the trustees for the time being of the will. "My trustees" cannot be limited to the original four named people because in the definition it includes not only the four named persons, but the survivors of them, the executors or administrator of the last survivor and the assigns of any of the people named before, not merely of the survivor or survivors of the four named persons. Nor is the power bad for perpetuity because a limitation must be implied that the trustees are bound to exercise it within a reasonable time after the property in respect of which they are to exercise the power has fallen into residue. That appears from the use by the testator of the words "within a proper time."

Milner Holland in reply : It is enough to make the power bad if it is capable of being exercised beyond the period permitted by the rule : see *Re De Sommery, Coelenbier v. De Sommery* (1). Here the trustees might quite properly in the exercise of their absolute and uncontrolled discretion determine to give an infant born after the death of the testator a share of the property but to vest it only on his attaining his majority. It is fallacious to suggest that where the power is capable of being exercised beyond the period permitted by the rule that it does not come within the rule, because it would be unreasonable to exercise it beyond the rule.

BENNETT, J. : The testator appointed four named persons trustees of his will. Having so appointed them he gives all his real and personal

estate and effects whatsoever and wheresoever to them upon the trusts thereafter declared. Then his will proceeds in these terms :

Upon trust that my said trustees and the survivor and survivors of them and the heirs, executors or administrators of such survivor their or his assigns (each and all of whom are intended to be included in the term "my trustees" hereinafter used) shall and do . . . sell, realise, get in and convert into money such parts of my trust estate as shall not consist of money or securities for money.

After making divers provisions in his will for the settlement of various legacies, the testator disposed of his residue in these terms :

And upon trust to pay over divide and distribute the net residue of my trust estate which shall remain in their hands to and among the descendants or such one or more to the exclusion of any other or others of the descendants of my brothers and sisters or one or more of them and in such shares, proportions or amounts and at such proper times as my trustees in their absolute and uncontrolled discretion shall determine after making such inquiries and giving such consideration as they shall deem proper to circumstances, conditions and characters of all or any one or more of such persons and to previous gifts, advancements and benefactions if any made by me to or for all or any of such persons either in my lifetime or by this my will or any codicil thereto it being my intention to leave the distribution of my residuary trust estate among the class of persons aforesaid in the absolute and uncontrolled discretion of my trustees in whom I place full confidence.

The testator died many years ago in 1887, and the Public Trustee is now trustee of his will. The will was originally proved by the four persons named by the testator therein as his executors and trustees. James Shaw, one of the four died on Jan. 20, 1902, William Mallinson, another of the four, died on Dec. 16, 1902, leaving two of the original four, John Salmon Quilter and Thomas Kilner Mellor as the trustees of the will. On Apr. 5, 1907, Quilter and Mellor appointed a gentleman, Charles Wheawill a trustee of the will in place of Quilter, and the trust property was assigned to Mr. Mellor and Mr. Wheawill. In 1923 Mr. Mellor was desirous of retiring from the trusts and in his place a Mr. Sudworth was appointed, Mr. Mellor retiring, and the trustees then being Mr. Wheawill and Mr. Sudworth. In 1934 Mr. Wheawill and Mr. Sudworth retired and the Public Trustee was appointed trustee of the will in their place.

The question that is asked is whether the gift of the residuary estate is wholly or to any and what extent void as infringing the rule against perpetuities or otherwise. The first point taken on behalf of the testator's next of kin is that the gift is void because there is no longer anybody who, in accordance with the terms of the testator's will, is entitled to exercise the power of selecting the descendants of the testator's brothers and sisters who are to take. That argument is rested upon the terms by which the testator has, in his will, defined the persons whom he describes as "my trustees." It is said that the Public Trustee is neither the heir nor the executor nor administrator of the survivor of the trustees originally named in the will, nor is he an assign of the survivor, it being

intended, upon the true construction of the will, in order to be included in the expression " my trustees " a person had to be able to say of himself he was an assign of the survivor of the four named persons. As a matter of construction I do not take that view. As a matter of construction I think an assign is a person to whom the property has been assigned, either by the four original named trustees or by any of the survivors or by the survivor of them and the Public Trustee in my judgment falls within the definition.

The next point taken is that the gift is void as infringing the rule against perpetuities, because the descendants of the testator's brothers and sisters may be selected by persons ascertained outside the limit fixed by the rule against perpetuities, and may themselves be persons who take outside that time. Mr. Gray, arguing the matter in the interests of the descendants, concedes that, in the circumstances of the case, the donees of the power are persons who may be ascertained outside the limit of time laid down by the rule against perpetuities. But he says that the persons who may be the trustees must exercise their power in favour of persons who are ascertainable within the time allowed by the rule. There is nothing in the language of the will which, in my judgment, confines the descendants who may take to descendants who must be born within a life in being at the death of the testator and 21 years after the death of that life, and it seems to me that the power is capable by the terms of the will of being exercised outside the period of time limited by the rule. If that be so it follows from the principles stated by PARKER, J., in *Re De Sommery, Coelenbier v. De Sommery* (1) that the gift is void and I so decide.

Solicitors : *Peacock & Goddard* (for the plaintiff) ; *Sharpe, Pritchard & Co.*, agents for *Maples & McCraith*, Nottingham (for the first defendant) ; *Crossman, Block & Co.*, agents for *Hoyle, Richmond & Aynsley*, Consett (for the other defendants).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

OLSEN AND ANOTHER v. CORRY AND THE GRAVESEND AVIATION, LTD.

[KING'S BENCH DIVISION (Greaves-Lord, J.), **June 18, 19, 22, July 20, 30, October 19, 1936.**]

Master and Servant—Apprenticeship—Benefit of infant—Common employment—Volenti non fit injuria—Imperfect system of teaching—Delegation of instruction.

The first plaintiff, who was at the time about 17 years of age, on Feb. 18, 1935, entered into a deed of apprenticeship with the defendants, the Gravesend Aviation, Ltd., whereby the latter covenanted that they would, through their officers during the term of 2 years to the best of their power, teach him or cause him to be taught the business or profession of a ground engineer. The second plaintiff, the mother of the first, joined in the said deed and paid to the aviation company £100 as a premium and the consideration of the said deed. The deed contained an exemption of the company from all liability, costs and damages in respect of any injury caused to the apprentice on the aerodrome, during a flight or for any reason whatsoever. The work of instruction was entrusted to a superintendent engineer, but it was found as a fact that he taught a system that was defective. On May 18, 1935, after about 2 months' tuition, he was told to take part as ground mechanic in the starting of the engine of an aeroplane of which the defendant Corry was the pilot. Owing to a misunderstanding the switches were put on before the infant plaintiff gave the word "contact" and the engine started, with the result that plaintiff's arm was severely injured:—

HELD: (i) the accident was due to the imperfect method of teaching adopted by the company.

(ii) the exemption in the deed from all liability included liability for negligence.

(iii) in so far as the deed exempted the company from liability for negligence it was not for the benefit of the infant and therefore void.

(iv) there was nothing in the covenant to teach to show that the company delegated that duty to the superintendent engineer, and the duty to see that a proper system of tuition was adopted remained with the company. Therefore any negligence in adopting a wrong system was the negligence of the company and not of a fellow servant of the infant plaintiff, and the defence of common employment was not available.

(v) the infant plaintiff was a mere pupil and had no knowledge and appreciation of the risk of swinging the propeller in such circumstances and the doctrine of *volenti non fit injuria* did not apply.

(vi) the premium of £100 was not recoverable by the second plaintiff.

[EDITORIAL NOTE.] The chief matter for discussion here was whether the deed of apprenticeship taken as a whole was one for the infant's benefit. It would not appear to have been shown by evidence whether the infant could or could not have obtained different or better terms with another firm, and the case could not therefore be brought within the terms of the judgment of LUSH, J., in *Leslie v. Fitzpatrick* (15), at p. 232. It is well known that flying is a dangerous occupation and is dangerous both to fliers and the ground staff at the aerodrome. In practically all contracts by air carriers wide exceptions from liability for accidents are included, and it may be that in a future case, evidence to this effect may be tendered. If it is this aspect of the case may possibly require reconsideration. In addition, the exclusion of the defence of common employment by reason of the company being liable for the system of instruction adopted and not having delegated it to an employee is in-

teresting as distinguishing the case of *Cribb v. Kynoch, Ltd.* (1), where a properly devised system was carried out faultily.

AS TO INFANT'S CONTRACT OF SERVICE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 121-123, para. 202; and FOR CASES, see DIGEST, Vol. 34, pp. 41-44, Nos. 168-206.

AS TO DELEGATION, see HALSBURY, Hailsham Edn., Vol. 22, p. 190, para. 318; and FOR CASES, see DIGEST, Vol. 34, pp. 210, 211, Nos. 1730-1743.]

Cases referred to :

- (1) *Cribb v. Kynoch, Ltd.*, [1907] 2 K.B. 548; 34 Digest 211, 1742.
- (2) *Smith v. Baker & Sons*, [1891] A.C. 325; 34 Digest 202, 1657.
- (3) *Rutter v. Palmer*, [1922] 2 K.B. 87; Digest Supp.
- (4) *Manchester, Sheffield, & Lincolnshire Ry. Co. v. Brown* (1883), 8 App. Cas. 703; 8 Digest 63, 428.
- (5) *Travers (Joseph) & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73; 8 Digest 44, 266.
- (6) *Taubman v. Pacific Steam Navigation Co.* (1872), 26 L.T. 704; Digest Supp.
- (7) *Thompson v. Royal Mail Steam Packet Co.* (1875), 5 Asp. M.L.C. 190, n; 8 Digest 126, 851.
- (8) *Haigh v. Royal Mail Steam Packet Co., Ltd.* (1883), 52 L.J. Q.B. 640; 41 Digest 667, 4984.
- (9) *The Stella*, [1900] P. 161; 41 Digest 667, 4985.
- (10) *Pyman S.S. Co. v. Hull & Barnsley Ry. Co.*, [1915] 2 K.B. 729; 41 Digest 976, 8660.
- (11) *Green v. Thompson*, [1899] 2 Q.B. 1; 34 Digest 506, 4193.
- (12) *Bromley v. Smith*, [1909] 2 K.B. 235; 34 Digest 43, 191.
- (13) *Valentini v. Canali* (1889), 24 Q.B.D. 166; 28 Digest 164, 207.
- (14) *Fagan v. Green & Edwards, Ltd.*, [1926] 1 K.B. 102; Digest Supp.
- (15) *Leslie v. Fitzpatrick* (1877), 3 Q.B.D. 229; 34 Digest 42, 184.

ACTION for damages for personal injuries and for return of a premium paid upon the execution of a deed of apprenticeship.

The defendants, The Gravesend Aviation, Ltd., carried on a school of flying, of which the defendant Corry was a pupil and a holder of an "A" licence. The infant plaintiff on Feb. 18, 1935, entered into a deed of apprenticeship and to this deed his mother, the second plaintiff, was a party. This deed was in the following terms:

1. The apprentice of his own free will and with the consent of the father/guardian hereby binds himself apprentice to the company in their business now carried on by them at the Gravesend Aerodrome, Kent, for the term of 2 years from the date hereof to learn the trade, business or profession of ground engineer at the aerodrome.

2. The company in consideration of the sum of £100 paid by the father/guardian to the company (the receipt whereof is hereby acknowledged) covenant with the father/guardian and with the apprentice severally as follows:

(i) That they will accept and take the apprentice to be their apprentice in the said trade, business or profession of ground engineer engaged as aforesaid for the term of 2 years from the date hereof provided that the apprentice shall obey the lawful commands of the officers of the company and shall observe the covenants on his part hereinafter contained.

(ii) That they will through their officers during the said term to the best of their power teach or cause to be taught to the apprentice the business, or profession of a ground engineer, as aforesaid and all things appertaining thereto.

(iii) That they will pay to the father/guardian the sum of 5s. per week during the period of these articles to cover the cost of washing and cleaning the white overalls hereinafter mentioned provided always that if and whenever the apprentice is absent from or unable to employ himself in his work from any cause beyond the company's control this sum shall cease to be payable for such period.

(iv) That they will permit the apprentice 14 days' holiday in each year at a time to be fixed to the mutual convenience of the apprentice and the company in addition to the usual and proper bank holidays provided that if the company shall require the attendance of the apprentice on the aerodrome upon any bank holiday he shall attend as required.

3. The father/guardian and the apprentice respectively covenant with the company as follows :

(i) That the apprentice shall attend at the said aerodrome for duty from the hour of 8 o'clock in the morning till 5 o'clock in the afternoon from Monday till Friday in each week and from 8 o'clock till 12 o'clock on Saturday or otherwise as the company may direct including Sundays without at any time absentsing himself except for holidays as hereinbefore provided and subject to illness and other reasonable circumstances over which the apprentice may have no control and will also attend the lectures which will be provided by the company for his benefit.

(ii) That the apprentice shall throughout the whole of the said term and at all times during the said term to the best of his power and skill serve the company as apprentice in the said trade, business or profession during the hours aforesaid and shall keep all the secrets of the company and carry out all directions, orders and commissions as the company through their chief flying instructor or ground engineer shall make known to him concerning the said business

(iii) That the father/guardian will provide for the apprentice his board and lodging, medical attendance and all clothing and apparel and books suitable for him in his said service and employment during the said term and in particular will provide the apprentice with white overalls which must be worn by the apprentice whilst on duty on the said aerodrome. The cost of maintenance washing and cleaning of such white overalls shall be the sole liability of the father/guardian and the company shall in no way be responsible therefor.

(iv) The apprentice shall not enter upon the club premises of the aerodrome except at the order of any officer of the company.

4. Provided always and it is hereby declared :

(i) That the training of the said apprentice does not include any training in the art of flying and the apprentice shall not be compelled to take any flights or to make any ascents in any aeroplane except with his consent and any flights made by him shall be entirely at his own risk in all things.

(ii) The company shall not be liable in any way for any costs, claims, damages or expenses whatsoever in respect of any injury caused to the apprentice during his duties on the aerodrome or by reason of any accident during any flight which the apprentice may make or for any other reason whatsoever.

(iii) That if during the said term the apprentice shall commit any act of gross misconduct or wilfully disobey any lawful command of the company's officers to the detriment of the company or continually absent himself without reasonable cause then the apprenticeship hereby created shall be deemed at an end and the father/guardian will have no claim upon the company for the return of the aforesaid sum paid as aforesaid or any part thereof.

In Witness, etc.

By the direction of the company's instructors the defendant Corry

was preparing to fly one of their machines and the infant plaintiff was proceeding to swing the propeller. Owing to a misunderstanding between them Corry closed the switches before the infant plaintiff thought he would, and, the engine being still warm from a previous flight, the engine started. The infant plaintiff was taken by surprise and the propeller struck his arm, which was so seriously injured that it had to be amputated below the elbow. The negligence alleged against Corry was that he switched on the engine without receiving the order to do so, and that he did not observe the proper practice which was in use at the school designed to prevent such an accident. The negligence alleged against the company was that proper precautions were not taken to ensure that the engine was safe before allowing the plaintiff to swing the propeller, and not taking steps to enforce the proper practice for starting the engine. The claim was amended in the course of the trial by the allegation that the system in practice at the defendant company's aerodrome was in itself a bad system and likely to lead to accidents. The defendant Corry's defence was a denial of the alleged negligence and a plea of contributory negligence. The company relied on clause 4 (ii) of the deed of apprenticeship as an exemption from all liability. They also pleaded contributory negligence, common employment between the plaintiff, the defendant Corry and the instructor and any other servants of the company. They further relied on the doctrine *volenti non fit injuria*.

W. H. Cartwright Sharp, K.C., and *Amiend Jackson* for the plaintiffs.

T. W. C. Carthew, K.C., and *C. N. Shawcross* for the defendant Corry.

E. Holroyd Pearce for the defendant company.

July 30.—His Lordship found the following facts before the questions of law arising upon them were argued.

GREAVES-LORD, J. : The plaintiff, who is 18½ years of age, having been born on Sept. 3, 1917, was in May, 1935, when 17½ years old, bound by deed of apprenticeship, his mother as guardian consenting and joining in the said deed, to the Gravesend Aviation Company, Ltd., for 2 years, to learn the trade, business or profession of ground engineer. By that deed the defendant company bound themselves to the best of their power to teach or cause to be taught to the apprentice the business or profession of a ground engineer and all things appertaining thereto, and he on his part agreed to obey the lawful commands of the officers of the company, and to observe the covenants contained in the said deed.

Now the covenant material to this action is clause 3 (i) and (ii) :

That the apprentice shall attend at the said aerodrome for duty from the hour of 8 o'clock in the morning till 5 o'clock in the afternoon from Monday till Friday in each week and from 8 o'clock till 12 o'clock on Saturday or otherwise as the company may direct, including Sundays without at any time absenting himself except for holidays as hereinbefore provided, and subject to illness and other

reasonable circumstances over which the apprentice may have no control and will also attend the lectures,

and so on. Then the second one is :

That the apprentice shall throughout the whole of the said term and at all times during the said term to the best of his power and skill serve the company as apprentice in the said trade, business or profession during the hours aforesaid and shall keep all the secrets of the company—

I need not read the rest of that paragraph.

It is also provided by clause 4 that :

the training of the said apprentice does not include any training in the art of flying and the apprentice shall not be compelled to take any flights or to make any ascents in any aeroplane except with his consent and any flights made by him shall be entirely at his own risk in all things. (ii) The company shall not be liable in any way for any costs, claims, damages or expenses whatsoever in respect of any injury caused to the apprentice during his duties on the aerodrome or by reason of any accident during any flight which the apprentice may make or for any other reason whatsoever.

In consideration of the said agreement the sum of £100 was paid as premium by his mother and/or guardian.

On May 18, 1935, when he had worked under the deed of apprenticeship for about 2 months, he was instructed to take part as ground mechanic in the work of starting a "Gypsy Moth," G.A.A.U.H., which was to be flown by one W. H. Corry as pilot. W. H. Corry had been a pupil of the defendant company, and after his course of flying had received his "A" certificate, having done some period of flying dual, and had flown altogether some 20 hours. There had been an interval during which he had not flown, between February, 1934, and May, 1934; he then flew with some regularity in June and July, several times in Aug. and Sept., 1934, and then not again until May, 1935, and he had resumed, and was anxious for more solo flying experience.

On the afternoon in question he had flown dual with Mr. H. Roxborough, an officer of the company, and having landed at about 3.30, the machine was left idle for about an hour and forty minutes. The defendant Corry was rather doubtful about the length of time that the machine was idle, and this doubt was of some importance, as appears hereafter. The plaintiff was then ordered by officers of the defendant company to assist in starting the machine. For this purpose he stationed himself on the ground, at the propeller; he gave orders: "Switch off—Throttle back—Suck in," and he understood a movement of the hand and a nod to signify that the defendant Corry had heard those orders or directions. He proceeded to swing the propeller, which he swung over without any effect. He then proceeded to swing a second time, when, to his astonishment, the engine fired and the propeller started at a considerable speed; and as the plaintiff's arm was in the way it was struck, causing damage,

unfortunately resulting in amputation of the right arm just below the elbow.

The report of the defendant Corry was to the effect that he thought he heard the plaintiff give the word "contact," which meant: "Place the switch on," and that he then repeated the word "contact" and put the switch on. He assumed that the plaintiff heard his repetition of the command, and was therefore not surprised when, on seeing the plaintiff turn the propeller, it started. All this appears from the written report of the defendant Corry, written and signed by him just after the plaintiff was taken to hospital.

The evidence which was given satisfies me that the normal procedure on starting an engine at the defendants' aerodrome was, on starting, for the ground mechanic to give the directions: "Switches off—Throttle closed—Suck in." Opinions differ as to whether each separate direction was to be repeated, or whether they were all to be repeated together, but it was agreed that the switches were not to be put on until the word "contact" was given. If the engine was warm, the engine could be started without sucking in, and the directions were: "Switches off—Throttle closed—Contact," the directions being repeated by the pilot, as the others were. No special provision was made for cases where the warmth of the engine might be a matter of doubt. The position on May 18 was that the plaintiff does not appear to have considered that there was any reason for departing from the normal routine for starting, as the engine had been standing some time and might be cold, while the defendant Corry, no doubt keen to be off, was satisfied that the engine had been used so recently that it might be started without sucking in, and therefore was prepared to expect the word "contact" when he fancied that he heard that word. The result was that the plaintiff and the defendant went to their respective stations, each with a different idea. Of course, the plaintiff, not having heard his order repeated, ought not to have touched the propeller, but even had he touched the propeller no accident could have occurred if the defendant Corry had not switched on the engine, as the only danger that could be reasonably anticipated if the plaintiff touched the propeller in such circumstances was if a short circuit occurred in the engine, which was not the case.

I therefore think that the accident is to be attributed to the misunderstanding by the defendant Corry of the order or direction given by the plaintiff, and to the defendant Corry turning on the switch in consequence of such misunderstanding. It was stated by several witnesses that it was not usual to start an engine except with the preliminary process of sucking in, unless there is a pre-arrangement to do so between the pilot and the ground engineer. One witness of some considerable experience at the de Havilland School, described by the witness Mollison as one of the best schools of flying in the country, stated

that on all occasions when an engine was started without preliminary sucking in, pre-arrangement between engineer and pilot was made, and no deviation from this routine was allowed otherwise.

The result of this system is that both ground mechanic and pilot expect the order "contact" when such an arrangement is made, and if such an arrangement is made there can be no ground for mistake, and certainly no excuse. I heard the criticism of a number of witnesses, all of considerable experience, that such pre-arrangement was unnecessary and in fact a danger, but I am afraid, giving due weight to the position of such witnesses in the world of aeronautics, that I fail to see how such pre-arrangement could give rise to danger, and it would in my opinion operate to prevent any such misunderstanding as in the present case.

In my view, the accident in the present case would not have happened but for the fact that the defendant company's method of teaching, which applied to a very dangerous operation, did not exclude, as it should have done, the possibility of such a misunderstanding, coupled with the mistake of the defendant Corry as to the order given.

The defendant company were in my view negligent in adopting a dangerous method of teaching to young people, the result of which was that complete unity of thought was not obtained between the pilot and mechanic, and in consequence the defendant Corry switched on the engine when he should not have done. As the plaintiff had no reason to expect the engine to be alive, I do not think his error in swinging the propeller can be considered to be negligence contributing to the accident.

Now, I think that covers the findings as to negligence, and now comes the question of what judgment should be given upon that.

Cartwright Sharp, K.C. : Then, my Lord, on those findings I ask your Lordship for judgment against both of the defendants for whatever sum your Lordship feels is proper compensation.

GREAVES-LORD, J. : There must be judgment certainly against Corry.

Carthew, K.C. : As I understood it your Lordship found that it was the system of tuition that was at fault.

GREAVES-LORD, J. : That does not excuse the definite misunderstanding of the order and the execution of an order he had never received.

Holroyd Pearce : Clause 4 (ii) of the deed constitutes an exemption which is a bar to this action : *Rutter v. Palmer* (3), at p. 92. This clause exempts the company from negligence whatever the negligence may be and despite the fact that the plaintiff is an infant : *Manchester, Sheffield, & Lincolnshire Ry. Co. v. Brown* (4) and *Travers (Joseph) & Sons, Ltd. v. Cooper* (5).

Cartwright Sharp, K.C. : The provisions of the Air Navigation Act, 1920, s. 9, put an owner of aircraft into the position of a common carrier and there are liabilities quite apart from negligence.

Holroyd Pearce: The words in the deed are very wide, clearly intended to exempt from any damage however caused: *Taubman v. Pacific Steam Navigation Co.* (6), *Thompson v. Royal Mail Steam Packet Co.* (7), *Haigh v. Royal Mail Steam Packet Co., Ltd.* (8), *The Stella* (9), *Pyman S.S. Co. v. Hull & Barnsley Ry. Co.* (10). As to whether the deed is binding upon an infant, it is necessary to look upon the deed as a whole: *Green v. Thompson* (11). The onus is upon the infant to show this is an unfair term and also to show that another master would have taken him on better terms. The infant would have the benefit of the Workmen's Compensation Act. He will have the benefit of the instruction and he knows he is entering upon a very dangerous occupation in which employers habitually exclude all liability for accident or injury. If the deed is not for the benefit of the infant it is void altogether: *Bromley v. Smith* (12). If that be so the female plaintiff cannot recover the £100: *Valentini v. Canali* (13). It cannot be said that the consideration has wholly failed. Upon the point of common employment, there is here no distinction between a servant and an apprentice. It has not been suggested that Brown was not a competent engineer or not competent to teach these apprentices. The duty on the employer is to instruct, and if the chairman of the company carried out the instruction the doctrine might not apply, but since an engineer was employed, if he was negligent in instructing, the doctrine applies: *Cribb v. Kynoch, Ltd.* (1). It is not suggested that anyone but Brown has taught or ought to have taught the plaintiff, and if there is negligence, it can only be that Brown ought to have taught in a different way and the doctrine applies. If the deed is void, the plaintiff was a volunteer and the doctrine of *volenti non fit injuria* applies, as anyone must have known the dangerous nature of the operation.

Cartwright Sharp, K.C.: The real object of the deed is that the plaintiff shall be instructed. There is no service at all and the doctrine of common employment does not apply: *Smith v. Baker & Sons* (2). The exemption in the deed is not meaningless unless it exempts negligence. A good meaning can be given to it without that: *Fagan v. Green & Edwards, Ltd.* (14). There is a liability apart from negligence under the Air Navigation Act, 1920, s. 9, and that is what is exempted here and not the negligence of the company or their servants. The contract must be regarded as a whole in considering whether it is for the benefit of the infant. The infant here is to get no wages, the employer is to be paid, and the employer, it is contended, may be as careless as he likes and the infant is to recover nothing. The contract is clearly not for the infant's benefit: *Leslie v. Fitzpatrick* (15).

His Lordship reserved judgment, which was delivered on Oct. 19.

GREAVES-LORD, J.: Practically speaking, I am now only con-

tinuing where I left off on the last occasion, and therefore I am not dealing to-day with the question of the actual cause of the accident, but at the same time I think it is only right to say this, that while I have found, and found definitely, that upon the statement of Corry he was negligent in that he did the one thing which created a continuing danger, and as I find, without notice to the plaintiff, there is no doubt that he was to some extent led into the creation of that danger by the fact that there was, in my view, a complete lack of system in regard to the starting of an aeroplane under these conditions at the defendants' aerodrome. I therefore start with that position.

Now, that being so, the defendant company claim that by clause 4 (ii) of the deed of apprenticeship they are excused from any liability to the plaintiff in respect of the accident. On the other hand, the plaintiff says that on its true construction this paragraph does not relieve the defendants from liability for negligence, or that if it purports so to do, when fully considered, the deed is void as not being for the benefit of the plaintiff by reason of his infancy, or rather, that he is an infant, and that the deed is not for the benefit of him, the plaintiff.

Now, I am quite satisfied that on its true construction the deed does purport to relieve the defendants from liability in respect of negligence, and is so wide as to purport to relieve the defendants even though they fail in their duty under the deed. Taking into consideration every suggested advantage that may still accrue to the plaintiff, in my opinion the deed is so wide in the extent to which it purports to relieve the defendants that it is not for the benefit of the plaintiff, and is therefore void.

It is further pleaded in para. 7 of the defence of the defendants, the Gravesend Aviation, Ltd., that :

Further or alternatively if the said Roxborough and/or other servants of these defendants were negligent as alleged or at all the infant plaintiff was in common employment with the said Roxborough and/or with such other servants or alternatively was voluntarily assisting the said Roxborough and/or such other servants in the course of their employment.

That, of course, is another way of saying that he was in common employment with such other servants. As the case turned out, the allegation was made not so much, if at all, against Roxborough as against one Brown, who was said to be the superintendent engineer and responsible for the tuition ; but that is the defence which is pleaded, and in order to decide this point it is necessary to consider the position of the plaintiff while occupied at the aerodrome.

The plaintiff's mother had paid a sum of £100 in order that the defendants should, through their officers, teach or cause the plaintiff to be taught the business of ground engineer. The clause in which they covenanted to teach the plaintiff is clause 2 (ii), where they covenant :

That they will through their officers during the said term to the best of their

power teach or cause to be taught to the apprentice the business or profession of a ground engineer, as aforesaid and all things appertaining thereto.

And it is true that there is also a covenant by which the plaintiff agrees to serve.

The point as to common employment depends upon two things: first, whether the teacher was, in fact, in common employment in what he was doing in respect of which his conduct is questioned, and, secondly, whether what he was doing was something delegated to him, or whether the employers reserved to themselves the actual duty.

It seems to me that it is quite impossible to read that clause and to say that thereby the company have delegated everything to their servants. The person who carried out the teaching was, of course, mainly Brown, but one must bear in mind exactly what it is that is found. The negligence found is set out in para. 5 of the statement of claim:

No safe or proper system of starting aeroplane engines on contact was taught or enforced by the defendant company, in that such mode of starting should only be used by pre-arrangement between the pilot and the mechanic swinging the propeller and/or in that the formula used and taught "Switches off—Throttle close—Contact" is unsafe without pre-arrangement, especially since the formula taught and used for sucking in is "Switches off—Throttle closed—Sucking in" and/or in that the pilot was not taught that when saying "contact" he must keep a close watch on the mechanic and must assure himself that the mechanic has heard and understood this direction before the pilot switches on.

To my mind the real defect was that the possibility of a change of orders was not excluded, and in the ordinary course of things the ground engineer would not expect, or would ordinarily not expect, that an engine which is either cold or as to which it is doubtful whether it is cold or not, would be started without any previous sucking in. Now, that to my mind is a question of system, and Brown, as far as one can make out, simply taught a system which was defective.

That the business was a dangerous business is common ground, and primarily the duty was upon the defendants to see that the plaintiff was properly taught. It is true that the tuition was carried out largely through Brown, but there is nothing in the covenant which indicates anything which shows that the defendants delegated the duty of teaching in such a way as to indicate that the plaintiff accepted the risk of negligence on the part of those through whom the defendants taught. On the contrary the clause shows that the teaching is to be carried out to the best of the defendant company's power, and it implies that they on their part retained the duty of seeing that a proper system must be taught. They do not carry this out merely by appointing officers to teach people, unless such teaching is supervised or devised to the best of their power. The negligence found is as set out in para. 5 of the amended statement of claim, and it was because the system of teaching

was so defective that the events happened which brought about the injury to the plaintiff. The negligence therefore was in carrying out the primary duty of the defendants, and was not negligence in carrying out a system properly devised but carried out faultily.

The case of *Cribb v. Kynoch, Ltd.* (1) was quite a different case, because there what happened was that in the normal course of the work the forewoman actually permitted the workgirl, as it was in that case, to do something contrary to her instructions, and under those circumstances that was a case of carrying out the system properly in the way of giving of instructions, but carrying it out faultily in allowing those instructions to be disobeyed; and to my mind that distinguishes the two cases. In fact, as I pointed out, the judgment of the learned county court judge rather proceeds upon the ground that, as the learned judge put it on p. 555 :

It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed.

It was the absence of such a contract which really is the basis of the decision of BRAY, J., in *Cribb v. Kynoch, Ltd.* (1).

Now here, so far from there being any question as to the master contracting, the master has specifically contracted, and if you take that clause, which is of a rather odd character, it shows quite clearly that the defendant company did not relieve themselves of the responsibility for devising the system by which the duty was carried out, because they reserved quite definitely to themselves the fact that it should be done to the best of their power, and I cannot construe that portion of the agreement in any other way. The phrase is :

that they will through their officers during the said term to the best of their power teach or cause to be taught to the apprentice the business—

and so on, and when one sees the phrase "to the best of their power," one asks one's self : To the best of whose power ? It is not that they will teach through their officers to the best of the officers' power, but it is that they will teach through their officers to the best of *their* power. There is a certain amount of confusion, perhaps, introduced by the duplicated use of the pronoun "their" and the pronoun "they," but when one reads it and gives the most sensible construction that one can give to it, it does mean this, that while, of course, the defendants are bound to act in matters of this kind very largely through servants, at the same time by inserting the words that they will do this "to the best of their power," they certainly reserve to themselves the devising of the system by which the trade shall be taught.

The result is that it can nowhere be said that the negligence of Brown was in carrying out faultily the system devised by the defendants, and

which he, Brown, was employed to carry out; but, on the other hand, the whole system of the aerodrome was, as I find it, a negligent system, and nowhere can it be pointed out that at any time the directors, who really were the persons contracting with the plaintiff or with the plaintiff's mother, ever attempted to devise any system such as was adumbrated by the witnesses would be a proper system. The result is that the real fundamental breach of duty is a breach of duty in the performance by the company of its definite work, and it is not merely a question of a breach of duty by somebody to whom the work of devising the system is delegated. At any rate, that is my view, and that is the difference between the case of *Cribb v. Kymoch, Ltd.* (1) and the present case.

By para. 7 (a) of the amended defence it is pleaded that :

Further or alternatively the plaintiff consented to the risk of the said accident and/or of the alleged negligence, if any (which is denied) both by entering into the said deed and by working on these defendants' premises and/or by starting aeroplanes on other occasions and on the occasion of the accident.

Now, I think that that leaves out the fundamental consideration which underlies the doctrine of *volenti non fit injuria*, and that defence is not in my opinion made out. It involves knowledge and appreciation of the risk, and in this case that means knowledge and appreciation of the risk of lack of teaching of a proper system of starting aeroplanes by a proper provision for effecting unity of purpose between the pilot and the ground engineer. The plaintiff is a mere pupil. It is quite true that he has had some experience, but as far as the evidence goes he nowhere at any time had had experience of the system to which the witnesses spoke, and which was described by them as the only safe way to vary the starting of the aeroplane engine from the starting through the normal process of first sucking in and then, and then only, proceeding to contact, and therefore he cannot be said to have had any material upon which he could appreciate the risk. The result is that the two parts which are necessary to constitute the defence of *volenti non fit injuria* are wanting, and that being so the defence is not made out. For authority as to that, one may take the speeches of LORD HALSBURY, L.C., and LORD WATSON in the case of *Smith v. Baker & Sons* (2).

The result is that in my view both defences fail, and it only remains for me to give judgment, but I realise that the judgment certainly raises what may be a very fine distinction between delegation of the work of teaching and the actual duty of the company itself. As I have said, I think that the clause providing for teaching clearly shows two things : It shows the extent to which a company must act through servants, but on the other hand, inasmuch as the company contracts not to employ agents to the best of their power, but actually to do the work of teaching to the best of their power, albeit they do the actual carrying out of the work through agents, I think that that clause reserves, and

specifically reserves, to the company itself, the duty of seeing that the teaching is properly carried out; otherwise there is no meaning in the words "to the best of their power," and it would be satisfied by merely employing persons who shall use their power and shall carry out the work of teaching to the best of their power. I am satisfied that what the plaintiff was entitled to here was not the best of the servants' power, but it was the best of the defendants' power, that is, the company's power, as distinct from the agents through whom the company acted. In other words, there was a definite contract in this case with the master, and, there being a definite contract with the master in that way, the doctrine of common employment has no application to this case.

Now, I said that the amount that I considered was right was a sum of £5,000, and I give judgment for that amount against both defendants with costs, but inasmuch as this amendment was not made until some distance through the trial I think it is only right that some method should be provided of meeting that position. I am afraid that that amendment and that prolongation of the trial laid a burden of extra costs both upon the defendant company and upon the defendant Corry, because it lengthened the time that Corry was bound to be here and represented, and therefore put him to considerably more costs. In my view it is very difficult indeed to arrive at a calculation upon an assessment of costs actually thrown away by an amendment, or of and occasioned by an amendment, and therefore I think it is very much simpler to award costs subject to this, that when those costs are taxed a certain proportion should not be payable by the defendants. I think it is better, therefore, that while awarding costs, those costs should first of all be taxed, and then each of the defendants should be compelled to pay, I think so far as the defendant Corry is concerned, a matter of not more than half the costs taxed against him, because I think that the position of the other defendants differs materially. They would have had to meet that case, and therefore to some extent the time that they were involved was in meeting a case which was put against them which they would have had to meet if that case had been put in the pleadings as at first drawn, and therefore I come to the conclusion that the right proportion of costs to be paid by the defendant company is three-fourths of the costs and not more. Now, there is one other point that I have not dealt with, and that is the question of the £100. In my view the £100 is not recoverable, in the view that I have formed, and under those circumstances there will be judgment in respect of that claim in favour of the defendant company.

Solicitors: *J. Howard Smith* (for the plaintiffs); *Beaumont & Son* (for the defendant Corry); *William Charles Crocker* (for the defendant company).

Re CHETWYND'S ESTATE, DUNN, TRUST, LTD, *v.* BROWN.[CHANCERY DIVISION (Bennett, J.), **October 21, 22, 1936.**]*Contract—Constructive contract—Money paid—Implied request—Discharge of promissory note—Note not enforceable.*

In 1930, at the request of C., who wished to borrow £120 from certain moneylenders, S. signed with C. a promissory note by which he and C. promised jointly and severally to repay to the moneylenders £156 by 5 equal consecutive monthly instalments of £6, the first payment to be made on Nov. 24, 1930, and the balance of £126 to become due and payable on Apr. 24, 1931. In the event of default in payment of any instalment so much of the balance as represented principal became payable forthwith. The note or memorandum of the contract signed by C. and S. did not comply with the Moneylenders Act, 1927, s. 6. C. duly paid the first instalment but made default in respect of the second. S. was in communication with the moneylenders in Jan., 1931, and, without referring to C., he discharged the whole liability on the promissory note for £138. When C. heard that S. had discharged the whole liability he wrote to S. offering to pay interest on the £138 so that S. should suffer no loss. No payment, however, was ever made by C. to S. An administration action was brought after C.'s death against his executors and in that action S. applied to rank as a creditor for £138, basing his claim on a request by C. implied by law that S. should pay the moneylenders and an implied promise by C. to repay S., supported by C.'s letter ratifying what S. had done. The application was opposed on the grounds that: (i) as the note was not enforceable, the request ought not to be implied, and (ii) in the circumstances in which S. made the payment, it ought not to be decided that the payment was made in pursuance of any implied request by C., but for the purposes of protecting S.'s own interests:—

Held: (i) in the circumstances of the case a request to discharge the liability ought to be implied.

(ii) although S. was discharging a liability of his own, he ought to be presumed to be acting, so far as the person accommodated, C., was concerned, in pursuance of the request which the law implied.

(iii) it was reasonable for S. to compromise the moneylenders' claim upon the promissory note for £138, and S. should be allowed to rank as a creditor for that amount in the administration action.

[EDITORIAL NOTE.] Generally speaking, in order to succeed in an action for "money paid," it is necessary to show that the payment was made under legal compulsion. A person may, however, elect to adopt such a payment, and if he elects to adopt it, he will become liable to repay the money.

AS TO RECOVERY OF VOLUNTARY PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 266, 267, para. 368; and FOR CASES, see DIGEST, Vol. 12, pp. 522-524, Nos. 4341-4367.]

Cases referred to:

- (1) *Sleigh v. Sleigh* (1850), 5 Exch. 514; 12 Digest 523, 4351.
- (2) *Parkfield Trust, Ltd. v. Curtis*, [1934] 1 K.B. 685; Digest Supp.
- (3) *Mason & Wood, Ltd. v. Greene*, [1936] 2 K.B. 370; [1936] 2 All E.R. 509; Digest Supp.
- (4) *Reade v. Royal Bank of Ireland, Ltd.*, [1922] 2 I.R. 22; Digest Supp.
- (5) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 26 Digest 146, 1099.
- (6) *Re O'Shea, Ex p. Lancaster*, [1911] 2 K.B. 981; 4 Digest 115, 1048.
- (7) *Alexander v. Vane* (1836), 1 M. & W. 511; 12 Digest 533, 4432.
- (8) *Re Kitchin, Ex p. Young* (1881), 17 Ch. D. 668; 26 Digest 103, 708.

APPLICATION by Wilfrid Reginald Stephenson to vary the master's decision in an administration suit brought by the plaintiffs on behalf of themselves and all other creditors against the executors of Sir George Guy Chetwynd, Bart. An order for administration having been made on Dec. 10, 1935, the master proceeded with inquiries to ascertain the debts, and refused the application of the applicant that he might be allowed to rank as a creditor upon the estate of the testator in the judgment in the action for the sum of £138.

The circumstances giving rise to the alleged debt, which are fully set out in the judgment herein, were shortly as follows : The testator being desirous in Oct., 1930, of borrowing £120 from B. S. Rhodes, Ltd., carrying on business as registered moneylenders, asked the applicant to act as his guarantor, and the applicant signed, with the testator, a promissory note, by which he and the testator promised jointly and severally to repay to the moneylenders the sum of £156 by 5 equal consecutive monthly instalments of £6, the first of such payments to be made on Nov. 24, 1930, and the balance, namely, £126, to become due and payable on Apr. 24, 1931. The testator duly paid the instalment due on Nov. 24, 1930, but made default in respect of that due on Dec. 24, 1930. The applicant thereupon got into communication with the moneylenders and, without referring to the testator, arranged to discharge the whole liability on the promissory note by a lump sum payment of £138. On hearing of what had happened the testator wrote to the applicant on Jan. 28, 1931, as follows :

I was much surprised to receive a letter from Franklin last night telling me that you have or are paying off Rosen the bill which you so kindly backed for me, that you were under the impression also that I was not going to meet my liability on it.

Having no details I am at a loss to know what all this is about and how the present situation has arisen. All I know is that I paid Rosen the £6 due in November and wrote to him just after Christmas telling him that I would send the December and January instalments (of £12 in all) at the end of this month. Not having heard from him I concluded it would be all right as I have done it before with him.

Then suddenly comes this tract from Franklin !

I had made all my arrangements for the end of April and was going to pay Rosen half the amount then and renew the other half. Of course I never had the least intention of your being called upon for a penny. . . .

Will you please let me hear from you ? I do not know what amount you paid or are paying Rosen but I must pay you the interest so that at all events you do not suffer a penny loss, and then you will no doubt be satisfied with my part. . . .

But no payments were ever made to the applicant by the testator in his lifetime, and the applicant therefore sought to prove for the £138 so paid by him in the administration proceedings.

The ground on which the application was resisted was that there was in law no debt enforceable by the moneylenders and therefore by the applicant. It was contended that the note was void as the note or memorandum required by the Moneylenders Act, 1927, s. 6, also signed

by the testator and the applicant, did not comply with the provisions of that section of the Act as interpreted by the decisions in *Parkfield Trust, Ltd. v. Curtis* (2), and *Mason & Wood, Ltd. v. Greene* (3).

M. J. L. Beebee, for the applicant : This is not an illegal contract but merely one that is unenforceable by action. That is the distinction between the Moneylenders Act, 1927, ss. 6 and 7. A surety's right to be indemnified by the principal debtor can arise (i) by subrogation to the rights of the creditor, (ii) on an express or implied promise by the principal debtor to pay arising from an express or implied request by him to the applicant. The applicant here cannot rely on subrogation since the moneylenders had no enforceable rights to which he can be subrogated, but the facts of this case are such that the law will imply a request by the testator to the applicant to pay the creditor and will therefore imply a promise by the testator to pay the applicant. The applicant undertook the position of surety at the request of the borrower and thereby undertook to pay the debt if he did not. There was an obligation to pay here, though it might be without legal force, and there is nothing to prevent a borrower being honest and not take a technical objection.

BENNETT, J. : referred to *Reade v. Royal Bank of Ireland, Ltd.* (4).

Beebee : That case might affect the applicant's right by way of subrogation. But he is not seeking to recover on the bill or to stand in the shoes of the moneylenders, and his rights which depend on the testator's implied promise to pay cannot be affected. But there is more than an implied promise here. The letter of Jan., 1931, amounts to a ratification by the testator of what the applicant had done.

BENNETT, J. : What are the rights of a surety who has paid a statute barred debt ? In *Wolmershausen v. Gullick* (5), there is a suggestion that although the debt is barred a surety who pays it has a remedy against the principal debtor.

Beebee : In *Re O'Shea, Ex p. Lancaster* (6), it was held that a friend who lends money to pay a gaming debt is not suing under a contract rendered void by the Gaming Act, but under an implied promise to pay money lent.

BENNETT, J. : I suppose there is no question but that the applicant's signature was an accommodation signature. Is there any case where a surety of a gaming debt or of any other liability which is not enforceable in law has been held entitled to recover from the principal debtor what he has paid in respect of the so-called debt ?

H. J. Wallington, K.C., and *Cyril Salmon* for the plaintiffs : *Alexander v. Vane* (7), is an authority for the proposition that a surety who paid a debt rendered unenforceable by the Statute of Frauds was entitled to recover against the principal debtor as for money paid to the use of the debtor, because there ought on the facts to be implied a request by the debtor to the surety to pay the debt. But that case proceeds on the

footing that there was a suretyship. The evidence of suretyship in this case is very unsatisfactory. In order to create a suretyship the applicant must show that he made it quite clear to the moneylenders that, although he was signing the note as a joint borrower so that he would be primarily liable, in fact he was only signing it as a surety. The position between the parties is different when instead of being a guarantor a person is in fact a principal debtor. There is, however, authority that even where the relationship of suretyship exists, if the surety pays a debt which as a matter of law he was under no obligation to pay he cannot recover against the principal debtor: see *Sleigh v. Sleigh* (1).

BENNETT, J.: It is difficult to reconcile that case with *Alexander v. Vane* (7).

Wallington, K.C.: In *Alexander v. Vane* (7) the payment was not as voluntary as it was here. There the principal debtor was liable on the contract so that the surety by paying relieved the principal debtor of his liability. If in Jan., 1931, the testator had said to the applicant: "I do not know whether this is an enforceable debt or not, but I want it paid," and the applicant had paid, he would have been entitled to recover. But here there is no request, nor a new promise, and there could be no ratification because the testator did not know how much had been paid. The real point in all these cases is that if an express request to pay can be found or if the circumstances lead necessarily to an implied request, in accordance with which the surety has paid, he can recover. The circumstances in this case are against an express request and the implication of an implied request is impossible. Nor was any request necessary for the applicant to pay. He was primarily liable on the bill and by paying it he discharged his own liability.

Moreover, the Moneylenders Act, 1927, s. 6, is not limited to the unenforceability of a contract for the repayment of money lent by action. The contract cannot be enforced in any way, so that the moneylenders could not have let the contract go and have recovered even the principal sum lent. The words of the section include even an implied contract.

BENNETT, J., referred to *Re O'Shea, Ex. p. Lancaster* (6).

Wallington, K.C.: But there the debtor was clearly liable on the bill: see *Re Kitchin, Ex p. Young* (8), which indicates that a surety can only prove for whatever he is clearly liable to pay.

Theodore Turner, for the executors of the will of the testator: It is clear from para. 3 of the applicant's affidavit that the moneylenders were not seeking to enforce the default clause. In those circumstances, whatever request may be implied it cannot be a request to the applicant to seek out the moneylenders and to give effect to the default clause by making a composition with them for the whole sum before the bulk of the principal became due on Apr. 24, 1931.

Beebe, in reply: The £138 was a compromise figure, and a surety can

make a reasonable compromise : see ROWLATT ON PRINCIPAL AND SURETY, 2nd Edn., p. 191.

BENNETT, J. : I do not think that the question which I have to decide is altogether free from difficulty. This is a summons by a Mr. Stephenson in an action by which the estate of Sir George Guy Chetwynd is being administered by the court, for an order that he may be allowed to rank as a creditor upon the estate of Sir Guy Chetwynd for the sum of £138.

Sir Guy died in the month of Aug., 1935, and the applicant's claim arose out of a transaction into which he and Sir Guy entered in the month of Oct., 1930, with a limited company, B. S. Rhodes, Ltd., carrying on business as moneylenders. According to the affidavit of the applicant, in the month of Oct., 1930, he met Sir Guy Chetwynd in the street in London, and he says in para. 2 of his affidavit filed on June 4, 1936, as follows :

I had not seen him for many years but I had known him from boyhood and we had a friendly talk about old times and after some conversation the testator proposed that I should go with him to B. S. Rhodes, Ltd., who were moneylenders in New Bond Street, and assist him to raise a loan from them by becoming a guarantor for such a loan. I was naturally not disposed to make myself liable in the way suggested, but the testator produced accounts of rents of certain properties and estates which he told me were supplied to him by Messrs. Frere, Cholmely & Co., solicitors, of Lincoln's Inn Fields, who, he said, were the solicitors who managed his estates and his general affairs. I looked at these accounts and saw that they showed a balance of income amounting to close upon £2,000 a year and the only intimation the testator made with regard to there being any charges upon or payments out of the balance of income shown by these accounts was to the effect that he was separated from his wife and a certain annual sum was payable to her out of the balance. Having been accordingly satisfied by the testator as to his apparent financial position I went with him to the offices of B. S. Rhodes, Ltd., and we both signed the promissory note for £156. The actual amount advanced to the testator on the said note was, I believe, £126, the whole of which sum was retained by the testator for his own use.

These facts are not disputed. The promissory note which Mr. Stephenson and Sir Guy Chetwynd signed on Oct. 24, 1930, was in these terms :

We jointly and severally promise to pay Messrs. B. S. Rhodes, Ltd., or order, at 13 and 14, New Bond Street, Piccadilly, London, W.1, the sum of £156 for value received by 5 equal consecutive monthly instalments of £6, the first of such payments to commence and become due and payable on Nov. 24, 1930, and the balance of £126 to become due and payable on Apr. 24, 1931. In the event of default being made in the payment of the first or any succeeding instalment or any part thereof so much of the balance of the said sum of £156 as represents principal shall forthwith become due and payable with interest on any overdue payment at the rate of 60 per cent. per annum until payment.

Now supposing the note had been one upon which the moneylenders could sue, the applicant, being an accommodation party, if he had been

compelled to pay the moneylenders the whole or any part of what was due, would have stood in the relation of surety to Sir Guy Chetwynd, and he would have been either subrogated to the rights of the moneylenders or would have had a cause of action against Sir Guy Chetwynd for money paid to Sir Guy Chetwynd's use. I do not think that there is any question but that that would have been his position if the note had been one upon which the moneylenders could have sued, having regard to the facts. But having regard to the terms of the Moneylenders Act, 1927, s. 6 (2) and the form of the note and memorandum of the contract, the moneylenders were unable to enforce the promissory note against the makers. It was not an illegal transaction, a document contrary to law, but it was an unenforceable transaction. Therefore it is useless for the applicant to seek to prove against the estate of Sir Guy Chetwynd upon the footing that he has been subrogated to the rights of the moneylenders, because it is obvious that any claim that he could make based upon the promissory note, would be answered by setting up the Moneylenders Act, 1927, s. 6.

In Jan., 1931, the applicant was in communication with the moneylenders, and learnt from them that Sir Guy had paid the first instalment upon the promissory note of £6 which had become due in November, but that he had made default in payment of the instalment which became due on Dec. 24, 1930, and in these circumstances he swears in the affidavit to which I have already referred as follows :

3. I accordingly called upon Messrs. Frere, Cholmely & Co., and told them the above facts and they then informed me that except for a small sum sufficient to provide for the testator's bare necessities he received nothing at all out of the income of his estates which were all settled and further that the testator had, for some time, been an undischarged bankrupt and also indicated that the testator's financial position was such that there was no prospect for a very long time, if ever, of any monies being available to make any payment on account of the promissory note.

4. In consequence of the information given to me by Messrs. Frere, Cholmely & Co. I instructed my solicitors, Messrs. Vizard, Oldham & Co., to negotiate with Messrs. B. S. Rhodes, Ltd., and to take up the said promissory note and to discharge my liability thereunder, and on Jan. 27, 1931, they paid to Messrs. B. S. Rhodes, Ltd., the sum of £138 in full settlement of the promissory note for £156, dated Oct. 24, 1930.

It is for that sum of £138, paid in these circumstances, that the applicant claims to be admitted as a creditor in the estate of the testator, Sir Guy Chetwynd. As I say, it is not possible for him to claim upon the basis of subrogation, the note being one which admittedly the moneylenders were unable to enforce against either of the makers, because of the provisions of the Moneylenders Act, 1927, s. 6 (2), and the claim therefore is based upon the request which the law implies, made by the party accommodated, to the party who gives his accommodation in such a transaction as that entered into on Oct. 24, 1930. It has been said by PARKE, B.,

in the case of *Sleigh v. Sleigh* (1), that to make a person liable in an action for money paid to the defendant's use, the plaintiff must show first of all that the money paid discharges the liability of the defendant to the holder of the bill. There is no doubt about the payment which the applicant made to the moneylenders in this case having discharged the liability of Sir Guy Chetwynd. But he must also show that he (the moneylender) was paid at the request, either express or implied, of the defendant, in this case the late Sir Guy Chetwynd, the testator, and it is suggested that, having regard to the fact that the note was not enforceable, the request ought not to be implied, and further, that because of the circumstances in which the applicant came to make the payment, it ought not to be decided that the payment was made in pursuance of any implied request by Sir Guy Chetwynd, but for the purposes of protecting the applicant's own interests. Now both parties, who were both makers of the promissory note, were, I think, on the facts, not aware that there was any defect in the form of the note or memorandum of the contract which would have enabled them to resist liability, and I see no reason why, upon the facts as proved, I should not imply the request which the law ordinarily does imply in a transaction such as that which was entered into on Oct. 24, 1930. And I propose to imply the request which the law normally does imply in similar circumstances. It is quite plain that the late Sir Guy Chetwynd had no intention of setting up in answer to any claim by the moneylenders the provisions of the Moneylenders Act, 1927, s. 6, because he himself paid the first instalment which fell due, and the terms of the letter which he wrote on Jan. 28, 1931, to the applicant indicate that at that date, at any rate, it was his intention to discharge, sooner or later, his liability upon the promissory note. I see no reason why, in these circumstances, I should not hold, as I do, that there was this implied request to discharge the liability.

As regards the point that when he made the payment the applicant was not acting in pursuance of the request, but was discharging a liability of his own, it seems to me that that must be true in every case in which a man has made himself liable on an accommodation bill and meets it. He is discharging a liability of his own, but at the same time he is presumed to be acting, so far as the party accommodated is concerned, in pursuance of the request which the law implies.

The only other point which creates any difficulty to my mind is with regard to the amount that was paid on Jan. 27, 1936, that is, £138. It is said to be, and I take it as having been, a compromise figure as between the moneylenders and the applicant. The promissory note is drawn in a way which makes it difficult for me to be quite clear what the rights of the moneylenders were in the event of default being made in the first or succeeding instalments, and I think it reasonable in the circumstances for the applicant to have compromised the claim by the moneylenders

upon the note, for the sum of £138. In my judgment the applicant is entitled to an order, and I propose to order, that he be allowed to rank as a creditor upon the estate of Sir George Guy Chetwynd, deceased, for the sum of £138 with the costs of this application. The cost of the plaintiffs will be their costs in the action.

Leave to appeal.

Solicitors: *Vizard, Oldham, Crowder & Cash* (for the applicant); *Woolfe & Woolfe* (for the plaintiffs); *Patersons, Snow & Co.* (for the defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

SWAIN v. WEST (BUTCHERS), LTD.

[COURT OF APPEAL (Greer and Greene, L.J.J., and MacKinnon, J.),
October 22, 1936.]

Master and Servant—Fraud—Dismissal—Agreement to give information concerning fraud of fellow-employee—Consideration—Estoppel—Duty of employee to disclose fraud of fellow-employee.

The plaintiff was employed for a term of 5 years as general manager of the defendant company. His contract of service provided, *inter alia*, that he would “do all in his power to promote, extend and develop the interests of the company.” The managing director gave the plaintiff certain unlawful orders, which orders the plaintiff carried out. The matter came to the notice of the chairman of the board of directors, who, in an interview with the plaintiff, told the plaintiff that if he gave conclusive proof of the managing director’s dishonesty, he would not be dismissed. The plaintiff duly supplied the information required. The plaintiff was then dismissed, the defendants alleging fraud and dishonesty. The plaintiff did not deny the allegations, but he brought an action for breach of contract and wrongful dismissal on the grounds that, under the terms of the verbal agreement between the plaintiff and the chairman, it was not open to the defendants to rely upon information given by the plaintiff relating to his own fraud and dishonesty:—

HELD: (i) it was the plaintiff’s duty, as part of his contract of service, to report to the board of directors any acts which were not in the interests of the company.

(ii) there was therefore no consideration for the alleged verbal agreement, and the defendant company was not prevented from relying upon the information received from the plaintiff.

[EDITORIAL NOTE.] It is clear from the judgments in this case that it cannot be said that there is any general duty upon an employee to disclose the improper conduct of his fellow employees. That there was such a duty in the present case is said to be the result of the particular circumstances of the case, and to flow from the express terms of the contract. As the terms relied on are very common in contracts of service in respect of positions of responsibility, the position in practice will now be clear in all ordinary cases.

AS TO DUTIES OF A SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 183, 184, para. 307, and FOR CASES, see DIGEST, Vol. 34, pp. 117-120, Nos. 881-922.]

Case referred to :

(1) *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161 ; Digest Supp.

APPEAL by the plaintiff from a decision of FINLAY, J., given on Feb. 10, 1936 (reported [1936] 1 All E.R. 224), in which he gave judgment for the defendants in an action for breach of contract and wrongful dismissal.

The appellant, an employee of the respondent company under an agreement for a term of 5 years, was dismissed during that term, the respondents alleging certain fraudulent and dishonest acts. The appellant did not deny these acts, but in an action for breach of contract and wrongful dismissal, he alleged that, under the terms of a verbal agreement between the appellant and the chairman of the respondent company, it was not open to the respondents to rely upon certain information given by the appellant concerning those fraudulent acts. The appellant alleged that by that verbal agreement, in return for information which would establish dishonesty on the part of another servant of the company, the chairman had undertaken not to dismiss the appellant for complicity in the frauds. It was held by FINLAY, J., that : (i) it was lawful for the chairman to ask the appellant about the frauds ; (ii) the appellant was bound as part of the contract of service to answer all lawful questions and in giving the information he was merely answering a lawful question ; (iii) there was, therefore, no consideration for the alleged verbal agreement, and the respondent company was not prevented from relying upon the information received.

F. P. M. Schiller, K.C., and *Philip Vos* for the appellant.

Sir Patrick Hastings, K.C., and *G. D. Roberts* for the respondents.

Schiller, K.C. : In my submission the view of the law upon which the learned judge acted is erroneous. The judge took the view that the chairman was entitled to ask questions of the appellant which were likely to incriminate him.

GREER, L.J. : It was his duty to report the wrong of somebody else and his greater duty when asked to do so.

Schiller, K.C. : I do not think there is any authority which says that a servant is under an obligation to report the misdeeds of his fellow-servant.

GREENE, L.J. : As I recollect the decision in *Bell v. Lever Bros., Ltd.* (1), the question whether a servant should report the misconduct of a fellow-servant depends upon the circumstances of the particular case.

Schiller, K.C. : It is only in contracts *uberrimæ fidei* that the duty exists. If he is not under a duty to disclose, there is no duty to answer questions. If I am bound to tell, I am still bound to tell whether asked or not. The mere fact that somebody asks me does not enlarge my duty. It can only be a breach of duty, if I ought to tell without being asked.

GREENE, L.J. : Is it not an implied obligation in a contract of service

to answer all proper questions with regard to the matters arising out of the scope of the employment ?

Schiller, K.C. : Yes, but I submit that to expose delinquencies is entirely outside that obligation.

GREER, L.J. : It is a duty of a servant to see that his master is not cheated.

GREENE, L.J. : If a general manager of a company has under him an official whose duty it is to enter matters in the company's books and the board discovers false entries and asks the general manager to give information regarding those false entries, assuming the general manager is no party to the fraud but knows who made the entries and why they were made, is it his duty to give the information asked for ?

Schiller, K.C. : No ; this is a question of law. The question is, does the law compel him to give the information, and this must be decided on the question of legal principle. In my submission the law does not compel him. This can only be so in *uberrimæ fidei* contracts.

GREENE, L.J. : If a managing director knows that one of his subordinates is incompetent, is it his duty to disclose that ?

Schiller, K.C. : No. He is under no legal duty.

GREER, L.J. : If he had failed to answer these questions he would have broken his duty as contained in his contract "to promote, develop and extend the interests of the company."

Hastings, K.C., was not called upon to reply.

GREER, L.J. : This is an appeal against the decision of *FINLAY, J.*, who held that the contract alleged between the appellant and the respondent was a contract without consideration. That decision of the learned judge depends on this principle, which has been laid down, that it is not good consideration for a person to promise the performance of something which it is already his legal duty to perform. It is said in this case that there is no legal duty upon the general manager of this company to give information regarding the wrongful acts of the managing director. He was the general manager of a company which had a number of butchers' shops, many of which used for selling purposes a sign with the words "Empire Products" thereon. Beef and mutton had to be labelled showing whether they were Empire produce or not. By some nefarious means the carrying on of the company's business was jeopardised by servants of the company selling non-Empire produce as Empire produce. In these circumstances we have to decide what was the duty of the general manager of the company in regard to these matters of which he was aware. The plaintiff was engaged as general manager of the defendant company to serve the company in their business as butchers subject to the terms and conditions set out in the agreement between himself and the company. He was employed to manage all the

business of the company. Clause 6 of his contract of service states that "during the continuance of the agreement the general manager shall devote all his time to the business of the company and do all in his power to promote, extend and develop the interests of the company." It was his duty if he knew of acts which were not in the interests of the company to report them to the board. He did not do so. The matter having come to the attention of the chairman of the board, the chairman thought it his duty to make inquiries, and in pursuance of his duty had an interview with the plaintiff at Frascati's restaurant. They lunched together and during the course of the luncheon the chairman asked the plaintiff what took place. The plaintiff says that the chairman

started off by pointing out to me how serious the thing was and what difficulties he was in. He said "Now we are trying to catch him"—meaning the managing director. He said: "I want you to get me the conclusive proof." I said: "Where do I come in?" He said: "If you do not get me the conclusive proof you are for it—if you do, you carry on."

I find it impossible to come to any other conclusion but that it was the duty of the general manager to find out what he could. In the course of time he did find out and sent in his report. In sending in that report I think he was doing what was his obvious duty as manager of the company to do. I do not decide that in every case where the relation of master and servant exists it is the duty of the servant to disclose, or to disclose upon inquiry, any discrepancies of which he knows of his fellow servants.

We have had a great deal of argument as to the effect of *Bell v. Lever Bros., Ltd.* (1) on this case. In my view that decision has nothing whatever to do with the decision in this case. For these reasons I am of opinion that this appeal must be dismissed with costs.

GREENE, L.J. : I agree. It was submitted to us that there was some general principle of law applicable to contracts of service in general and to this contract in particular that a servant is under no duty to disclose the improper conduct of his fellow servant. I am unable to accept such a proposition. Whether there is such a duty or not must depend upon the circumstances of each particular case. Under clause 7 of the agreement between the appellant and respondent in this case the appellant is given the general control of the company subject to the overriding power of the managing director. He is made responsible for the business as a whole, subject to the lawful orders of the managing director, and he is obliged to "promote, develop and extend the interests of the company." The plaintiff received instructions from the managing director to do acts which were a dishonest contravention of an order in council. These acts were done on the instructions of the managing director and from the plaintiff's own evidence it was clear that the plaintiff

said : " the managing director told me to do this." The plaintiff was responsible for the management of the business and was responsible for seeing that the business was conducted honestly and efficiently by all who came under his control. If the dishonesty of a fellow-servant came within his notice he should tell the board. The true position in my view is this : what are the obligations undertaken in this particular contract ? The managing director gave the plaintiff unlawful orders. The plaintiff's duty was to report to his employer that the managing director had endeavoured to persuade him to do something which was dishonest and which would, if carried out, be a breach of his duties in controlling the business of the company. If this was his duty it is not altered by the circumstance that he carried out the suggestion made to him. The fact that he carried out the suggestion made it none the less his obligation to inform his directors of the orders which had unlawfully been given to him. He was invited thereafter to give the board details of the complicity of the managing director in these proceedings. He gave a statement of his knowledge of the facts. Can it be said that what he was invited to do was not already his duty to do ? His duty to give information to the board arose at the moment when the original improper orders were given to him, and this duty is not lessened by the fact that he obeyed those orders himself. In my judgment there was no consideration for the contract alleged, and this appeal must be dismissed.

MACKINNON, J. : I agree.

Solicitors : *J. N. Nabarro & Sons* (for the appellant) ; *Wild, Collins & Crosse* (for the respondents).

[*Reported by* LESLIE CARNEGIE, Esq., *Barrister-at-Law.*]

TELSEN ELECTRIC CO., LTD. v. J. J. EASTICK & SONS.

[KING'S BENCH DIVISION (Lawrence, J.), **October 19, 20, 21, 1936.**]*Companies—Winding up—Set-off—Damages for breach of contract—Breach of price maintenance agreement—Breach by receiver before appointment of liquidator.*

By certain agreements between the plaintiffs, manufacturers of radio sets, and the defendants, wholesale dealers in such radio sets, it was agreed that the retail prices of the radio sets should be maintained at prices fixed by the plaintiffs. The order form provided that the wholesalers were to be compensated for any loss that might occur through any alteration of list prices by the plaintiffs, and that if a receiver should be appointed or the plaintiffs should go into liquidation, the defendants should have the right to return any of the goods which they might have in stock. On Oct. 5, 1934, a receiver for the debenture holders of the plaintiffs was appointed and the appointment was notified to the defendants on the same day. On the same day a large number of radio sets was invoiced to the defendants. On Oct. 9 the defendants were informed that business was being carried on and that the company's policy of price maintenance was unaffected. The defendants thereupon ordered further goods from the receiver. On Nov. 3, 1934, a creditor presented a petition for winding up the plaintiff company, and on Nov. 20 the receiver stopped manufacture, no further goods being ordered by the wholesalers after that date. The receiver proceeded to negotiate for the sale of the plaintiffs' business, and on Nov. 30, 1934, an offer to purchase a large number of sets was accepted, the receiver imposing no conditions as to price maintenance. On Dec. 3 an order was made for winding up the company and a provisional liquidator appointed, and on the same day possession of the stock was given by the receiver's agent to the purchasers, with the result that a large number of radio sets was put on the market at prices much below the list prices. The defendants wrote to the receiver referring to their right to return the goods, but no arrangement for their actual return was made. The liquidator then brought an action for the balance due on the radio sets delivered to the defendants, who counterclaimed damages for breach of contract, contending that the receiver had broken his contract to maintain prices. The plaintiffs contended that, assuming there was such a contract between the receiver and the wholesalers, there was no breach before the winding up order on Dec. 3, and that after that date the receiver had no authority to bind the company, and that therefore the counterclaim could not be set off. The wholesalers contended alternatively that the liquidator was guilty of breach of contract in refusing or not accepting the return of the sets:—

HELD: (i) the agreement for the sale of the plaintiffs' business on Nov. 30, 1934, constituted a breach of the receiver's agreement to maintain prices.

(ii) alternatively the liquidator ought to have accepted the return of the goods, as at the date of his appointment the wholesalers were entitled to return them.

[EDITORIAL NOTE.] In so far as this counterclaim is against the receiver it is held upon the facts that the breach was complete before the liquidation commenced and no question of mutual credit in bankruptcy arises. In so far as the claim is against the liquidator, the bankruptcy rule must be applied. The decision follows the authority of *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (2), but the point of interest in it is the liability of the receiver and liquidator in the event of the breach of a price maintenance agreement. Generally speaking these officers have to sell

goods for what they will fetch in the open market and it is essential therefore that they should not be in any way a party to such an agreement.

AS TO SET-OFF IN WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, pp. 683, 684, para. 1138, and FOR CASES, see DIGEST, Vol. 10, pp. 936-942, Nos. 6416-6455.]

Cases referred to :

- (1) *Gosling v. Gaskell*, [1897] A.C. 575 ; 10 Digest 792, 4975.
- (2) *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 ; 12 Digest 339, 2835.
- (3) *Re Milan Tramways Co., Ex p. Theys* (1884), 25 Ch. D. 587 ; 10 Digest 940, 6442.

ACTION for £416 7s. 1d. for goods sold and delivered, and counterclaim for damages for breach of the agreement under which the defendants took delivery of the said goods. The facts are fully stated in the judgment.

A. T. Miller, K.C., and *Valentine Holmes*, for the plaintiffs.

R. P. Croom-Johnson, K.C., and *A. A. Gordon Clark*, for the defendants.

LAWRENCE, J. : In this case an action is brought on behalf of the Telsen Electric Co., which is in liquidation, for the sum of £416 7s. 1d., for goods sold and delivered, and the defendants counterclaim for damages for breach of the agreement under which they took delivery of the goods, the price of which is sued for. The plaintiff company is a company which manufactures radio sets, and the defendant firm is a firm of wholesale dealers in these articles. The parties have been carrying on business for some time on the terms of the contracts contained in certain documents, wherein the parties agree that the prices of these radio sets should be maintained at the prices settled by the plaintiff company. The course of business was that the plaintiff company settled the selling price to the public, and gave from that price to the defendants a discount of 20 per cent., and 30 per cent., and the defendants gave to the retailers to the public the discount of 30 per cent., retaining for themselves the discount of 20 per cent. In the order form of the defendants on which order all the goods in question in this action were delivered, it is provided that :

The order is given on the understanding that we [the defendants] are to be compensated for any loss that may occur through any alteration of list prices by you [the plaintiffs]. Should a receiver be appointed or should you go into liquidation or give up the manufacture of the goods concerned in this order, we have the right to return any we might have in stock.

On Oct. 5, 1934, a receiver for the debenture holders was appointed, a Mr. Herbert Smith, and his appointment was notified to the defendants on the same date. On that day a large number of these radio sets was invoiced to the defendants ; some £511 worth or thereabouts. On Oct. 9, Colonel Jewels, a director of the plaintiff company, who was

acting on behalf of the receiver and whose authority so to act was accepted by the receiver in his evidence, wrote to the defendants referring to the appointment of Mr. Herbert Smith as receiver and saying that the business was being carried on as usual, "and the company's policy with regard to the production of quality products, price maintenance and service remain unaffected." The defendants then wrote back to the plaintiff company saying that they hoped that they would increase their sales in the future, and indicating in that letter that they proposed to carry on business with them. On Oct. 15, the plaintiff company wrote back thanking the defendants for their good wishes and saying that they were selling normally and goods would be supplied in the ordinary course against orders at the usual terms, and every effort made to protect the market. In those circumstances the defendants proceeded to order further goods from the receiver and the balance which is now sued for is in respect of those goods; that is to say, if an appropriation of the payments which have been made is carried out, it would appear that the goods, the price of which is now sued for, were all delivered after the appointment of the receiver, and I hold that they were sold by the receiver upon the terms that the price list would be maintained, and that the other terms as to service and hire-purchase, such as they were, were to be observed.

On Nov. 3 a creditor presented a petition for winding up the plaintiff company, and in view of that petition, on Nov. 20 the receiver stopped manufacture, and no further goods were ordered by the defendants after that date. The receiver then proceeded to negotiate for the sale of the business of the plaintiff company, and on Nov. 29 a letter was written to him by Messrs. Alfred Herbert, Ltd., offering to purchase the business of the plaintiff company, including the goodwill, patents, stock-in-trade, plant, etc., and the freehold buildings at Aston, excepting the landlord's fixtures and excluding book debts, for the sum of £65,000, and stating that the offer was open for acceptance until mid-day on Nov. 30. On Nov. 30, the receiver accepted that offer verbally and imposed no conditions upon Messrs. Alfred Herbert, Ltd., as to price maintenance or service. On Dec. 3 an order was made for the winding up of the company and a provisional liquidator was appointed. On that day possession was given of the stock on the plaintiff company's premises by Colonel Jewels, acting on behalf of the receiver, to some purchasers—Mr. Hitner and Mr. Rosenfield, who were sub-purchasers from Messrs. Alfred Herbert, Ltd.—and on Dec. 6 Messrs. Whiteleys, the London departmental stores, purchased 2,500 of the radio sets which were then on the premises of the plaintiff company.

After Nov. 30 the terms of payment were apparently altered by the receiver, and on Dec. 8 (as was contemplated on Nov. 30) a formal contract was drawn up, carrying out the sale by the receiver to Messrs.

Alfred Herbert, Ltd. On that same day the plaintiff company was removed from the list of manufacturing subscribers to the mutual trading agreement. The position then was that a large number of radio sets had been let loose upon the market by the action of the receiver and would be offered in London by Whiteleys at prices much below the prices settled by the plaintiff company. Naturally that put the defendants into a position of great difficulty, and accordingly on Dec. 8, immediately they were informed that an order for the winding up of the company had been made, they wrote to the receiver saying that they had heard of the winding up order; they had well over £1,000 worth of goods in stock, and they would refer to the conditions of their orders and would be glad to have their comments per return. They added: "We regret under the circumstances that we must ask you to return our recent acceptance value £692 19s. 4d." The terms to which they refer are the terms which empowered them to return the goods on the appointment of the liquidator. No answer was received to that letter and on Dec. 14 the solicitors to the defendants wrote asking for an answer. On Dec. 18 the receiver wrote saying that the official receiver had been appointed provisional liquidator and he proposed calling a meeting of creditors early next month when a liquidator would be appointed, and suggesting that the matter be left over until the liquidator had been appointed and the full facts submitted to him in order that a settlement might be arrived at. Nothing further happened and on Jan. 30, 1935, the solicitors to the defendants wrote to the liquidator saying:

Our clients are desirous of getting this matter finally settled. They wish to return, in accordance with their order (to which please refer) the stock of sets still in their possession as listed below, and they will be glad if you will send delivery instructions.

That letter was answered by a letter from the receiver, dated Jan. 31, 1935, in which they were told that it would be brought to the notice of the liquidator at an early date. They wrote again on Feb. 18, and received no answer. On Feb. 25 they wrote again saying they had put a "stop" on the acceptance of £692 19s. 4d., and again on Mar. 23 they wrote pressing for an answer to their letters. No answers were given and on Mar. 30 this action was brought by the liquidator claiming £416 7s. 1d. in respect of the balance due upon the radio sets which had been delivered to the defendants between Oct. 2 and Nov. 20, 1934.

In those circumstances the defendants set up a counterclaim for damages for breach of the agreement to maintain the prices, and their contention is that the receiver sold all the radio sets at the prices claimed in this action, on the ground that the price should be maintained, and that by entering into the agreement of Nov. 30 he broke that contract, and they are entitled to set off the damages for that breach against the

price of the goods. It has been agreed between the parties that in the event of my holding that the defendants are entitled to set off these or any other damages, the amount of the damages should be referred to the liquidator himself, Mr. Latham. It is contended on behalf of the plaintiff company that—assuming there was such an agreement by the receiver—there was no breach by the receiver before the winding up order of Dec. 3, and that after Dec. 3, the receiver had no authority to bind the company, and that therefore the counterclaim could not be set off, and for that proposition Mr. Miller cited the case of *Gosling v. Gaskell* (1). It was argued on behalf of the defendants that the breach was complete upon Nov. 30, and in any event the liquidator was not entitled, having carried out the completion of that agreement on Dec. 8, to disavow the agency of this receiver. The case was also put in an alternative way on behalf of the defendants, namely, assuming the case put by the plaintiff company—that the breach was not complete on Nov. 30, and that on the winding up order being made the receiver had no further authority—then the liquidator himself was guilty of a breach of the contract in refusing or not accepting the return of the sets when the return was offered to him on Dec. 8. In order to raise that case it was asked that the pleadings might be amended, and I am prepared to allow that amendment in order to do what I conceive to be justice, in the event of it being held that the breach by the receiver was not complete by Nov. 30 and the receiver had no further power to bind the company thereafter, but in my opinion the breach of contract by the receiver was complete before the winding up of the company. The receiver accepted the offer of Messrs. Alfred Herbert, Ltd., on Nov. 30, and I hold that that acceptance of that offer constituted a breach of the agreement which the receiver had made to maintain the prices of these sets, and it appears to me to be clear from the case of *Mersey Steel & Iron Company v. Naylor* (2), that when a company is being wound up a claim for liquidated damages can be set off against the liquidator who is claiming a debt due to the company, and I hold that the *Milan Tramways* case (3) is of no value upon the matter, as it was dealing with the rights of an assignee for value without notice and did not purport to affect the law as laid down by the House of Lords in the case of *Mersey Steel & Iron Co. v. Naylor* (2).

This agreement which was arrived at on Nov. 30, as I find, was carried out before the winding up order was made, with the authority of the authorised agent of the receiver, Messrs. Hitner and Rosenfield being permitted to take possession of the goods by Colonel Jewels. I am, therefore, of the opinion that the defendants are entitled to succeed in this action upon their counterclaim and are entitled to the damages which they have suffered by the failure to maintain the prices fixed by the receiver, when he sold these goods to the defendants.

On the alternative view of the case, namely, that the defendants could not succeed because of a breach of their contract by the receiver, I think that I shall only be doing justice if I allow the amendment which was asked for, and I accordingly do allow it, subject to it being properly entered in red ink upon the pleadings of the defendants, and I hold that on that amendment the liquidator broke the terms of the contract, namely, that on the appointment of the liquidator the defendants were entitled to return the goods. It is argued for the plaintiffs that there was no tender of the goods, but in my opinion in a transaction of this sort what was done in this case was amply sufficient to carry out the performance of the contract on the part of the defendants. Directly the liquidator was appointed they offered to return the goods, and it would have been, in my judgment, absolutely unbusinesslike and absolutely unnecessary to tender the goods to the receiver or anyone else in any other shape or form than the shape in which they were tendered in the correspondence to which I have referred. There is no possible justification, in my judgment, for the liquidator not taking back those goods, and in so far as the defendants have suffered damage by his not taking back those goods they are entitled, in my judgment, to set off the amount of those damages against the price of the goods sued upon in this action.

As I have said, however, I hold in the first place that the defendants are entitled to set off the damages, as to which the measure will be different from the measure as against the liquidator on the claim for the refusal to accept the return of the goods, and I hold that the defendants are entitled to set off the damages which they have sustained by the contract entered into by the receiver and Nov. 30, 1934, which involved the defendants in the damages which they have sustained by reason of these goods which were sold to Messrs. Alfred Herbert, Ltd., being put upon the market without any restriction as to price maintenance. There will, therefore, be an inquiry before Mr. Latham, as agreed, in regard to damages. The damages ought to be ascertained on both those heads.

Order for inquiry. Leave to amend. All costs reserved. Liberty to apply.

Solicitors : *Herbert Oppenheimer, Nathan, Vandyk & Mackay* (for the plaintiffs) ; *Monier-Williams & Milroy* (for the defendants).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

UNITED DAIRIES (LONDON), LTD. *v.* STIRLING.[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 22, 1936.**]

Workmen's Compensation—Partial incapacity—Treated as total incapacity—Review of compensation—Failure to take reasonable steps to find employment—Change of circumstances—Workmen's Compensation Act, 1931 (c. 18), s. 1

In 1932 a workman was injured and partially disabled. In an application for compensation, it was found that the workman had taken all reasonable steps to find employment and had failed, and that the injuries were wholly or mainly responsible for the continued disability, and an order was made that the workman should be treated as wholly incapacitated within the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Workmen's Compensation Act, 1931, s. 1. In 1936 the employers applied for a review of compensation on the grounds that the workman had not taken reasonable steps to obtain employment and that this constituted a change in circumstances. The county court judge dismissed the application on the ground that once an order had been made under sect. 1 of the Act of 1931, and there was no medical change, the question whether the workman was still taking or not taking all reasonable steps to obtain employment could not be considered on review. The employers appealed:—

HELD: the question whether the workman was still taking or not taking all reasonable steps to obtain employment ought properly to be considered in an application for review.

[EDITORIAL NOTE.] So long as the arbitrator is assured that there is not total incapacity the workman is bound to show that he has taken reasonable steps to obtain employment even if he is only able to do light work. On the other hand the man's own evidence that he has been unable to obtain it is conclusive in the absence of rebutting evidence: *Osborne v. Tralee & Dingle Ry.* (1913), 6 B.W.C.C. 913; 34 Digest 395, 3228 i.)

AS TO REVIEW OF WEEKLY PAYMENTS, see HALSBURY, 1st Edn., Master and Servant, Vol. 20, pp. 232, 233, para. 548; and FOR CASES, see DIGEST, Vol. 34, pp. 453-458, Nos. 3721-3751. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., p. 279.]

Cases referred to:

- (1) *Donachie v. Whitehaven Colliery Co., Ltd.* (1933), 26 B.W.C.C. 63; Digest Supp.
- (2) *Hughes v. Penmaenmaur & Welsh Granite Co., Ltd.* (1933), 26 B.W.C.C. 99; Digest Supp.
- (3) *Langslow v. John Lines & Sons, Ltd.* (1935), 28 B.W.C.C. 186; Digest Supp.
- (4) *Hancox v. Balfour, Beattie & Co., Ltd.* (1932), 25 B.W.C.C. 596; Digest Supp.
- (5) *M'Alinden v. Nimmo (James) & Co., Ltd.*, [1920] A.C. 39; 34 Digest 455, 3731.

APPEAL by the United Dairies (London), Ltd., against an award made by His Honour JUDGE WOODCOCK at the Marylebone County Court on June 29, 1936, whereby he dismissed an application for review made by applicants, in respect of an award under the Workmen's Compensation Act, 1925, of £1 3s. 6d. per week made on Nov. 14, 1934, by His Honour DEPUTY JUDGE TUDOR REES.

The grounds of appeal were that the county court judge was wrong in law : (i) in dismissing the application for review ; (ii) in holding that the respondent must be treated as wholly incapacitated ; (iii) in failing to have regard to the respondent's admission that she was taking no steps to obtain employment.

G. J. Paull and *J. H. C. Goldie* for the appellants.

A. W. Elkin for the respondent.

Paull : The county court judge was wrong in law in holding that the employers had adduced no evidence as to a "change of circumstance." Where an award has been made for total incapacity under the Workmen's Compensation Act, 1925, s. 9 (4), it is open to the employers to come forward later and to say that the workman has ceased to take all reasonable steps to secure employment and that therefore they are entitled to a reduction of compensation. The respondent had not taken reasonable steps to obtain employment, and that constituted a "change of circumstance." [Counsel referred to : *Langslow v. John Lines & Sons, Ltd.* (3) ; *Hancox v. Balfour, Beattie & Co., Ltd.* (4) ; *Donachie v. Whitehaven Colliery Co., Ltd.* (1) ; *Hughes v. Penmaenmawr & Welsh Granite Co., Ltd.* (2) ; *M'Alinden v. Nimmo (James) & Co., Ltd.* (5).]

Elkin : The onus of proof was upon the employers to prove the change of circumstances, and they have not discharged that onus. The county court judge made no notes of his findings and there was a difference in the notes made by counsel as to what he said in giving his judgment.

SLESSER, L.J. : This appeal succeeds. Mary Murray Stirling was injured on Dec. 12, 1932, while working for the United Dairies (London), Ltd., and had to suffer an amputation of the first three fingers of the right hand. As the result of that disability she received compensation, and after a certain time, in 1934, the compensation ceased and an application was made to the court for compensation under the Act. At that hearing it was alleged that this lady, though in one sense partially incapacitated physically, for only one of her hands was incapacitated, yet should be treated as totally incapacitated by reason of the language of the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Act of 1931. To quote from the notes of counsel made at the time, of the judgment of the learned deputy county court judge, Mr. Tudor Rees, he came to the conclusion that she was totally incapacitated, and he said :

I find she has taken all reasonable steps and failed. Stage further, due wholly or mainly to injury. I have no doubt at all that in fact injuries are wholly or mainly responsible for the continued disability.

So far there is a finding, therefore, that this lady at the time when this order was made was, among other things, taking all reasonable steps to obtain employment. That finding was an essential part of the judge's finding if the lady was to be able to take advantage of the section, as

was stated by this court in the case of *Donachie v. Whitehaven Colliery Co., Ltd.* (1), and affirmed in *Hughes v. Penmaenmawr & Welsh Granite Co., Ltd.* (2). It is sufficient for this purpose to point out that in the earlier case LORD HANWORTH, M.R., at p. 73 said :

the directory terms of the proviso seem to make the proviso *in pari materia* with the condition precedent. Therefore the workman has to establish that he has taken all reasonable steps.

Mr. Paull points out to us that there is a special provision in the section of the 1931 Act to the effect that the amendment of sect. 9 (4) of the 1925 Act shall read without prejudice to the right of review conferred by that Act, and the right of review conferred by that Act entitles either party, upon a change of circumstances, to go to the court and ask them to reconsider their award in view of the alleged change of circumstances. The change of circumstances here alleged is that this lady, as is found by the county court judge, his Honour, JUDGE WOODCOCK, "has not been making some efforts to find some work." The learned county court judge came to the conclusion, as I understand his judgment, that once an order has been made under sect. 1 of the 1931 Act, and where there is no medical change so that it can still be said that the workman has only so far recovered as to be fit for employment of a certain kind, the question whether the workman is after the judgment still taking or not taking all reasonable steps to obtain employment, is not a question which can be considered upon a review. He says : "I cannot go behind that finding"—that is that the partial injury must be treated as total—"because she has not been making some efforts to find some work." In my view that is erroneous. Having regard particularly to the two cases I have cited, which set out the several conditions which are necessary to be proved, in order that a workman's partial incapacity may be treated as total—i.e., not only, that he has so far recovered from the injury as to be fit for employment of a certain kind, and that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident ; or that his failure to obtain employment is a consequence, wholly or mainly, of the injury ; but also : "no order shall be made under this subsection if it appears to the judge that the workman has not taken all reasonable steps to obtain employment"—I think that the whole of these conditions are matters which are properly to be the subject of review, and if there be a change of circumstances or any of the necessary conditions which entitle the workman to say that his partial incapacity is total, that change is one which the learned judge is entitled to consider.

I might point out that any other reading of this proviso would have the effect that, once the workman's medical condition was established to

be unchanged, the workman apparently might for an indefinite time fail to take reasonable steps to obtain employment, even though, notwithstanding her medical condition, she had been offered employment on terms equal to or slightly less than the employment in which she was engaged at the time of her injury.

It follows, therefore, that this case must go back to the learned county court judge for him to inquire whether on the facts of this case, at the time when the review was sought, it had or had not been established that the workman had taken all reasonable steps to obtain employment. That is essentially a matter for him. I do not think, for example, that where an order has been made under this section, it would necessarily follow that an allegation by the employer that within perhaps a month of that time no steps had been taken to obtain employment, and the medical condition remains unchanged, would of itself justify the judge necessarily in coming to the conclusion that the proviso was not satisfied. That seems to me a matter of degree and of fact. The circumstances must all be taken into consideration, and whether it is or is not necessary to take steps to obtain employment, and whether it is reasonable, are primarily matters for the county court judge ; but the employer is entitled to ask that there be a review, though the facts of each case will decide whether the particular review is or is not successful.

This case will, therefore, be remitted to the county court judge. The appeal will be allowed with costs, the costs of the first hearing to abide the decision in the second hearing.

SCOTT, L.J. : I agree.

EVE, J. : I also agree.

Solicitors : *James Turner & Son* (for the appellants) ; *H. E. Aston* (for the respondent).

[*Reported by FRANK ROWE, Esq., Barrister-at-Law.*]

Re EASTCHEAP ALIMENTARY PRODUCTS, LTD.[CHANCERY DIVISION (Crossman, J.), **October 20, 21, 22, 1936.**]*Execution—Rent—Provision for payment of—Landlord and Tenant Act, 1709 (c. 18) s. 1.**Practice—Motion to discharge order made in chambers—Time for.*

By an agreement made in 1934 and expressed to be between the S. Ry. Co. and "T.C.B. and M.G. trading as E.A.P., Ltd." thereafter called "the tenants," certain premises were let to "the tenants," and it was provided, *inter alia*, that "the tenants hereby jointly and severally agree to pay the rent," etc. In the testimony clause "the tenants respectively set their hands, etc." In 1936 judgment was obtained against E.A.P., Ltd., a writ of *fiery facias* issued against certain goods of E.A.P., Ltd., at the above-mentioned premises, and the sheriff's officer took possession of the goods. The sheriff received notice from the S. Ry. Co. that a certain sum was due to them for rent of the premises. The execution creditors sent a cheque for that amount to the sheriff. E.A.P., Ltd., then went into voluntary liquidation and on the same day the S. Ry. Co. applied to T.C.B. and M.G. for the rent due. The liquidators of E.A.P., Ltd., wrote to the sheriff, undertaking to reimburse the sheriff in respect of the rent if he should be found entitled to it, and the sheriff thereupon delivered to the liquidators the goods which had been taken in execution. The execution creditors took out a summons, asking for an order that the liquidators should repay to the execution creditors or to the sheriff on their behalf the sum paid by the execution creditors to the sheriff for the rent due to the S. Ry. Co. The execution creditors based their claim on the Landlord and Tenant Act, 1709, s. 1. The liquidators contended that the relationship of landlord and tenant did not exist between the S. Ry. Co. and E.A.P., Ltd., and that in the absence of such relationship, the Act of 1709 did not apply:—

HELD : (i) the relationship of landlord and tenant must exist between the person claiming the rent and the execution debtor to make the Landlord and Tenant Act, 1709, applicable.

(ii) upon a proper construction of the lease of 1934, the tenants were T.C.B. and M.G. and not E.A.P., Ltd.

(iii) the Act of 1709 did not therefore apply, and the execution creditors were not entitled to the order asked for.

(iv) There seems to be no strict rule as to the time within which notice of motion to discharge an order made in chambers ought to be given but it would seem that 14 days is a proper time in ordinary cases.

[EDITORIAL NOTE.] This case decides a point that has been accepted upon the authority of a case decided in 1727 and very shortly reported. The effect of that case has been said to be that the relationship of landlord and tenant must exist between the person claiming the rent and the execution debtor when rent is claimed in priority to the execution creditor, and this view of the law has been adopted by all the textbooks. It is satisfactory to know that the learned judge found himself able to support this view and so his decision replaces the unsatisfactory authority of 1727. It is clear that the case of *Carr v. Goldington* referred to in *Bennet's Case* (1)—that is the authority of 1727 above referred to—is the case reported in 11 Mod. Rep. 414 under the name of *Carr v. Goslington*. The case was decided in the same year as *Bennet's Case* (1), but the report is no fuller, though it is clear that the two cases cover precisely the same point and are to the same effect.

AS TO PAYMENT OF RENT BY SHERIFF, see HALSBURY, Hailsham Edn., Vol. 14, pp. 63, 64, para. 109; and FOR CASES, see DIGEST, Vol. 21, pp. 522-524, Nos. 963-978.]

Cases referred to :

- (1) *Bennet's Case* (1727), 2 Stra. 787; 18 Digest 345, 808.
- (2) *Riseley v. Ryle* (1842), 10 M. & W. 101; (1843) 11 M. & W. 16; 18 Digest 348, 851.
- (3) *Re Mackenzie, Ex p. Hertfordshire (Sheriff)*, [1899] 2 Q.B. 566; 18 Digest 344, 796.

MOTION to discharge an order made by Mr. Registrar Stiebel on July 27, 1936. The facts are fully set out in the judgment.

Robert Fortune, for the applicants : On the form of the lease individuals held on behalf of the company. The Landlord and Tenant Act, 1709, s. 1, does not require the execution debtor to be the tenant; the section is designed to protect the landlord's rent so long as there is a tenancy, no matter who may be in occupation. *Bennet's Case* (1), if necessary, is wrongly decided on this point. The Law of Distress Amendment Act, 1908, s. 4 (2), expressly excepts from the protection afforded by that Act goods of any company where the tenancy is in the name of a director or officer of the company. The Companies' Act, 1929, s. 269, equally with the Bankruptcy Act, 1914, s. 41, has in no manner taken away from the landlord his rights under the Act of 1709, because goods required to provide the rent given to the landlord by the Act of 1709, are not goods of the company or the bankrupt within those statutes.

Wilfrid A. Barton, for the respondents : On its true construction the contract is clearly with individuals and not with the company. The Landlord and Tenant Act, 1709, requires that the relationship of landlord and tenant must exist between the execution debtor and the person claiming the rent. If *Bennet's Case* (1) were wrongly decided the effect of the Act of 1709 would be to give the landlord a right of distress over goods otherwise exempted by statute.

Fortune, in reply : I admit the form of the agreement is applicable to a letting to tenants, but its substance must be looked at. As to the Act of 1709 giving the landlord a right of distress over goods otherwise exempt, it may well be that PARKE, B., recognised this in *Riseley v. Ryle* (2). If the respondents were right the landlord would get no protection in the case where a nominee was tenant, and the Act of 1709 would be cut down in express opposition to its own terms.

CROSSMAN, J. : This case involves a comparatively small sum of money, but it has taken a very great deal of time—I do not say too much. It has been very well argued indeed by counsel; and I am much obliged to them for their assistance.

The position is this. A company called Wax & Vitale, Ltd., are execution creditors of Eastcheap Alimentary Products, Ltd., which is

now a company in voluntary liquidation ; and Wax & Vitale, Ltd., have moved before me to discharge an order made by Mr. Registrar Stiebel on July 27, 1936. The applicants did not serve notice of this motion on the respondents, the liquidators of Eastcheap Alimentary Products, Ltd., until Aug. 18, 1936 ; and the question arose whether their motion was too late. There seems to be no strict rule as to the time within which notice of motion to discharge an order made in chambers ought to be given ; but, on the analogy of an interlocutory appeal, I think in the ordinary way 14 days would be the proper time. In this case it was not within the 14 days ; but in the circumstances, I came to the conclusion that I ought to allow the applicants to proceed with their motion, notwithstanding the fact that it was some 10 days over the 14 days.

The registrar's order was made on an originating summons, dated July 9, 1936. That was taken out in the voluntary winding up of the Eastcheap Alimentary Products, Ltd. By it the applicants and the sheriffs of the City of London—I note that specially because the sheriffs of the City of London are not parties to this appeal—applied for an order in these terms, an order that the said liquidators :

do out of the goods and chattels of the said company taken in execution by the said sheriffs of the City of London by virtue of a writ of *feri facias*, dated Mar. 26, 1936, and received by the said liquidators pursuant to an undertaking of the said liquidators, dated, Apr. 24, 1936, repay [to the applicants or to the sheriffs] on their behalf the sum of £43 15s. 3d. paid by [the applicants] to the said sheriffs for rent due to the Southern Railway Company [the landlords] or so much thereof as represents the value of the said goods and chattels remaining after payment of the proper charges of the said sheriffs.

The summons also asks for the costs of the application to be paid by the respondents, who were the liquidators, to the applicants. The registrar's order of July 27, 1936, states :

The court doth not think fit to make any order on the said application, but doth order that the applicants, the said Wax & Vitale, Ltd., and the said sheriffs of the City of London do pay to the respondents their costs of the said application, such costs to be taxed, but that the costs against the said sheriffs be limited to those incurred after they were joined as such applicants.

They were not originally parties to the summons ; but were joined when the objection was taken that without the presence of the sheriffs the application could not proceed. The applicants' notice of motion, which is dated Aug. 18, 1936, asks for an order that :

the time for appealing against the order of Mr. Registrar Stiebel, dated July 27, 1936, and more particularly referred to in para. 2 hereof, be extended for 14 days from Aug. 10, 1936.

I have dealt with that part of the notice of motion.

(ii) The refusal of Mr. Registrar Stiebel, dated July 27, 1936, to make any order

on the application of the applicants at chambers, dated July 9, 1936, and ordering that the applicants do pay the costs of the application to be taxed may be discharged, and that upon the undertaking of the applicants to pay the landlords, the Southern Railway, the rent claimed by the said landlords amounting to £43 15s. 3d. an order may be made in the terms of the said application, dated July 9, 1936, or such further or other order as to this honourable court may seem meet ; (iii) That the costs of this application be paid by the respondents.

That is the nature of the application which I am now considering. The material facts appear to me to be as follows. On Mar. 26, 1936, the applicants obtained judgment against the Eastcheap Alimentary Products, Ltd., for £37 4s. 3d. and £5 15s. 0d. costs. On Mar. 31, 1936, a writ of *fiери facias* issued on the judgment against certain goods and chattels of Eastcheap Alimentary Products, Ltd., at 29 and 30, Cannon Street Arches, Upper Thames Street ; and on the same day the sheriff's officer took possession of the goods. Again on the same day the sheriff received notice from the Southern Railway Co. that £43 15s. 3d. was due to the railway company for rent of the premises Nos. 29 and 30, Cannon Street Arches. On Apr. 3, 1936, the applicants sent a cheque for £43 15s. 3d. to the sheriffs for such rent. What exactly has happened to that cheque is not in evidence ; but I have no evidence that it has ever reached the landlords, the Southern Railway Co. On Apr. 8, 1936, the Eastcheap Alimentary Products, Ltd., went into voluntary liquidation, a resolution having been passed to that effect. Mr. H. Kingston and Mr. W. H. Cork were appointed liquidators ; and they are respondents to the present application. It appears also that on the same day, Apr. 8, 1936, the Southern Railway Co. applied to Mr. T. C. Barnard and Mr. M. Gale for payment of this sum of rent of £43 15s. 3d. Who Messrs. Barnard and Gale were will appear hereafter. Then on Apr. 24, 1936, the liquidators wrote to the sheriffs as follows :

Re Eastcheap Alimentary Products, Ltd. (in voluntary liquidation).'' Referring to my conversation with you by telephone yesterday afternoon I confirm on behalf of myself and Mr. Cork as joint liquidators, that we undertake to pay such legal charges as you are entitled to, relative to the goods of the above company now in your possession. With regard to the rent, as you are aware this matter is being considered and if we find that you are entitled to be reimbursed this rent, you have our assurance that such will be done. You will appreciate that we are acting in the interest of the creditors, and we can only pay such charges as are legally and properly due. In accordance with the arrangement made with you I shall be glad if you will now hand order for delivery of the goods to bearer of this letter, Mr. T. C. Barnard.

The letter was signed by Mr. Kingston as joint liquidator.

It appears that on the same date, Apr. 24, the sheriffs delivered the goods, which had been taken in execution on Mar. 31, 1936, to the liquidators ; and as far as I know, they are still in the possession of the liquidators. On July 9, 1936, the applicants issued their originating

summons, the terms of which I have already stated ; and on July 27 the registrar made the order appealed against. On Aug. 18, 1936, the applicants only, not the sheriffs, served this notice of motion.

The applicants base their claim on the Landlord and Tenant Act, 1709. The material section of that Act is sect. 1, which is to this effect :

For the more easie and effectual recovery of rents reserved on leases for life or lives term of years at will or otherwise be it enacted by the Queen's most excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled and by authority of the same (1) that from and after the first day of May which shall be in the year of Our Lord one thousand seven hundred and ten no goods or chattels whatsoever lying or being in or upon any messuage lands or tenements which are or shall be leased for life or lives term of years at will or otherwise shall be liable to be taken by virtue of any execution on any pretence whatsoever unless the party at whose suit the said execution is sued out shall before the removal of such goods from off the said premises by virtue of such execution or extent pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution. Provided the said arrears of rent do not amount to more than one years rent and in case the said arrears shall exceed one years rent then the said party at whose suit such execution is sued out paying the said landlord or his bailiff one years rent may proceed to execute his judgment as he might have done before the making of this Act and the sheriff or other officer is hereby impowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.

Three points were taken before the registrar by the respondents as against the applicants. First, it was suggested that the sheriffs should have been applicants. That point was disposed of by the sheriffs being joined by the originating summons ; but I have to note particularly that the sheriffs are not a party to this present motion. Secondly, the point was taken that there has been no payment of the rent to the landlords at present ; but the only thing done has been the handing of a cheque to the sheriffs. That point might be got over by some undertaking, or by an order for the payment of the money. The third point, which is the serious point that I have to deal with, is this. It was suggested and argued before the registrar that the relationship of landlord and tenant did not exist between the railway company and Eastcheap Alimentary Products, Ltd. It was contended that unless the relationship of landlord and tenant existed between the landlord and the execution debtor in any particular case, the Statute of Anne, the Landlord and Tenant Act, 1709, s. 1, has no application. I am going to assume for present purposes that the applicants can get over the first and second of the difficulties which are raised against their original application, because their motion now is that an order may be made exactly as they asked for it on their summons. I propose to assume for the moment that they can get over the first and second difficulties which I have

stated ; and I am going to consider only the third point which is taken against them, and consider the point as it has been argued before me here. The first point taken by Mr. Barton on behalf of the respondents is that the relationship of landlord and tenant must exist between the person claiming the rent and the execution debtor, in order to make the Landlord and Tenant Act, 1709, s. 1, applicable at all. He has argued, secondly, that such relationship does not exist between the Southern Railway Co. and the Eastcheap Alimentary Products, Ltd. As regards the first contention, I find that that contention is supported, though there may be no authority for it, as a matter of argument by the recognised textbooks on the law of Landlord and Tenant. I look at those textbooks to see how the statement which he adopts as his argument is put. The first of those textbooks I look at is REDMAN ON THE LAW OF LANDLORD AND TENANT (8th Edn., p. 455). This is what is stated there :

In order that the Statute of Anne—[the learned author is there referring to the Act of 1709]—may apply in any particular case there must be an immediate tenancy between the person claiming the rent and the execution debtor.

Then there is a reference to *Bennet's Case* (1). That is the first statement I find in the textbooks. There is no later edition of this book. Then passing to WOODFALL ON LANDLORD AND TENANT (23rd Edn.), on p. 636, the author states :

The Act only applies to a subsisting tenancy, and the landlord's statutory right to be paid arrears of rent ceases on determination of the lease.

A little lower down there is this paragraph :

[The Act] does not apply to a yearly sum payable in respect of the goodwill of a business, the yearly sum having been arranged in lieu of a premium, and it does not apply to ground rents as against an underlessee, but is only in favour of the immediate landlord.

The reference there again is to *Bennet's Case* (1). Then in FOA'S LANDLORD AND TENANT (6th Edn.), at p. 201, after stating on p. 200 the effect of the statute, the author says : "The application and effect of the statute just set out may be considered as follows." The heading is : "What tenancies." Then come these words :

The relationship of landlord and tenant must exist between the person claiming the rent and the execution debtor, and such relationship must be immediate not that e.g., of lessor and sub-lessee.

That is the positive statement on this question : "The relationship of landlord and tenant must exist between the person claiming the rent and the execution debtor." It goes a little further in the actual statement, because it says : "such relationship must be immediate and not that, e.g., of lessor and sub-lessee." That makes it necessary for me to con-

sider what was the basis or the authority for those propositions in the textbooks. I find, as far as I can see, these propositions are all based upon *Bennet's Case* (1). The report of that case is not a very satisfactory one. It is very short, and it is to this effect :

The case of John Bennet, Esquire, one of the masters of the High Court of Chancery. He was a ground landlord of a house, in which an under lessee dwelt, against whom execution was sued out. The court was moved for a rule on the sheriff to pay Mr. Bennet a year's rent, pursuant to 8 Ann. c. 14. But it was held, that this was not a case within the statute, which extends only to the immediate landlord ; and the case of *Carr v. Goldington* was mentioned to have been so adjudged.

That is an authority, and a clear authority, by which it was held at that time, a very long time ago now, in effect that the statute did not apply unless you had a landlord and his immediate tenant as the execution debtor. The fact that he must be the immediate tenant, of course, is a step further than will be necessary in this case, if Mr. Barton's second point is right that there is no tenancy at all between the execution debtor and the landlord in the present case. But curiously enough, counsel has not been able to refer me to any subsequent case in which *Bennet's Case* (1) has been mentioned ; though I have been referred to a case of *Riseley v. Ryle* (2), which to some extent, I think, supports the proposition for which *Bennet's Case* (1) is quoted. *Riseley v. Ryle* (2) is a case of a demurrer to an action against the sheriff for damages for wrongfully parting with the proceeds of goods taken in execution without providing for the landlord. There was a :

special demurrer, assigning for causes, that no cause of action appears on the face of the declaration, inasmuch as it is not stated, nor does it appear therein, that any tenancy was subsisting between the plaintiff and the said J. Knott and W. Knott of the said brewery.

The plaintiff there was the landlord, who was suing the sheriff. J. and W. Knott were the execution debtors, whose goods had been taken. Taking that proposition, strictly speaking it implies that the basis of the demurrer was that no tenancy had been shown to be subsisting between the person who claimed rent and the execution debtor. After hearing the demurrer the court gave leave to amend on payment of costs, that is to say, the court gave leave to amend by alleging a tenancy between the landlord and the execution debtor ; and the report goes on : " Otherwise, judgment for the defendants." So far as it goes, I think that does support *Bennet's Case* (1) ; though it does not seem to me to be entirely satisfactory. From the later report of the same case, it subsequently appears that the plaintiff failed to prove what was necessary, and the action failed.

The only other case which is material is the case of *Re Mackenzie, Ex p. Sheriff of Hertfordshire* (3). In that case there are some words by which

LORD LINDLEY, M.R., on p. 575, implies, or it may be thought that he implies, that the execution debtor must be the tenant; because he states in his judgment, in giving the reason for the effect of the Act:

The execution debtor would not be damnified, for he owed the rent.

If he owed the rent he was the tenant, of course. Again I do not think that is very satisfactory; but it is consistent with *Bennet's Case* (1).

The position is this. *Bennet's Case* (1) is standing there. It has never been in any way dealt with. The textbooks have followed it, and it has been there since 1727; and I do not think I can disregard it. I think I am bound to hold on that case that the statement in F.O.A.'S LANDLORD AND TENANT is correct, and that in order to bring this Act into force, the relationship of landlord and tenant must exist between the person claiming the rent and the execution debtor.

If that be the case, I have then to consider whether Mr. Barton's second proposition is right, in which he says in this case no relationship of landlord and tenant exists between the Southern Railway Co. and the Eastcheap Alimentary Products, Ltd. In my view, that is entirely a question of the construction of the tenancy agreement—I will not say between whom, because to some extent that is a question at issue—which was entered into by the Southern Railway Co. on Feb. 22, 1934. That agreement is in a very peculiar form. I have never seen anything precisely in this form before. I do not know whether it is the usual way of dealing with the matter; but I have to put some meaning on it. The difficulty is that it is in an unusual form; and to some extent I think it may be said that it is a meaningless form. This is what it says:

This agreement made Feb. 22, 1934, between the Southern Railway Co. (hereinafter called the company) by William John Clayton of Victoria Station in the city of Westminster, their estate agent of the one part and Theodore Cleveland Barnard of Redholme, Queen's Road, Richmond Hill, Surrey, captain, and Malcolm Gale, of 66, Lancaster Gate, London, W.2, trading as Eastcheap Alimentary Products, Ltd., of 47, Eastcheap, E.C.3 in the City of London (hereinafter called the tenants) of the other part: Witnesseth that the company hereby agrees to let unto the tenants and the tenants hereby jointly and severally agree to take from the company the land covered by and within parts of arches numbered 29 and 30 situate under the Southern Railway, at Upper Thames Street, Cannon Street in the city of London (as and for the purpose of storing canned goods, and for housing a motor-lorry—no storage of petrol allowed in the part arches except that contained in the tank of the vehicle) which said premises hereby agreed to be let are hereinafter called "the premises" and are for the better description thereof delineated on the plan hereto annexed and thereon coloured green.

Then there is a habendum for a year determinable as hereinafter mentioned; and there is a reservation of rent of £100 and a covenant as to further rent and insurance. This is a printed form filled in in type. Over the page there appears this:

And the tenants hereby jointly and severally agree to pay the said rent at the times and in the manner aforesaid.

And then they covenant also to enclose and keep enclosed the said part arches and to keep the inside cleansed, and so on. This is a joint and several covenant by the tenants. Then there is a covenant that they will not assign, underlet or in any way part with the possession of the said premises; and that the tenants will yield up the said premises at the end of the term. Then it is provided that it shall be lawful for the company or for the tenants to determine the said tenancy by notice which is in this form. Such notice is to be given by the company, though it may be:

under the hand of their secretary, estate agents, or other officer for the time being, and may be given either to the tenants personally or left on or sent by registered letter to the tenants' last known place of abode or business or left on the premises hereby agreed to be let.

Then there is a provision in case the tenants shall become bankrupt—there is a right then to determine the tenancy. Then finally this testimonium clause:

In witness whereof the undersigned William John Clayton as the estate agent of the company and the tenants have hereunto respectively set their hands the day and year first above written.

It is contended by Mr. Fortune on behalf of the applicants here that Eastcheap Alimentary Products, Ltd., under that document is the tenant, and the letting is either to that company, the Eastcheap Alimentary Products, Ltd., or to the two individuals on behalf of the Eastcheap Co. I have heard Mr. Fortune's argument and he has put the matter very forcibly before me; but I am quite unable to come to that conclusion on the construction of this agreement. I find on the true construction of the agreement that the tenants are the two individuals Theodore Cleveland Barnard and Malcolm Gale. The words "Trading as Eastcheap Alimentary Products, Ltd., of 47, Eastcheap E.C.3," are, in my view, an attempted description of the tenants. It is quite possible that it is a meaningless description; because it may be said that two individuals cannot trade as a limited company. But if it is a meaningless description, I think all I can say is that it must be disregarded. Mr. Barton pointed out to me various points on the agreement which indicate that the tenants are really these two individuals. The first point he mentioned was that the tenants agreed jointly and severally, which would be quite inappropriate if the tenants were the limited company. Then notice is to be given to the tenants personally, which is not an appropriate phrase if the tenants are the limited company. Then there is the proviso in the event of the tenants becoming bankrupt, which is quite inappropriate to a limited company. Finally the tenants are treated as having set their hands to the agreement. I have not seen that part of the agreement executed by the tenants, which is in the

possession, no doubt, of the Southern Railway Co. ; but looking at the agreement as a whole, I cannot help coming to the conclusion that this is a tenancy under which the two persons, T. C. Barnard and Malcolm Gale are the tenants, and that the company is not the tenant. There may be—I do not know how that is—some arrangement between them and the company ; but as it stands the tenants of the railway company are these two individuals. If so, this case seems to me to be an *a fortiori* case compared with *Bennet's Case* (1). *Bennet's Case* (1) was the case of a sub-tenancy ; this is a case of no tenancy at all. If *Bennet's Case* (1) is right, I do not see how I can avoid coming to the conclusion that this is not a case to which the statute of Anne applies at all ; and therefore the applicants cannot be entitled to what they ask on their summons. In those circumstances, all I can do here is to make no order on this motion. I am afraid I must say in the circumstances that the applicants must pay the costs of the motion.

Solicitors : *Theodore Bell, Cotton & Curtis* (for the applicants) ;
M. Wilson Prentis (for the respondents).

[*Reported by* REGINALD TOWNSEND, Esq., *Barrister-at-Law.*]

BLEE *v.* LONDON AND NORTH EASTERN RAILWAY CO

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Eve, J.), **October 19, 20, 1936.**]

Workmen's Compensation—Course of employment—Commencement—Accident on way to work—Emergency work.

On Jan 21, 1935, the workman finished his ordinary day's work at 5.15 p.m., and in the normal way would have started work again at 7.20 a.m., on the following day. At 10.30 p.m. on that same evening he was called for emergency duty and was knocked down by a car when crossing the street on his way to work. There was no evidence that his employers had any right to give him any orders until he arrived at the place where his services were required :—

HELD : the employment did not commence when the workman left his home, but upon his arrival at the place where his services were required and the accident did not arise in the course of the employment.

[EDITORIAL NOTE.] The substantial question here is whether any differentiation is to be made between ordinary employment and emergency employment. It was sought to be shown that in the case of emergency employment the man was subject to his employers' orders from the time he left home, but this view was not upheld.

FOR THE COMMENCEMENT OF COURSE OF EMPLOYMENT, see HALSBURY, Supp., Master and Servant, para. 361; and FOR CASES, see DIGEST, Vol. 34, pp. 277-279, Nos. 2341-2357.]

Cases referred to :

- (1) *St. Helen's Colliery Co., Ltd. v. Hewitson*, [1924] A.C. 59; 16 B.W.C.C. 230; 34 Digest 280, 2364.
- (2) *Allen v. Siddons* (1932), 25 B.W.C.C. 350; Digest Supp.
- (3) *Sparey v. Bath Rural District Council* (1931), 24 B.W.C.C. 414; Digest Supp.
- (4) *Upton v. Great Central Ry. Co.*, [1924] A.C. 302; 16 B.W.C.C. 269; 34 Digest 276, 2336.
- (5) *Cross, Tetley & Co., Ltd. v. Catterall* (1905), [1926] 1 K.B. 488n; 18 B.W.C.C. 445n; 34 Digest 278, 2353.
- (6) *Evans v. Postmaster-General* (1924), 17 B.W.C.C. 151; 34 Digest 278, 2348.

APPEAL by the L.N.E. Ry. Co. from an award made by His Honour JUDGE McCLEARY, on May 1, 1936, at the Clerkenwell County Court as an arbitrator under the Workmen's Compensation Act, 1925, whereby he awarded £300 compensation to the widow of an acting ganger in the employ of the railway company.

On Jan. 21, 1935, Blee finished his ordinary turn of duty at 5.15 p.m., and in the normal way would have started work again at 7.20 a.m. on the following day; but at about 10.30 p.m. on Jan. 21, after he had gone to bed, a messenger from the railway company called on him to take emergency duty. On his way to work when crossing the street he was knocked down by a car and sustained injuries to his leg and shock. He was off work until Feb. 18, 1935, returned to work for 3 weeks, and was forced again to give it up. He was diagnosed as suffering from Parkinson's disease (*paralysis agitans*) and died in hospital on Aug. 19, 1935.

The railway company, in reply to particulars for arbitration, admitted

total dependency, but denied liability to pay compensation on the grounds that :

(i) the accident did not arise out of and in the course of the employment ;

(ii) the deceased sustained the accident while going to work, and the employment had not then begun ;

(iii) the death was not caused by the injuries sustained in the accident, but was attributable to natural causes.

At the hearing before the county court judge, Dr. Feldman, the doctor attending the deceased, said that Blee's death was accelerated by the lowered vitality due to the accident. Dr. Rogers on behalf of the railway company said that Blee suffered from cancer of the right bronchi which produced bronchial pneumonia, and that this was the cause of death. The county court judge held :

(i) the deceased's death was accelerated by the accident ;

(ii) the deceased's employment began at the time he left home, and therefore the accident arose out of and in the course of the employment.

The railway company appealed on the grounds :

(i) that there was no evidence on which the county court judge could properly find that the accident arose out of and in the course of the employment ;

(ii) that the county court judge misdirected himself in confusing the question as to when the hours of employment began with the question as to when the employment itself began ;

(iii) that, upon the evidence as to the time from which men on emergency work book on, such retrospective booking was merely for the purposes of calculating remuneration and was not concerned with either " the hours of work " or " the commencement of the actual employment " ;

(iv) that there was no evidence upon which the county court judge could find that the death was accelerated by the accident.

F. W. Beney, for the appellants : The accident did not arise out of and in the course of the employment. When a man walks to his work and is injured on his way, that is not an accident arising in the course of the employment: *St. Helen's Colliery Co., Ltd. v. Hewitson* (1); *Allen v. Siddons* (2). In *Allen v. Siddons* (2) a contractor's foreman had to be at work at 7.30 a.m., but, as he had to travel 7 miles from home, for pay purposes his time was calculated from 7 a.m. It was held on appeal that the employment started at 7.30 a.m.

There was no evidence that death in August was caused by the accident in January.

W. Shakespeare, for the respondent : If the risk a workman runs is due to a thing which he is employed to do, then it necessarily arises out of the employment : *Upton v. Great Central Ry. Co.* (4) ; *Cross, Tetley & Co., Ltd. v. Catterall* (5).

The fact that pay began at the time the workman left home is some evidence—although not conclusive—that his employment also began then. The work was of an emergency nature and the man was summoned to it at an unusual hour. When an employment begins and ends is a question of fact : *Evans v. Postmaster-General* (6).

SLESSER, L.J. : This case, in my opinion, can really be disposed of in a very few words. It is a sad case, a man has been killed in the street—knocked down by a car—and he died as a result of his accident. The question we have to consider here is whether there was any evidence, assuming that his death was caused by the accident in the street, that it was an accident which arose in the course of his employment. Mr. Shakespeare has said, and truly said, that that is primarily a question of fact for the county court judge ; but it is elementary that the county court judge is not entitled to find facts unless there is evidence to support his finding, and in my view of the present case there is no evidence on which the county court judge was entitled to find that this man died as a result of an accident arising out of his employment. It is not necessary to cite the authorities ; it is sufficient once again to quote the test laid down by LORD WRENBURY in the case of *St. Helen's Colliery Co., Ltd. v. Hewitson* (1) at p. 95 :

The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs.

In my opinion it is impossible to say on the facts of this case that this man was in the performance of a duty under his contract of service at the time when the accident occurred. The widow, Rose Annie Blee, says this in her evidence :

On Jan. 25 a message came for my husband from the respondents [the railway company]. He was in bed. He got up and went to his duties. He left at 10.30 and got back about 11.

It was during that passage from his house down the street to his duties that he was knocked down by the motor car. Mr. Hawkins, who was an acting ganger employed by the respondents, gave evidence as to the nature of the work, and he said :

On Jan. 25 I was called out on emergency work,

and I assume, although it is not actually proved, that the deceased was also called out on emergency work. Then he says :

I entered the time I left home. It was the practice so to do. Every man was booked on at the time he left his home.

That cannot mean, I think, that there is a book provided by the railway company in each man's home ; it means that when the time for his employment is booked on at the railway company's premises he is given credit in the computation of his wages for the time from when he left his home. That is really nearly all of the evidence, but Hawkins goes on to say :

I have a standing wage of 63s. We get overtime pay. On emergency work we get a minimum of two hours.

It is quite clear to my mind that this man did not owe any duty under his contract of service to his employers beyond this, that he had agreed that when he was wanted in an emergency he should report, as soon as conveniently might be, at the employers' premises when the emergency arose and when he was required. How he got to those premises seems to me entirely his own affair ; his duty was and his duty started when he reached his employers' premises.

The only case which I think is of any material assistance in the present one is the case of *Allen v. Siddons* (2). The headnote in that case says :

A foreman was engaged by a contractor for earthworks at a fixed weekly wage. He had to work at various places. On the day in question he had to be at his work by 7.30 a.m. He left home for work on a motor cycle at 7 a.m., and in ten minutes met with an accident from which he died. His widow claimed compensation. At the arbitration the employer said that the hours of employment were from 7 a.m. to 5 p.m., but that on the day in question he was not concerned with what the workman did before 7.30 a.m., so long as he reached his place of work by that time. The county court judge held that the accident arose out of and in the course of the employment, and made an award in favour of the widow. The employer appealed. Held : there was misdirection. Although the employer might have had the right to give orders to the workman at any time after 7 a.m., he did not on this occasion exercise that right and the workman's employment in fact began at 7.30 a.m. The accident having happened merely when the workman was going to work it did not arise out of and in the course of his employment.

That case seems to me, on the facts, if anything, a case which is more in favour of the workman than the present one, because apparently in that case there was evidence that the employer, if he wished, might have given orders to the workman at 7 o'clock ; but in the present case there is no evidence at all that, provided the man answered the emergency call, his employers had any right to give him any orders at all until he arrived at the place where his emergency services were required.

For those reasons I think the learned county court judge was quite wrong in thinking that on the facts in the particular case he could find that the employment began at the time the workman left his home. The facts of the case are not really in dispute, but those facts point to the man being entirely free from any duty to his employers until such time as he reached the place of his employment, and, as the accident

happened before he reached the place of his employment, the accident did not arise in the course of the employment.

I should like to add one word on the matter, which is an alternative ground of appeal, urged by Mr. Beney, and that is that the county court judge has found that the deceased man's death was accelerated by the accident. In my view there was some evidence on which the county court judge could come to that conclusion. The evidence is of a Dr. Rogers who said that this unfortunate man died of bronchial pneumonia with abscesses of the lungs, primarily caused by a cancer of the bronchi causing the pneumonia. It was in evidence that he was suffering at the time from the disease known as *paralysis agitans*, which disease, it was said by another doctor, a Dr. Feldman, would not have developed if he had not had the accident. In cross-examination Dr. Rogers says :

Lowered vitality may be produced by *paralysis agitans* and may accelerate cancer.

Furthermore, there was the evidence of the widow who says that before the accident he was very well, and when he went back to work he did not sleep very well, and after that he continued to be increasingly unwell. Had the matter depended on the casual connection between the accident and the death, I think the respondent would have been entitled to succeed ; but, in the circumstances, I think this appeal must be allowed because the accident did not arise in the course of the employment.

SCOTT, L.J. : I entirely agree. It was argued by Mr. Shakespeare that because the work that the unfortunate man was going to do was emergency work a different conclusion might properly be drawn by the learned county court judge as to whether the employment had or had not begun. In my view that is a fallacy. The Act contains no epithets attached to the word "employment" ; it does not speak of ordinary employment or emergency employment or overtime employment ; it merely speaks of employment. The question as to when the employment begins must, I think, be answered by having regard to the same considerations in overtime or emergency employment as in the case of ordinary employment. I think that where the facts are beyond dispute, as they are in the case here, and are really wholly agreed between the parties, the conclusion as to whether the employment has or has not begun, or whether the accident has taken place in the course of the employment, is a pure question of law, as was pointed out by LORD RUSSELL in the case of *Sparey v. Bath Rural District Council* (3). In the present case Mr. Shakespeare has tried to find a piece of evidence over and above the mere fact of emergency, and I think he has failed. I can see no evidence at all upon which he bases his argument except the fact of emergency, and with that I have already dealt. I do not think it is

necessary to add any other observations upon the case. I entirely agree with what SLESSER, L.J. has said.

EVE, J. : I also agree.

Appeal allowed with costs. Leave to appeal to House of Lords.

Solicitors : *Pattinson & Brewer* (for the applicant) ; *I. Buchanan Pritchard* (for the respondents).

[*Reported by FRANK ROWE, ESQ., Barrister-at-Law.*]

HILTON v. BILLINGTON & NEWTON, LTD.[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 23, 1936.**]*Workmen's Compensation—Disease—Heart failure—Contributing to death of workman—Temporary recovery.*

On Feb. 21, 1936, a cold day, a lorry driver strained himself by having to crank up his lorry at frequent intervals. On returning to his home he complained of pain to his wife. On Feb. 23, he was found to be suffering from influenza. He returned to work on Mar. 16, having recovered from the influenza. He died on Apr. 27. Evidence showed that the strain on Feb. 21 was much more than the ordinary strain of work, and that the lorry driver was continuously ill from the day of the strain to the day of his death. The lorry driver had been suffering from heart disease of long standing and he might have died from the effects of any sudden strain. One doctor said that death was due to the strain, another that excessive strain would have shortened his life, and the lorry driver's own doctor stated that he had "apparently well recovered, but heart irregular—heaving impulse." The county court judge was not satisfied on the medical evidence that death had been caused by the strain and he dismissed an application for compensation by the lorry driver's widow:—

HELD: the county court judge had misunderstood the evidence of the lorry driver's own doctor, when he thought that it meant that the lorry driver had recovered from the strain. The evidence meant that he had recovered from the influenza but not from the strain, and there was no evidence of the effect of the influenza on his heart. The judge had misdirected himself and the appeal was allowed and an award made in favour of the widow.

[EDITORIAL NOTE.] Where a workman dies of heart failure and there is heart disease of long-standing, the question for decision has been laid down by the House of Lords to be whether the strain to which the workman was subjected during his employment contributed or not to his death. This is usually a difficult matter to decide and it is here complicated by the fact of a temporary recovery.

AS TO DISEASE AS ACCIDENT, see DIGEST, Vol. 34, pp. 344-347, Nos. 2775-2796, and FOR A DISCUSSION OF THE MATTER, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 106-122.]

Cases referred to:

(1) *Partridge Jones & John Paton, Ltd. v. James*, [1933] A.C. 501; 26 B.W.C.C. 277; Digest Supp.

(2) *Clover, Clayton & Co., Ltd. v. Hughes*, [1910] A.C. 242; 34 Digest 273, 2316.

APPEAL by the widow of a workman from a decision of His Honour DEPUTY JUDGE BURNE given at the Hanley County Court, Staffs., on July 23, 1936, in which he dismissed her application under the Workmen's Compensation Act, 1925, on the ground that the workman's death was due to heart disease and was not due to or accelerated by injury by accident.

The workman, a lorry driver, aged 56, was employed by the respondents. On Feb. 21, 1936, which was a cold day, he strained himself by having frequently to re-start his motor-lorry by cranking up. On returning

home he complained of severe pain. Two days later he had influenza and a high temperature. He was laid up for 10 days, and returned to work on Mar. 16. He died on Apr. 27. The applicant contended that Hilton had never recovered from the strain to his heart caused by the cranking up on Feb. 21. A post-mortem examination revealed that the deceased had for a long time been suffering from cardiac disease, and that his heart was twice the normal size. His condition was such that he might have died from the effects of any sudden strain. The deputy county court judge was not satisfied that the strain caused the workman's death, and he dismissed the application. The widow appealed.

E. W. Cave, K.C., and G. H. Oliver, for the appellant.

R. H. Norris and Douglas Jenkins, for the respondents.

SLESSER, L.J.: This appeal succeeds. It is an appeal brought from the judgment of the learned county court judge who has given judgment against the dependant of a deceased workman called Hilton on grounds which seem to me to be entirely indefensible.

The facts of the case are these: Mr. Hilton was a lorry driver and he was driving a lorry which was not fitted with a self-starter, and according to the evidence of a Mr. Frank Cope, who was a fellow worker, on the date in question, Feb. 21, 1936, Hilton had had trouble with his lorry all day, he kept stopping and he had continually to wind it up, and he said he had the carburettor off 5 times during the day, and so on; it was a very stiff and difficult starter. On this occasion he started this lorry, and shortly afterwards he returned home. Evidence was given by the widow to this effect:

On Feb. 21 he arrived home later than usual. He had been attending doctor on Feb. 17. Feb. 21 was very cold day and he came home exhausted and sat on stool by fire. He said he felt a pain under his heart. He looked ill and pressed his hand under heart. Applied hot flannels all night. Next day I was present when my husband told F. Cope to tell Noah Cope [the storekeeper in the employment of the respondents] how ill he felt. This was at our house. He remained in bed. Called in Dr. Mott on Feb. 23—[that is 2 days after the accident]—Frank Cope called again on Feb. 25 or 26.

On Mar. 16 this man had sufficiently recovered to go to work. He went to work and rode to work on a 'bus, but during the period from Feb. 21, and all the time while he was working until his death, he said the pains were worse at times than at others; he had to be pillowed up, and on Mar. 20, after he got back to work, Dr. Mott was called in, and the widow went and told the firm that her husband could not come. The next thing which has to be noticed is this, that on Apr. 6, Dr. Mott, who had given a certificate that this man was not fit for work, was asked to amend his certificate to describe the exact circumstances, in order to show whether this man was to have wages, or was to be treated as a compensation case, and the doctor added to the words he had already

stated, that he had had a strain at work—the original certificate had said “heart strain” only. After that the man became worse and died.

The question which had to be considered by the learned county court judge in this case was the question indicated in the House of Lords decision in the case of *Partridge Jones v. James* (1): Whether the strain which had been the result of an event which happened during his work had or had not contributed to his death. Ever since the case of *Clover, Clayton & Co. v. Hughes* (2) it has been held that the mere fact that a man is working with a diseased heart will not disentitle him to compensation if he can show that the accident of which he complains contributed to his death or to his disability; and it does not matter whether that strain is in the ordinary course of his work or is something in the nature of an extraordinary strain. Here I think, on the evidence, it would be right to say that the strain was something more than ordinary, because, as Frank Cope said, he had had trouble with the lorry all day and had continually to wind it up. That was the evidence so far. The remainder of the evidence supports, I think, the view that this man, from the moment when he strained himself operating the motor lorry on Feb. 21, until the time of his death, was ill all the time; he was pillowed up, he was more or less in pain, and, according to Mr. Frank Cope—although this matter appears to have been accepted at the trial perhaps it is not strictly evidence, yet it forms a part of the matters to be considered—he made a complaint to Mr. Cope at the time he was winding up the lorry. Perhaps the exact language of the complaint ought not to be considered. On that evidence, of course, the medical aspect of the case fell to be considered, and a number of doctors were called, all the doctors for the applicant agreeing in substance in their evidence. First of all, Dr. Gilchrist, who had performed the post-mortem, was called. After stating the cause of death to be aortic valvular disease due to arterio-sclerosis, heart disease of long standing, he said:

I think owing to excessive exertion and exposure balance of heart was upset and death was directly due to that strain.

That evidence lacks nothing in precision. The doctor says in terms that he thinks the death was directly due to the strain. Dr. McLean, the next doctor to be called, was not quite so positive; he says he saw the applicant at the infirmary, and he says:

He told me of the history of the strain while winding lorry engine—his condition was consistent with cardiac defect from strain—excessive strain would shorten his life. No signs of pleurisy, heart condition of many years standing. I assume he made a temporary recovery and was able to return to work.

Then there was the evidence of Dr. Mott, who had treated him for influenza on Feb. 23, 1936, which was 2 days after the accident, and he said:

He appeared to be quite well after it. He died from heart disease, old; I think

strain was a factor in his death. He was apparently well recovered when he came to my surgery. Heart was irregular—heaving impulse.

The learned county court judge in his judgment has, in my view, as I have said, misunderstood the very important evidence of Dr. Mott. Having come to the conclusion that :

the evidence did not in my view do more than show that the strain of work was a possible cause of the death. Natural causes were equally consistent—

he adds :

In arriving at this conclusion I was influenced by the fact that Hilton had returned to work in March apparently quite recovered, according to his doctor.

Of course, if Hilton had returned to work apparently quite recovered, it would have been a very strong ground for saying that his dependant had failed to show that the strain was the operative cause of the death ; but in truth and in fact, when the evidence of his doctor is looked at, the doctor said no such thing—in fact, as I read his evidence, he said the direct contrary. What Dr. Mott said was this : Having said he had had influenza for a week or ten days, he said : “ He appeared to be quite well after it ”—that is the influenza—“ He died from heart disease, old ; I think strain was a factor in his death.” That is to say, that the strain, notwithstanding the influenza and the recovery from it, was a contributing cause to his death. Then follow these words, which I think the learned county court judge has wholly misunderstood : “ He was apparently well recovered when he came to my surgery. Heart was irregular—heaving impulse.” That means that he was apparently well recovered from the influenza of which the doctor had spoken in his evidence in chief ; but the doctor is at pains, as he would naturally be after saying that he thought the strain was a factor in his death, to say that the man had not recovered *quoad* the heart, because he says : “ Heart was irregular—heaving impulse.” It seems to me that on this vital matter the learned county court judge has misdirected himself. He has come to the conclusion that the doctor attending the man had said he had recovered, whereas what that doctor had said was that he had recovered from the influenza. Then the learned county court judge goes on in his judgment to say :

The normal development of the disease, aggravated it may be by the toxic effects of his recent influenza, would quite sufficiently account for his death.

I do not know that there is any evidence in the case at all about the toxic effects of influenza. At any rate, be that as it may, the uncontradicted evidence stands that this man's strain caused the death.

There is this further matter which has not been considered by the learned county court judge at all, as I read his judgment, and which has a most important effect on the case, and that is that the evidence is that

the pain which started immediately he had strained himself continued more or less until the time of his death—that is the evidence of the widow. That was a strong reason why the learned judge should not have come to the conclusion that natural causes were equally consistent. All the evidence seems to me to point to a strain setting up the pain on a diseased heart which led, as the doctor says, to the man's death, and that notwithstanding that he had in between an attack of influenza the effects of which had passed away.

All I wish to say further is that I was in some doubt during the case whether this appeal ought not to have resulted in the ordering of a new trial, and that was because a certain Dr. Emanuel, who was called on behalf of the employers, gave evidence that he was satisfied that the man had recovered on Mar. 15; but when his evidence is examined it appears to me to depend on an assumption which is by no means proved. He says :

The heart failure pain described as on left side is not of cardiac origin—always in middle of chest.

That evidence, as I understand, about the place where the pain was, does not derive from any medical fact or diagnosis, but merely from the wife in court indicating with her hand where the man may have felt a pain. That seems to me entirely unreliable evidence, upon which no proper opinion could possibly be formed. This is a woman describing with her hand on her own body where her husband said he had felt a pain. I really think that such evidence cannot be regarded. Beyond that, it is said "If he damaged his heart earlier his course would have been a gradual failure. Disease came on insidiously," and the doctor adds :

It is not a serious matter for a man in his condition to wind a lorry, because he was accustomed to it.

The evidence is that the man had used on this occasion extreme exertion because he had trouble with the lorry, and therefore there is no reason for the doctor to assume that he was accustomed to that extreme exertion which he was called upon to exercise that day. Then he says : "Many hold the view that you cannot strain a diseased heart." The doctor is careful not to say whether he holds that view or not, and therefore the view of many does not seem to me to be evidence, unless Dr. Emanuel says he agrees with it, which he is careful not to do. Finally, he says :

I think cause of death was pleural effusion of influenzal origin in a man with a very diseased heart.

As the doctor who had been attending him had been at pains to say that he had already recovered from the influenza, I see no reason to suppose that that evidence had any application. I think one must use some

discretion in ordering a new trial, and as the evidence for the employers seemed to me to be so entirely valueless from a factual point of view, not really amounting to a scintilla of evidence to contradict the workman's doctors. I think it would be wrong in this case to put the parties to the expense of a new trial, seeing that if the case is re-tried the result must be the same as the result of this appeal. Therefore the appeal will be allowed with costs here and below.

SCOTT, L.J. : I agree. In my view the learned county court judge allowed Dr. Emanuel to usurp his judge's functions. Dr. Emanuel was, in effect, attempting to give judgment on the evidence. I think the learned judge thoroughly misapprehended the evidence, and particularly he misapprehended the nature of the strain that the deceased man underwent in trying to crank this lorry. Frank Cope, the lorry driver, who saw the deceased man on the same day and went with him to Stafford, says in his evidence : " He looked done up. I could not start this lorry by hand, it had to be towed to start it," and anybody who knows anything about heavy motors knows that the old starting handle on a heavy lorry is a terrible strain. If, in addition to that, you have the further fact, which you get from the statement of Frank Cope, which was put in in evidence in cross-examination, that on examination it was found that the air-vent was stopped up and so caused a stoppage to the carburettor, you see at once that the task of trying to start the lorry with the starting handle was obviously one of extreme difficulty from the point of view of the degree of exertion required. That fact is not touched upon by Dr. Emanuel in his evidence, and he does not seem to have addressed his mind to that possibility. However, apart from that matter, the learned county court judge in his judgment does not seem to me to rely at all on the evidence of Dr. Emanuel. Reading his judgment as a whole, I read that judgment as saying : " I do not think that the evidence for the applicant proves or is evidence of a strain which contributed to the death," and not as saying that there is a conflict of view between the witnesses for the applicant and the doctor called by the respondents in order to express scientific opinions ; he merely says that the applicant has failed to discharge the burden laid upon her. Therefore, in my view, both because Dr. Emanuel did not give any evidence which amounts really to evidence that the strain was not the cause of the death, and because the learned county court judge did not treat it as evidence to that effect, I think there was no evidence called by the respondents to answer the evidence called on behalf of the applicant.

I have only one further remark to make. The learned county court judge in his judgment speaks of the medical assessor, who was sitting with him, as having shared his opinion as to the death by accident not having taken place. My view is that the learned county court judge was guilty

of treating the medical assessor as a member of the court sitting with him to adjudicate upon the facts given in evidence, and that was a wrong way of treating the medical assessor. No questions on the issue before the learned county court judge ought to be addressed by the judge to the assessor, and I cannot help thinking that the learned judge may have been misled by the answers he got to the questions he put to the medical assessor.

Taking the case as a whole, I am satisfied here that there was no evidence to answer the evidence of the applicant, and therefore the proper course is to say that the award must be set aside and the applicant is entitled to the £300 for which she asks.

EVE, J. : I agree entirely.

Appeal allowed with costs. Award for £300. Leave to appeal refused.

Solicitors : *Pattinson & Brewer*, for *Hollinshead & Moody*, Tunstall (for the appellant) ; *Berryman*s, for *T. Haynes Duffell & Son*, Birmingham (for the respondents).

[*Reported by FRANK ROWE, Esq., Barrister-at-Law.*]

HILL v. LADYSHORE COAL COMPANY (1930), LTD.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 20, 21, 1936.**]

Workmen's Compensation—Medical referee—Report—Certificate of employer's doctor—Imperfect copy—Compliance with statute essential—Workmen's Compensation Act, 1925 (c. 84), s. 12 (3).

A collier was injured while working and a big toe was amputated in consequence. After paying full compensation for a time and then part compensation, the employers proceeded under the Workmen's Compensation Act, 1925, s. 12, and gave notice of termination of payments. A copy of the medical adviser's certificate as to workman's condition supplied with the notice contained nothing that was not in the original certificate, but omitted various matters included therein. The medical referee certified the workman as fully recovered and payments were terminated. Renewed trouble appeared at the seat of the amputation, shortly afterwards, and the workman applied for and obtained an award of compensation from the county court. The employers appealed on the ground that the medical referee's decision was conclusive and binding, and the county court had no jurisdiction to inquire into the matter. A preliminary objection against the appeal was taken on the ground that the omissions in the copy medical certificate, served on the workman, were contrary to the express terms of sect. 12 (3), and that it and all subsequent proceedings based on it were a nullity:—

HELD: the omissions in the copy of the certificate of the employers' doctor were contrary to the express provisions of the Workmen's Compensation Act, 1925, s. 12 (3), and all subsequent proceedings based upon it were invalid and a nullity. The appeal must therefore be dismissed and the parties left to take such proceedings as they might be advised.

[EDITORIAL NOTE. The provisions of the Workmen's Compensation Act, 1925, s. 12 (3) are now held to be statutory conditions which must be fulfilled in order that any act or decision based upon them may be binding upon the parties. They are not mere matters of procedure but the rights of the parties. The certificate of a medical referee, which is based upon proceedings under sect. 12 (3) which are irregular in any way, is therefore not binding and conclusive.

FOR THE LAW ON THE POINT, see HALSBURY, Supp., Master and Servant, para. 458; and FOR CASES, see DIGEST, Vol. 34, pp. 376-378, Nos. 3051-3083: and FOR A DISCUSSION THEREOF, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 336, 337, 341-344, 410, 411.]

Case referred to:

- (1) *Burgoyne v. Rose Bridge Colliery Co.*, [1936] 1 All E.R. 743; 29 B.W.C.C. 86; Digest Supp.

APPEAL from an award of compensation made by His Honour JUDGE CROTHWAITE, at the Bolton County Court of Lancashire on May 20, 1936.

The workman, E. W. Hill, was a collier in the employ of the appellants, and on Mar. 12, 1934, he was injured by a fall of dirt. The big toe of his left foot had to be amputated and he was paid full compensation until Apr., 1935. He then returned to the colliery and was employed on light work, being paid compensation at 6s. per week thereafter. Later, acting under the Workmen's Compensation Act, 1925, s. 12, the appellants

sent the workman a notice of their intention to terminate payments, and enclosed therewith what was stated to be a copy of their medical adviser's certificate, but various matters, e.g. "Past accidents," "History of present accident," "Present condition," were omitted. The workman serving a certificate disagreeing with that of the employers' medical advisers, the matter went before a medical referee, who certified the workman as wholly recovered. The weekly payments then ceased on Dec. 13, 1935. In Jan., 1936, the amputation scar broke down and became ulcerated and the workman again became unfit. The matter became the subject of an arbitration and the county court judge held that the medical referee's certificate was only conclusive as to the facts at the time it was given, and he was entitled to consider the position at the time of the arbitration. He held that there had been a recrudescence of the original disability and awarded compensation at the rate of 23s. per week. No objection was taken in the county court as to the insufficiency of the copy of the certificate of the employer's medical adviser.

The employers appealed.

A preliminary objection was taken to the appeal upon the ground of the insufficiency of the copy certificate and that the certificate of the medical referee was consequently invalid.

Cave, K.C., and *Basil Nield* for the appellants.

Edgar Dale for the respondent.

SLESSER, L.J. : This case has been very fully argued, but the court has come to a decided opinion about the matter and, therefore, we do not think it is necessary to consider certain matters which would have arisen had we been in favour of the appellants on the preliminary point which is taken here by the respondent. Now the preliminary point which is here taken by the respondent is this : Under the Workmen's Compensation Act, 1925, s. 12, there is imposed a limitation on the power of an employer to end or diminish weekly payments. The actual language is as follows :

An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases.

Now the case which we have here to consider is contained in subsect. (3) and is in the following words :

Where the medical practitioner who has examined the workman under sect. 18 of this Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner), together with notice of the intention of the employer at the expiration of 10 clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman.

Certain consequences follow.

In the present case the workman, Mr. Edward Hill, had been injured on Mar. 12, 1934, by a fall of dirt, and as a result the big toe of his left foot had to be amputated. He received 23s. a week compensation until Apr., 1935, when he returned to light work. Thereafter he received partial compensation until Dec., 1935, at the rate of 6s. a week, and in connection with the payment of that compensation, in order that the payments might be terminated or diminished lawfully under sect. 12, there was served upon the workman on Nov. 25, 1935, what purports to be a notice under sect. 12 to end the weekly payments. 10 days' notice is given "to end paying you compensation after Dec. 5, 1935," and then follows:

Below is a copy of our medical practitioner's certificate:—Townleys Hospital, Farnworth, Nov. 22, 1935. I examined on Nov. 21, 1935, Edward Wilmot Hill, aged 51, of 56, Bispham Avenue, Brightmet, Bolton. I am unable to find any reason to account for the pain of which he complains. The stump of the toe now appears firmly healed in a satisfactory manner. No clinical evidence of arthritis in the remaining joint of the toe. It is possible that he may have pain in the toe, but I can find no reason to account for his symptoms.

Now that was assumed to be the copy of the certificate which set out the grounds of the opinion of the medical practitioner. The workman did what he is permitted to do under the proviso of sect. 12 (1): he sent to the employer a certificate disagreeing with the certificate served by the employer. That certificate is to the effect that: "Mr. Edward Hill residing at 56 Bispham Avenue is suffering from after effects amputation toe and is now able to follow light employment." The first observation I have to make is that the counter-certificate of the workman, as the proviso says, is one disagreeing with the certificate to be served by the employer and in order that he may effectually decide whether he will agree or disagree, it is essential that he shall have before him the actual certificate which the employer had been given. If he is given an extract or a commentary or a paraphrase of that certificate, he is not in the position which the section contemplates he will be in properly to consider whether he will agree with it or disagree with it. However, the workman and his medical and legal advisers assumed, and, indeed, had no reason to assume the contrary, that the certificate of the employers' doctor which had been served upon them was a true copy of the certificate which he had given, and proceedings continued on that basis and assumption. On Dec. 3, 1935, again complying with the provisions of sect. 12 of the Act, the two parties, the workman and the employer, applied to the registrar, as provided in sect. 19 of the Act, for the appointment of a medical referee to decide the issues. The application recited that the injury had happened on Mar. 12, 1934, that questions had arisen between the workman and the employers as to the condition and fitness for employment of Edward Wilmot Hill, or as to whether (or to what extent)

the incapacity was due to the accident, and no agreement could be come to between the said Edward Wilmot Hill and the said Ladyshore Coal Co. with reference to such questions, and continued :

The said Edward Wilmot Hill has submitted himself for examination by a medical practitioner provided by the said Ladyshore Coal Co. (1930), Ltd., and has also been examined by a medical practitioner selected by himself, and copies of the reports of the said practitioners are annexed to this application.

As I understand it, and it is not disputed, the reports which were annexed were in a similar form to the original reports to which I have already referred, but that was what was considered to be the position at the time when the referee was appointed. But it appeared, as I think, for the first time at the trial, that the original report of the employers' doctor contained certain matters which were not contained in the copy which had been sent by the employers to the workman when they served the notice under sect. 12 of the Act. I do not say that there may not be cases where the alteration is so entirely trivial—it may be a matter possibly of some clerical slip—that the matter might be one of no moment, but in the present case the alterations, the differences, are really very substantial. To begin with, there was produced, as I understand, for the first time during the hearing, the actual report which Dr. Gawne, the doctor for the employers who had examined the workman, had actually given on Nov. 20, 1935. I do not propose to subject it to detailed analysis, but it is sufficient for this purpose to say that, while it is true that all the matters which were contained in the medical practitioner's certificate annexed to the employers' letter of Nov. 25, 1935, are to be found in the actual certificate given by him, there is in the certificate a large amount of matter which was not sent on for the consideration of the workman or his advisers. First of all, on the opinion itself appear at the end words which are omitted altogether from the copy sent to the workman :

I would suggest that [the workman] be tried at his previous occupation of a collier.

Now Mr. Cave has argued that those words are not a part of the opinion. I do not agree. The fact that a doctor thinks a man may try a previous occupation shows, at any rate, that he has formed an opinion of his medical condition, that he does not think his condition so bad that he cannot safely try his previous occupation. That seems to me a matter of very grave moment and entirely germane to the question which was here to be considered, whether the man was or was not totally or partially disabled. But in addition to that, in the report itself is set out *in extenso* "Past accidents," "History of present accident," "Present complaints," "Present condition" and "Opinions"—the heel, the toe, the stump, all the matters which are relevant as grounds of the opinion are there

set out. What sect. 12 (3) says is that a copy of the certificate, which shall set out the grounds of the opinion of the medical practitioner who has certified that the workman has partially recovered, together with the notice of the intention of the employer to cease payment, shall be sent to the workman. Now I find it impossible to say that this abbreviated certificate of Nov., 1935, which, although it does contain some of the opinion of the medical practitioner, contains none of the grounds and not even all of the opinion, can be said to be a copy of the certificate which shall set out the grounds of the opinion of the medical practitioner. It follows, therefore, that the proceedings which came subsequent to the termination of the weekly payment are all invalid. The failure to comply with subsect. (3) first of all failed to bring into operation any question of counter-notice by the workman. I have already pointed out how, by that failure, he did not even obtain the material upon which he could decide whether to agree or not to agree. The subsequent agreement of the parties to refer the matter through the registrar to the medical referee, together with the certificates which had been given, was similarly invalidated. The referee does not seem to have received the certificates as they ought to have been sent, and if he did—and I am not very clear how that matter stood—they did not agree with the certificates which had already been sent under subsect. (3). So that the continuity of the matter was broken, and at different times different certificates were considered. It appears that the referee did not have before him any matter other than the abbreviated and incomplete certificate. Even if he did, it makes no difference, because the workman was entitled in any event, before the referee ever took jurisdiction of the matter, in coming to the conclusion whether he would send the matter to the referee at all (because it was sent there by consent and not by order of the court) to know what it was that the employers' doctor had certified about him. That, at any rate, it is common ground, was never known to the workman. Therefore, as I say, in my opinion the medical referee never acquired in this case any jurisdiction to pronounce upon the matter at all. We have recently had occasion in the case of *Burgoyne v. Rose Bridge Colliery Co., Ltd.* (1) to consider the effect of a failure strictly to comply with the regulations and provisions of the statute with regard to these references to the medical referee. It is pointed out in that case that the referee's functions are judicial, or *quasi-judicial*. His finding on medical matters is final and conclusive and evidentially binds the judge, when he is properly acting within his jurisdiction. We had occasion to point out in that case, that the registrar had no authority to add questions of his own motion for the referee to discuss, and GREENE, L.J., says at p. 749 :

It is to be observed that, the whole jurisdiction of the medical referee being based

on consent, the parties are entitled to have put before him the relevant questions in the form which they agree.

As I say, through the absence of the workman here being informed of the case as contained in the certificate which was sent to him, no true consent ever arose at all. Indeed, had the matter ended there, I think it would have been unarguable, but that the learned judge in this case was not entitled to look at this alleged certificate at all. Indeed, on the facts of the case he was bound to find that the employers were not entitled to terminate the weekly compensation, because they had not complied with sect. 12 at all. It is a view which was not canvassed before the learned county court judge, and Mr. Cave says, and, having heard what happened in the county court, I think he is fully justified in saying, that when the learned judge says in his judgment, as he does say, that no one impugned the validity of the certificate, he was saying that which was accurate; no one at the trial did impugn the accuracy of the certificate, and one doctor does mention, as EVE, J., pointed out during the course of the argument, that he had said something in the original report. But, says Mr. Cave, in so far as this certificate was not impugned, in so far as the learned judge proceeded to give judgment upon the basis, as he did, that this certificate was valid—to use the learned judge's own language, that he accepted it—and that it was a conclusive finding of fact at a certain time, we cannot now consider this ground which is urged by the respondent for upholding the learned judge's decision. Now that view does not commend itself to me. It seems to me to be contrary to principle. I think that where a court is without jurisdiction to entertain a particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court. A great number of cases, which I do not think it necessary here to discuss, are cited in HALSBURY'S LAWS OF ENGLAND (Hailsham Edn., Vol. 8, p. 532, para. 1178) for that proposition, which I think in every respect was almost elementary. The proposition is cited there that the consent of the parties cannot confer jurisdiction upon the court to consider any particular matter. Now the matter which the court here considered, wrongly, was the matter of this final certificate which, although the learned judge has held was only final and conclusive as to the man's condition up to a certain time—he feeling that after that time it was open to him to consider whether there had been a recrudescence of disability arising from the original accident—yet, in my opinion, no consent, no acquiescence of parties could make this invalid certificate into a valid one, and the learned judge had no right to look at this certificate at all. Now, as I pointed out, in fact in this case the workman succeeded notwithstanding that the learned judge looked at this certificate, because the learned judge thought that it did not deal with the question of recurrence, but only dealt with the

medical condition at the time when the man was certified. It was to impeach that matter that Mr. Cave came to this court, and he placed before us a number of authorities and a number of very weighty arguments, which might have the effect of suggesting that the learned judge was wrong, had he been dealing with a valid certificate in this form, in thinking that this certificate was not final and conclusive of the whole matter, not only then but in future. But in so far as I have come to the conclusion, for the reasons I have stated, that this certificate was invalid I do not feel it incumbent upon me to express any concluded opinion on the accuracy of Mr. Cave's observations as to the finding of the learned judge.

I think this appeal fails for the reason, and for the reason only, that the learned judge had no jurisdiction to look at this certificate at all, that the requirements of sect. 12 were not complied with by the employers and that, therefore, the employers had no right to terminate the payments on the basis of partial incapacity which they were giving at the time when they served the notice under sect. 12. I think, therefore, that this appeal fails.

SCOTT, L.J. : Where it is apparent on an appeal to this court that there has been a defect of jurisdiction in the proceedings below, I think it is better for this court to avoid expressing opinion on the merits of the appeal, and to decide the appeal solely on the question of jurisdiction. That is the case, in my view, in the present appeal, and I therefore express no opinion on the other matters that have been argued in the course of the appeal.

In order to appreciate precisely what the question of jurisdiction is, it is necessary to state the facts very shortly. On Mar. 12, 1934, a workman engaged in a colliery owned by the respondents, the appellants in this court, was injured by a fall of dirt. His left foot was hurt, the big toe of it was amputated, and, in consequence, he became entitled to compensation, which was fixed at 23s. a week. That he received until Apr., 1935, when he returned to the colliery to light work, the compensation being accordingly reduced to 6s. a week. He received this compensation for partial incapacity until a date in Dec., 1935, when it was terminated, and he was in fact discharged from the colliery. It came to be terminated in the following circumstances. The employers had him examined under sect. 18 of the Act by their medical adviser. The medical adviser made a report and thereupon the company purported to act upon the provisions of sect. 12 of the Act, with a view to obtaining a termination or a further diminution of the weekly payment in accordance with the provisions of that section. The section is imperative in its terms, and it says this :

An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases

The only one which is relevant is that contained in subsect. 3, which my Lord has already read and which I need not repeat. The gist of it is that the employer must send to the workman a copy of the certificate given by the employer's doctor, a certificate setting out the grounds of the opinion of that doctor. That notice must be served upon the workman ; but it contains a proviso that when it is so served upon them the workman may get himself examined by his own doctor and if his own doctor disagrees with the doctor for the employer, then the weekly payment is not to be ended or diminished, except in accordance with the man's doctor's views, or if the employer is not willing to accept the view of the man's own doctor, then not until the employer has got a certificate from a medical referee under sect. 19 of the Act. Under sect. 19 (2) of the Act, it is provided that where a workman has submitted himself for examination by the employer's doctor and the employer has, within 6 days, furnished the workman with a copy of the report of that doctor, then if they disagree the matter may be referred to a medical referee to decide the relevant issues as between the two ; but there is a proviso which is of great importance :

Provided that where the application is made by only one of the parties, the registrar, or on appeal the judge, if he is of opinion that, owing to the exceptional difficulty of the case or for any other sufficient reason, the matter ought to be settled in default of agreement by arbitration, shall refuse to allow the reference.

That is the procedure which is laid down by the Act and laid down obviously for the purpose of ensuring that the medical referee shall not be appointed unless the man is satisfied with the procedure, and giving the man the right to go to court and ask that the procedure shall not be adopted if he is so advised. In this case the employers sent to the workman a letter which was treated as the service contemplated by sect. 12, in which they said that they set out a copy of their doctor's certificate. The workman assumed that that was a complete certificate and he was examined by his own doctor, who did not agree with the view expressed in that certificate, and in these circumstances, the two parties agreed to send the matter to a medical referee, who was duly appointed in the usual way. I assume that the registrar of the court did send to the medical referee as required by the regulations, a copy not only of the workman's doctor's report or certificate, but also a complete copy of the certificate of the doctor chosen by the employers. I assume that ; whether it was so or not I do not know. In fact, we now know that the copy sent to the workman was not a copy of the original report, but only an extract of part of it. I will deal with the details of the disparity and the result in a moment, but the effect of that was that the workman did not know the whole of the views of the employers' doctor, and therefore, in fact agreed to the medical referee being brought in to decide the critical questions without the knowledge that the statute

intended he should have before he came to that conclusion. The matter went before the medical referee and the medical referee then on Dec. 9 reported, *inter alia* :

He has wholly recovered from his accident and he is fit to resume his ordinary work as a collier and his incapacity has ceased.

And he put that into a formal certificate. Thereupon, as I have already said, the employers terminated the weekly payments and in fact discharged the man from their employment. The man thought he had recovered in accordance with the statement in the abbreviated report, or extract of his employers' report, and took no steps for the moment, but in Jan., 1936, his foot became bad again through blisters breaking out, and he then wanted compensation for the condition in which he found himself, which, in fact, resulted from the original accident. He accordingly asked for arbitration. The matter came before the learned county court judge and the learned county court judge gave him compensation in accordance with the view he took of the man's physical condition and the degree of his incapacity. The appeal to this court was an appeal by the employers from that decision, and the point made by the employers on the appeal was that the learned judge had no jurisdiction to come to any such conclusion, because the medical referee's certificate found as a fact that the man had completely recovered and that his incapacity had ceased. I express no opinion on that contention, because we have not heard the other side, but *prima facie*, it seems a very powerful argument setting aside the learned judge's judgment, because under the statute the procedure of reference to a medical referee under sect. 19 is, as it seems to me, intended to take the place of a judicial trial before the arbitrator contemplated by the Act, namely, the county court judge, and, therefore, to clothe the medical referee with judicial, or, at any rate, *quasi*-judicial powers for the purpose of determining the litigation, to use a metaphor, between the workman and his employer and, in my view, the right of a medical referee to give a conclusive certificate under the Act must be measured by precisely the same considerations as the jurisdiction of a court giving a decision between litigants. The jurisdiction he has is created by the Act and must be exercised strictly within the limits imposed by the Act and, subject to the conditions laid down by the Act, unless he acts within those limits and observes those conditions, and unless the conditions laid down to be performed by other parties, such as the registrar of the court, have been so performed, the medical referee has no shred of the jurisdiction conferred by the Act; he has no jurisdiction at all. It is a jurisdiction which he must have wholly and completely for the purpose of giving a final decision between the parties or he has no jurisdiction, and, to use the legal phrase, the proceedings are *coram non iudice*. The

reason why the conditions laid down by the Act are so important in a case of this kind is, that the procedure introduced by the Act for the purpose of saving expense to the parties of an ordinary trial on issues which are largely medical will be defeated unless the substituted tribunal, the medical referee, is put as nearly as possible in the position to know all about the case. The legislature has taken the view that his knowledge of the case will be acquired very largely by his own examination of the man, but also by his being able to rely completely upon the reports made by the respective doctors, the man's doctor and the employer's doctor, and because he would be entitled to rely upon their putting into those reports whatever is really relevant to the diagnosis of the man's case and the prognosis for the future. For those reasons, if we may look for a moment at the question from the man's point of view, when the employer seeks to diminish or to bring to an end a weekly payment on the ground of a recovery of the workman and the complete or partial cessation of incapacity, it is essential that the workman should know exactly what are the medical grounds upon which it is stated that the employer's doctor has come to the conclusion he has recovered, and consequently, the vital question for the purpose of working this procedure with justice to the workman is that he should have a complete copy of the certificate of the employer's doctor of the results of his examination under sect. 18 of the Act. Consequently, if the first step for initiating the substituted method of adjudication on the workman's condition and of his capacity is not taken in accordance with the terms of the Act, everything that follows subsequently is, in my view, a nullity, and it does not matter whether the registrar did or did not send to the medical referee a complete copy of the original report of the employer's doctor. That is the reason why, as I said, I assumed that that was done for the purpose of my expression of my view upon the law applicable here. I need not refer to the other provisions of sect. 19, but subsections (3) and (4) both support the view that I have expressed on the general nature of the position.

I, therefore, come to the quite clear and definite conclusion that the conditions imposed by sect. 12 of the Act are essential, that they must be performed in strict compliance with what is there laid down and, as a matter of interpretation, I should like to say, in answer to an observation by Mr. Cave, that I think the words in brackets in sect. 12 (3), which say "which shall set out the grounds of the opinion of the medical practitioner," should relate to the noun "certificate" and not to the noun "copy," and that the copy of the certificate must be a copy of every word in the certificate. The legislature put in rather awkwardly in this subsection, which is concerned with the copy, an enactment as to the contents of the certificate. That being *prima facie* the position, what is the effect upon the proceedings below? The first effect is that

the medical certificate which was before the learned judge was a nullity and, if that was so, then the position was different in law to what everybody in court seemed to have thought it was. It was generally assumed by counsel on both sides and by the learned judge, that the partial payment of 6s. a week had been brought to an end in accordance with sect. 12. That view was wrong. The right of the employers to end the payment had never arisen, because they had not brought themselves within any one of the exceptions to the general veto touching the weekly payment except on the conditions laid down. The man was entitled therefore at the time to his 6s., but the learned judge took the view that his condition was worse and gave a judgment on the footing that he was not affected by the medical certificate on the ground that it did not estop him—it was not *res judicata*—and he was free, therefore, to express his view on the circumstances as they were before him. He acted on that view. Hence the appeal of the employers. On the appeal, as I have already said, it was argued that he had no right to go behind the medical referee's certificate, that that certificate was wholly conclusive because sect. 12 of the Act says that it shall be wholly conclusive. *Prima facie* I agree with that, although I did not have the opportunity of hearing an answer to that argument. It would have been probably a good ground for allowing the appeal, but then we were faced by Mr. Dale with his point, that the medical referee's certificate was a nullity, because the copy of the employers' doctor's certificate had not been served in accordance with the conditions laid down by sect. 12 (3). Consequently, we did not ask him to argue the other point. It was enough for him to say there was nothing at all to interfere with the action taken, if taken, by the learned county court judge upon the application for arbitration, at any rate, so far as the medical referee's certificate was concerned. But, says Mr. Cave, in answer to that argument, at the trial that condition precedent was treated by the workman as waived. It is a condition in the statute imposed in his favour and could be waived and, in order to satisfy us that it was so waived, he refers to the note of the learned county court judge, where the learned county court judge says that that certificate was not impugned by anybody. I am prepared to assume that that is a perfectly correct statement of the attitude of the workman's counsel at the arbitration before the learned county court judge, and I do not doubt for a moment that that is strictly accurate. Upon that Mr. Cave says that that was a consent by the workman to the learned county court judge treating the medical referee's certificate as a valid instrument in accordance with sect. 12, and he argued that the case of a party waiving a condition in a matter of procedure imposed to his advantage will bar his objecting to the procedure thereafter, was applicable here. I do not think any question of procedure in that sense was involved in this matter which we are discussing. I think it was a

question of rights, not a question of procedure—the right of the workman to have his weekly payment continued in accordance with the terms of the Act, unless it was brought to an end by due performance of the conditions laid down for its termination in sect. 12. The learned judge, of course, took no notice of the medical certificate in one sense, and the question of its being conclusive against the workman did not arise in the county court, because the learned judge said that conclusive or not it did not prevent his giving the judgment he was going to give, and he gave it. But here in this court Mr. Cave says that the fact that no objection was taken by the workman in the county court to the certificate with regard to its validity prevents it being taken on appeal by the respondent here. I cannot follow the chain of reasoning upon which that argument rests. It seems to me that once the certificate is shown to have been a nullity from the very start of the proceedings which brought in the medical referee, that thereafter it must be treated for all purposes as a nullity, and the fact that the point was not taken before the learned county court judge did not give him a jurisdiction which he did not possess. He had no jurisdiction at all, as it seems to me, to deal with the matter. The workman's proper course was to ask for a review of his weekly payment when he became worse in January, and when he was stopped illegally in Dec., 1935, to have insisted upon the 6s. being continued, pending an application for review. But the appeal here must fail, because the appeal is based upon one ground, and upon one ground only, namely, that the medical referee's certificate was conclusive and binding and prevented the learned county court judge having any jurisdiction at all to inquire into the matter on the ground that the medical referee's certificate had brought to an end once and for all the man's rights which arose out of the original accident. The man had no more right under the Workmen's Compensation Act to apply for anything whatever on the basis of that Act once the medical referee's certificate had been given and upon its terms the employers had brought the weekly payment to an end. That being so, the ground of appeal fully fails, and, in my view, the parties must be left to take such proceedings as they may be advised in the result.

EVE, J. : I agree entirely with the conclusions at which my learned brethren have arrived, and in this case I really cannot find anything which I could usefully add to what has been so elaborately stated in the two judgments you have listened to.

Solicitors : *W. P. Ellen*, agent for *Peace & Darlington*, Liverpool (for the appellants); *Patersons, Snow & Co.*, agents for *Fielding & Fernihough*, Bolton (for the respondent).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

WURZAL v. HOUGHTON MAIN HOME COAL DELIVERY
SERVICE, LTD.

WURZAL v. ALFRED ATKINSON, WALTER NORFOLK
AND JAMES WARD (Trading as THE DEARNE VALLEY
HOME COAL DELIVERY SERVICE).

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and du Parcq, JJ.),
October 27, 1936.]

*Street Traffic—Motor vehicles—Private carrier's "C" licence—Carriage for hire
or reward—Road and Rail Traffic Act, 1933, (c. 53), s. 2 (1).*

Two mutual benefit societies were formed for the delivery of coal to the servants of collieries and payment for such coal was made by deduction from wages. The first society was registered under the Provident and Industrial Societies Act, 1893, and was in effect a limited company, with the result that the society was a separate legal entity from its members. The second society was unincorporated. Each society distributed all excess of income over expenditure among its members; and each owned a motor vehicle for the purpose of delivering the coal to its members, in respect of which vehicle a "C" licence under the Road and Rail Traffic Act, 1933, was taken out. It was contended that the terms of the licence, which prohibited carriage of goods for hire or reward had been broken:—

HELD: (i) in the case of the limited company, the company being a separate entity from its members, there was a carriage of goods for hire or reward, and the terms of the licence had been broken.

(ii) in the case of the unincorporated society there had been no such breach. The persons to whom deliveries were made were in law the owners of the vehicles, and if there was any hire, it would involve the conception that the members were hiring from themselves and rewarding themselves.

[EDITORIAL NOTE.] The limited licence granted to a private carrier restricts the carriage to the trade or business of the carrier and prohibits carriage for hire or reward. The question argued here is whether there is any hire or reward in two rather exceptional cases—the carriage of goods of mutual benefit societies. The decision is that where the society is a separate legal entity from its members, i.e., where it is a limited company or otherwise incorporated, there may be hire or reward; but this is not so in the case of an unincorporated society.

AS TO CARRIER'S LICENCES, see HALSBURY, Supp. Street Traffic, para. 562, and FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 2 (1), see HALSBURY COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 874.]

Cases referred to:

- (1) *Graff v. Evans* (1882), 8 Q.B.D. 373; 8 Digest 522, 109.
- (2) *Newell v. Hemingway* (1888), 58 L.J.M.C. 46; 8 Digest 523, 119.

APPEAL by way of case stated by the justices of the peace in and for the West Riding of the County of York in the petty sessional division

of Staircross. The facts are fully set out in the cases stated, which, so far as material, were as follows :

Wurzal v. Houghton Main Home Coal Delivery Service, Ltd.

CASE.

6. Upon the hearing of the informations the following facts were proved or admitted before us :—

(a) The respondent society is registered under the Industrial and Provident Societies Act, 1893, and its objects, as set out in its rules, are to carry on the industries, businesses or trades of haulage and carting contractors and motor proprietors by providing for its members the delivery of home coal supplies from the Houghton Main Colliery (hereinafter called "the colliery") and for the purpose of affording transport facilities for the conveyance of its members to and from work at such colliery.

(b) The rules of the respondent society provide, *inter alia*, that :—

(i) All persons employed at the colliery who are entitled to home coal supplies shall be eligible for membership.

(ii) Every member shall hold at least one share, but no member (other than a registered society under the Industrial and Provident Societies Act, 1893) shall hold an interest exceeding one shilling in the shares of the society.

(iii) No member shall hold more than one share and no interest or dividend shall be paid thereon. Shares shall not be transferable nor withdrawable, and a member shall forfeit the value of his share on ceasing to be a member.

(iv) Except by the dissolution of the society or in the necessary purposes of the society's maintenance, no profits or funds shall be distributed among the members.

(c) The activities of the respondent society are confined to the delivery to its members of coal supplied to the members from the colliery by the owners thereof, namely, Houghton Main Colliery Company, Limited (hereinafter called the "colliery company"). The prices charged by the respondent society to its members for such deliveries of coal are, by arrangement, deducted or stopped from the wages of the members payable by the colliery company and subsequently paid over by the colliery company to the respondent society.

(d) The only members of the respondent society are the persons employed by the colliery company who are entitled to house coal supplies all of whom are shareholders in the respondent society which has no other shareholders whatever.

(e) The respondent society was formed as an unincorporated society in 1921 and was registered under the Industrial and Provident Societies Act, 1893, in 1927. The respondent society originally employed a contractor to deliver coal to its members, but subsequently bought out the said contractor. The income of the respondent society is disbursed on wages and other expenses and in reducing the cost of coal deliveries which have, in fact, been reduced from an average of 5s. 8½d. per load in 1926 to 2s. 3½d. per load in 1936. Sometimes the respondent society delivers coal free of all charge to its members who are ill or out of work but no deliveries are made in any circumstances to non-members. It is the intention of the respondent society to build garages to house its lorries used for delivering coal. A copy of the balance sheet of the respondent society for the half-year ending Dec. 31, 1933, was produced in evidence before us.

(f) The respondent society is *inter alia* the owner of two motor goods vehicles Nos. WX 7252 and WX 2304 in respect of which they are the holders of a "C" licence within the meaning of the Road and Rail Traffic Act, 1933, authorising them

to use the said vehicles subject to the conditions printed on the said licence. By condition No. 1 of the said conditions it is provided as follows :—

“ In accordance with sect. 2 (4) of the Act :—

“ The holder of this licence is entitled to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, *but no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward.*

(g) On Jan. 2, 1936, a police officer on duty at Snape Hill Road, Darfield, saw the respondent society's said motor goods vehicles WX 7252 and WX 2304 delivering loads of coal at the respective houses of one Robert Randerson and one John Henry Bernard Podmore. The said Randerson and the said Podmore who are employed at the colliery, are members of the respondent society each holding one 1s. share therein. The 1s. subscription of each of these members was paid by the colliery company deducting or stopping the amount from their wages and paying it to the respondent society. In respect of the said deliveries of coal sums of 2s. 1d. were deducted or stopped by the colliery company from the wages of both the said Randerson and the said Podmore, which sums were subsequently paid by the colliery company to the respondent society.

7. On behalf of the respondent society it was contended that :—

(a) The respondent society was not guilty of the offences charged.

(b) The payments made by or on behalf of the said Randerson and the said Podmore for deliveries of coal by the respondent society did not constitute “ hire or reward ” because the said Randerson and the said Podmore were members of the respondent society ; and the accumulated profits of the respondent society, whilst being available for reducing the average cost of delivery of such coal remained with the respondent society by its rules for the ultimate advantage of its members.

(c) Although the respondent society had taken out a “ C ” licence, no licence need have been taken out because the said motor goods vehicles were the property of the members of the respondent society and were being used for the delivery of coal only to members. Alternatively if any licence was required the appropriate licence was a “ C ” licence because if it were to be held that the vehicles were used for or in connection with any trade or business carried on by the respondent society, i.e., that of the carriage under the circumstances hereinbefore set out of its members' coal only such vehicles nevertheless were not used for the carriage of goods for hire or reward.

(d) Road Traffic Act, 1934, s. 26, has been specially passed to cover public service vehicles and there is no corresponding section in the Road and Rail Traffic Act, 1933, or in any subsequent amending legislation ; the words “ notwithstanding any rule of law ” in sect. 26 aforesaid imply that there is such a rule of law still operative with regard to “ goods vehicles,” and that a society, such as the respondent society, does not carry on its operations for “ hire or reward.”

(e) The fact that the respondent society is a legal entity apart from its members and is the owner of the said motor goods vehicles did not constitute the aforesaid payments for “ hire or reward ” as every member is a shareholder and every shareholder a member of the respondent society.

8. On behalf of the appellant it was contended that :—

(a) The respondent society was guilty of the offences charged.

(b) The respondent society is a legal entity apart from its members and was the owner of the said motor goods vehicles ; and the said coal was being carried by the respondent society in its capacity as haulage and carting contractors and that it was paid by the said Randerson and the said Podmore for such carriage.

(c) The ultimate disposal of the accumulated payments for and consequential

profits of the said deliveries of coal by the respondent society, although restricted in method of distribution by the rules, does not obviate the fact that the coal was being carried for hire or reward, nor does the fact that the members of the respondent society had a proprietary interest in the assets thereof affect the fact that the user of the said vehicles was "for hire or reward."

(d) The actual user of the vehicle is the criterion as to whether the same should be licensed and as to how it should be licensed and the method of disposal of the "rewards" thus obtained was not the deciding factor.

(e) Road Traffic Act, 1934, s. 26, is merely a declaratory section and does not justify the inference that the omission of a similar section as regards "goods vehicles" was proof of the fact that societies, such as the respondent society, carrying goods in the circumstances of the present case were not carrying the same "for hire or reward."

OPINION.

9. We being of the opinion that the contentions on behalf of the respondent society were correct dismissed the said informations.

Wurzal v. Atkinson, Norfolk & Ward, trading as Dearne Valley Home Coal Delivery Service.

CASE.

4. Upon the hearing of the information the following facts were proved or admitted before us:—

(a) The respondents are members of an unincorporated society called the Dearne Valley Home Coal Delivery Service (hereinafter called "the society") membership of which is restricted to persons employed at the Dearne Valley Colliery (hereinafter called "the colliery") the owners of which are the Dearne Valley Colliery Company Limited (hereinafter called "the colliery company"). The sole business of the society is to deliver to its members coal supplied to the members from the colliery by the colliery company. The initial fee of 1s. payable for membership of the society and the price charged by the society to each member for delivery of coal are, by arrangement, deducted or stopped from the wages of the member payable by the colliery company and subsequently paid over by the colliery company to the society. No deliveries of coal are made by the society to non-members.

(b) The society is the owner, *inter alia*, of a motor goods vehicle No. AWW 398, in respect of which the respondents, on behalf of the society, are the holders of a "C" licence within the Road and Rail Traffic Act, 1933, authorising them to use the said vehicle subject to the conditions printed on the said licence. By condition No. 1 of the said conditions it is provided as follows:—

"In accordance with sect. 2 (4) of the Act:—

"The holder of this licence is entitled to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him but *no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward.*"

(c) In July, 1935, in response to the application of the society for the said "C" licence the licensing authority stated to the society that as it was impracticable to show on the licence the names of all members of the society it would meet the case if the society nominated one or more members (preferably not more than three) who would be responsible for the proper operation of the service and the observance of the conditions of the licence. In pursuance of such request the society nominated the respondents for such purpose.

(d) On Jan. 4, 1936, a police officer on duty at Edward Street, Darfield, saw the said motor goods vehicle No. AWW 398 delivering a load of coal at the house of one Frederick Charles Stanley who is employed at the colliery and is a member of the society. In respect of the said delivery of coal, the sum of 3s. 9d. was deducted or stopped by the colliery company from the wages of the said Stanley and subsequently paid by the colliery company to the respondent Atkinson in his capacity as secretary of the society.

5. On behalf of the respondents it was contended that :—

(a) The respondents were not guilty of the offence charged ;

(b) The payment made by or on behalf of the said Stanley for the delivery of coal by the society did not constitute “ hire or reward ” because the said Stanley was a member of the society and as such had an equal interest with his fellow members in its accumulated profits, if any, and because the said Stanley and his fellow members were the joint owners (*inter alia*) of the said motor goods vehicle and of all moneys paid to the society.

(c) Although the respondents on behalf of the society had taken out a “ C ” licence, no licence need have been taken out since the said motor goods vehicle was the property of the members of the society and was used for the delivery of coal only to members. Alternatively if any licence was required the appropriate licence was a “ C ” licence because if it were held that the vehicle was used for or in connection with any trade or business carried on by the society, i.e., that of the carriage under the circumstances hereinbefore set out of its members’ coal only such vehicles nevertheless were not used for the carriage of goods for hire or reward.

(d) Road Traffic Act, 1934, s. 26, has been specially passed to cover public service vehicles and there is no corresponding section in the Road and Rail Traffic Act, 1933, or in any subsequent amending legislation ; the words “ notwithstanding any rule of law ” in sect. 26 aforesaid, imply that there is such a rule of law still operative with regard to “ goods vehicles ” and that a society carrying on its operations as in the present case does not do so for “ hire or reward.”

6. On behalf of the appellant it was contended that :—

(b) The fact that the members of the society had a proprietary interest in the assets thereof does not affect the fact that the user of the said vehicle was for “ hire or reward.”

(c) The actual user of the vehicle is the criterion as to whether the same should be licensed and as to how it should be licensed and the method of disposal of the “ rewards ” thus obtained was not the deciding factor.

(d) Road Traffic Act, 1934, s. 26, is merely a declaratory section and does not justify the inference that the omission of a similar section as regards “ goods vehicles ” was proof of the fact that societies carrying goods in the circumstances of the present case were not carrying the same “ for hire or reward.”

OPINION.

7. We being of the opinion that the contentions on behalf of the respondents were correct dismissed the said information.

Valentine Holmes, for the appellant.

N. R. Fox-Andrews, for the respondent.

The arguments in the court below were repeated on this appeal.

LORD HEWART, L.C.J. : These are two special cases stated by justices for the West Riding of Yorkshire and heard together for con-

venience. The questions which they involve arise under the Road and Rail Traffic Act, 1933. Shortly the point was in the one case, as in the other, that the respondents, being the holders of a "C" licence (that is to say a licence referred to in the Road and Rail Traffic Act, 1933, s. 2 (1) (c)) failed to comply with a condition attached to that licence, namely, a condition that the holders were entitled to use the vehicles for the carriage of goods for or in connection with any trade or business carried on by them but not to use any vehicle so authorised for the carriage of goods for hire or reward. Those words appear in sect. 2 (4) of the Act of 1933, which provides as follows :

A private carrier's licence (in this part of this Act referred to as "a 'C' licence") shall entitle the holder thereof to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward.

In each of these cases it was contended that the respondents had contravened the statute by using vehicles of this nature licensed with a "C" licence for the carriage of goods for hire or reward. The justices came to the conclusion in both cases that no offence had been committed and dismissed the informations. The question for us is whether in so deciding they came to a correct determination in point of law.

It may be convenient to deal first with the case which is the first in the list, the case in which the respondents are a limited company. It was a limited company of a somewhat unusual kind registered under the provisions of the Industrial and Provident Societies Act, 1893, and its objects are to carry on the industries, businesses or trades of haulage and carting contractors and motor proprietors in a particular way, namely, by providing for its members the delivery of home coal supplies from the particular colliery and for the purpose of affording transport facilities for the conveyance of its members to and from work at the colliery. The rules provided, among other things, that all persons employed at the colliery should be eligible for membership, and every member should hold at least one share, but no member should hold an interest exceeding 1s. in the shares of the society; that no member should hold more than one share and that no interest or dividend should be paid upon that share, and that except by the dissolution of the society or in the necessary purposes of the society's maintenance, no profits or funds should be distributed among the members. The special case goes on to find as a fact that the activities of the company were confined to the delivery to its members of coal supplied to the members from the Houghton Main Colliery at certain prices charged for delivery. The term "prices" is used. The special case says :

The prices charged by the respondent society to its members for such deliveries of coal are, by arrangement, deducted or stopped from the wages of the members

payable by the colliery company and subsequently paid over by the colliery company to the respondent society.

More than that, the only members of the respondent society were the persons employed by the colliery company, who are entitled to house coal supplies. Then there comes this important finding :

The respondent society was formed as an unincorporated society in 1921 and was registered under the Industrial and Provident Societies Act, 1893, in 1927. The respondent society originally employed a contractor to deliver coal to its members, but subsequently bought out the said contractor. The income of the respondent society is disbursed on wages and other expenses and in reducing the cost of coal deliveries which have in fact been reduced from an average of 5s. 8½d. per load in 1926 to 2s. 3½d. per load in 1936. Sometimes the respondent society delivers coal free of all charge to its members who are ill or out of work, but no deliveries are made in any circumstances to non-members.

That society is the owner, amongst other things, of two motor goods vehicles in respect of which they hold a " C " licence within the meaning of the statute authorising them to use the vehicles subject to the conditions printed on the licence. One of those conditions is to exclude the use of the vehicle for the carriage of goods for hire or reward.

On the day that is referred to in the information both of these vehicles were stopped. They were engaged in the work of making deliveries of coal, for which deliveries sums of 2s. 1d. were deducted or stopped by the colliery company from the wages of the two persons employed at the colliery who were having deliveries of coal made to them. The question was whether, in those circumstances, it is true to say that those vehicles, owned as they were and used as they were, were being used for the carriage of goods for hire or reward. The limited company contended, and contended with success, that there was no hire or reward. On the other hand, the appellant argued that the respondent society was a legal entity apart from its members and was the owner of the goods vehicles ; that the coal was being carried by the society in its capacity as haulage and carting contractors and that it was paid by the two members for the carriage. The appellant contended further that the ultimate disposal of the accumulated payments for and consequential profits from deliveries of coal, although restricted in mode of distribution by the rules, did not obviate the fact that the coal was being carried for hire or reward ; nor did the fact that the members of the respondent society had a proprietary interest in the assets affect the fact that the user of the vehicles was for hire or reward. Finally it was contended that the actual use of the vehicle was the criterion as to whether it should be licensed and as to how it should be licensed, and that the method of disposal of the rewards thus obtained was not the deciding factor.

It seems to me that the contentions which were then urged, and which have been repeated to-day on behalf of the appellant, were right. In

my opinion the controlling fact is that this respondent society was and is a legal entity, apart from its members. When the individual member was employing a vehicle belonging to the limited company for the purpose of making a delivery of coal at his house, he was causing the vehicle to be used for the carriage of goods for hire or reward. It matters not that the payment to be made—a payment we are told in proportion to the distance travelled—was not paid directly in cash by him to the limited company but was deducted or stopped by his employers, the colliery company, and then passed on to the respondent society. It seems to me that it is a fact, not merely of some but of governing importance that there was a limited company, a legal entity, apart from the members who held its shares.

Conversely in the second case there was no limited company. The informations there were against certain individuals named as respondents and described as trading as Dearne Valley Home Coal Delivery Service. In no material respect do the facts of that case differ from the facts of the first case, except that here there was no limited company. There was a collection of individuals rather of the nature of a club who joined together and purchased motor vehicles and used them for the purposes already described. Here it was held that no offence had been committed. The contentions of the respondents were upheld. The appellant argues that the fact that the members of the society had a proprietary right in the assets would not affect the fact that the user of the vehicle was for hire or reward. It seems to me that where you are dealing, not with a transaction between a shareholder and a limited company as in the first case, but between one member of an unincorporated society and his fellow members, different considerations apply. Our attention has been directed to a case which is not *in pari materia*, but which is nevertheless useful as throwing light upon the matter, the case of *Graff v. Evans* (1), where the manager of a *bona fide* club was prosecuted for selling by retail intoxicating liquors within Licensing Act, 1873, s. 3, and he was held not to be selling by retail intoxicating liquors. It is quite true that there are manifest differences between selling liquor by retail and carrying goods for hire or reward, and yet there are some things which may be said to be common to both. FIELD, J., in giving judgment in that case at p. 377, said :

In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section. It is not disputed that the club was *bona fide* a club.

Then at p. 378 he goes on to say :

I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays for the liquor is equal

to or more or less than the cost price. The transaction does not become the more or the less a sale on that account. It cannot be the true view that if the member pays a sum exactly equal to the cost price there is no sale within the section, but that if he pays more than the cost price there is. The section must be construed by looking at the language used, and taking a large view of the object of the legislation.

Finally, FIELD, J., on the same page, said :

The question here is, did Graff, the manager, who supplied the liquors to Foster, effect a "sale" by retail? I think not. I think Foster was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price.

In like manner here it seems to me that the persons at whose houses the coal was being delivered were among the owners of the motor vehicles which were making the delivery, and to say that they were having their coal carried in those vehicles for hire or reward involves a proposition that they were hiring from themselves and rewarding themselves, a difficult conception.

It was part of the argument that under the Act of 1934 a certain section had been enacted in order to bring within the net persons who were carried as passengers on motor vehicles. That section is Road Traffic Act, 1934, s. 26, and it provides as follows :

Where, under a transaction effected by or on behalf of a member of a society on the one hand and the society or another member thereof on the other hand, a person is carried as a passenger in a motor vehicle in such circumstances that he would be deemed to be carried for hire or reward if the transaction were effected otherwise than as aforesaid, then, notwithstanding any rule of law, he shall for the purposes of the principal Act and of this Act be deemed to be carried for hire or reward,

And the section goes on to add these words :

In this section the expression "society" means any association of persons whet he incorporated or not.

It seems to me to be argued with force that it took a section of a statute to cause liability to exist in those circumstances, and I think there is force in the argument that if the legislature, when it was dealing with arrangements between members of societies for carriage in motor vehicles, had been minded to deal with the topic of carriage of goods apparently for hire or reward in motor vehicles belonging to societies and making deliveries to members of societies, nothing would have been easier than to have inserted a few words to accomplish the purpose. It looks as if the topic, as a topic, had been before the legislature, and the legislature, for some reasons not difficult perhaps to imagine, had decided to exclude from the provisions of the Act the carriage of goods in such circumstances as are here revealed while it brought within the Act by express words the carriage of persons.

I will only add that if the argument which is urged on behalf of the appellant in this case were to prevail, the consequences would be rather odd in relation to associations of partnership. Where, it might be asked, is the line to be drawn? Here no doubt in the case of this unincorporated association there are many members, but in point of reason it seems difficult to think that that can make any real difference. Suppose there had been two and two only, and suppose they had been called partners, could it, except for controversial purposes, have been argued that one partner was hiring the vehicle from the other partner or from the partnership when it was being used to deliver coal at his house and *vice versa* with his co-partner when it was being used for a similar purpose at his house? I think that the ingenious argument which has been put forward on behalf of the appellant in that particular case is capable of *reductio ad absurdum*.

In the result, therefore, I think that in the case where the limited company is concerned, the appeal ought to be allowed, and the case should go back with a direction to find that the offence which was charged was proved, while in the other case I think that the true conclusion is that the appeal ought to be dismissed.

SWIFT, J.: I agree. I think that the difference between these two cases solves the problem which has been put before the court. In the one case the owner of the vehicle, which was used for the purpose of transporting coal, was a limited liability company, a legal entity which owned and controlled and could let out on hire or refuse to let out on hire the vehicle which is said to have been used for hire or reward in this case. In the other case, the vehicle which was in question was owned by all the members of a combination of workers in the Dearne Valley Mine. It was an unincorporated society and each member was entitled to use in his turn the vehicle for his purpose, making such a contribution to its expenses as was agreed upon by his fellow members. It seems to me that the second case comes within the principles of law—though, of course, the facts are quite different—laid down in *Graff v. Evans* (1), which have been cited by my Lord. I want to add only one word more. An attempt was made by Mr. Fox-Andrews to bring the case of the limited company into the same principle, and he relied for that purpose upon a case of *Newell v. Hemingway* (2). I do not think that in that case sufficient attention was paid to the difference which exists between a proprietary club and a members' club. LORD COLERIDGE, C.J., seemed to think that the case was covered by *Graff v. Evans* (1), whereas in truth it was an entirely different case, for there the purchase was not from the common stock of the members, as it was in *Graff v. Evans* (1), but it was from the limited company which owned the club. I do not think that that case is binding in any way upon us in regard

to this matter. In my opinion, these two summonses, which were before the magistrates, should be dealt with as my Lord has said.

DU PARCQ, J.: I agree with regard to both the cases before us, and I cannot usefully add anything to what has been said already.

One appeal allowed with costs and the other appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the appellant); *J. S. & P. Walsh*, Leeds (for the respondents).

[*Reported by HENRY WESTLAKE, Esq., Barrister-at-law.*]

SALT v. POWER PLANT COMPANY, LTD.

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), **October 27, 1936.**]*Master and Servant—Wrongful dismissal—Contract of employment—Interpretation—"Permanent."*

The plaintiff was employed by the defendant company upon the terms of a letter, dated Dec. 24, 1925, which provided that the engagement would be for a minimum of 3 years, subject to the defendants' right to cancel the agreement in case of wilful default. The letter continued: "The company shall have the right to terminate the agreement after the expiration of the above-mentioned period by giving 6 months' notice in writing prior to the ensuing Dec. 31, and in the absence of such notice the engagement to remain in force as a permanent one." The defendants gave the plaintiff 6 months' notice, to expire on Dec. 31, 1936. The plaintiff brought an action for wrongful dismissal:—

HELD: in the absence of notice to determine the employment at the end of the three years ending Dec. 31, 1928, the plaintiff's engagement was to be for his life, and there had been a breach of the agreement.

[EDITORIAL NOTE.] The form of engagement here is perhaps unusual in that there is a fixed period, then a further year in which notice may be given, and thereafter the engagement is to be permanent. It seems clear that there must be a distinction between the second and third periods and the only distinction possible is that the third or indefinite period is not to be subject to termination by notice. It will be further noticed that it is suggested in the judgment that if the company goes into liquidation, the plaintiff will be in a position to claim damages for the loss of a life appointment.

AS TO DURATION OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 144-146, Nos. 235-239; and FOR CASES, see DIGEST, Vol. 34, pp. 52-59, Nos. 261-355.]

APPEAL from a judgment of HORRIDGE, J., delivered on Feb. 23, 1936, dismissing the plaintiff's claim for damages for wrongful dismissal.

The plaintiff had been employed by the defendant company as secretary since Nov., 1918. On Dec. 24, 1925, the managing director of the defendant company wrote to the plaintiff as follows:

In accordance with your interview with the directors last week, I have pleasure in confirming the agreement to renew your engagement as secretary of this company for a further minimum period of 3 years at the present remuneration provided always that the company shall have the right to cancel this agreement in case of wilful disobedience to any lawful order of the directors. It is also understood that the company shall have the right to terminate the agreement after the expiration of the above-mentioned period by giving 6 months' notice in writing prior to the ensuing Dec. 31, and in the absence of such notice the engagement to remain in force as a permanent one subject to your continuing to perform your duties to the satisfaction of the directors.

On June 26, 1936, the defendants tendered the plaintiff 6 months' notice to expire on Dec. 31, 1936. The plaintiff brought an action for wrongful dismissal. HORRIDGE, J., gave judgment in favour of the defendants. The plaintiff appealed.

F. P. M. Schiller, K.C., and *Philip Vos*, for the appellant.

G. R. Blanco White, K.C., and *H. J. Phillimore*, for the respondent company.

Schiller, K.C. : The defendants could only give the plaintiff notice in the manner prescribed in the agreement. There were three possibilities : if he were wilfully disobedient ; if they gave him 6 months' notice before the ensuing Dec. 31 ; or if he failed to carry out his duties satisfactorily. The latter is not suggested. The notice was bad, as it did not expire on the ensuing Dec. 31, and because the time during which notice could be given had expired. It is difficult to give any meaning to the word " permanent," if the defendants could give notice at any time. " The ensuing " means the period ensuing after the 3 years had expired.

Blanco White, K.C. : The plaintiff was on a yearly employment. " Permanent " is used in the same sense as a permanent civil servant as opposed to a temporary civil servant. It does not mean " that which cannot be terminated " but that it is hoped and expected that it will go on. That is compatible with his being employed from year to year. " Ensuing " means ensuing after the notice. It means 6 months' notice prior to the *then* ensuing Dec. 31. So long as no notice was given, the agreement was in force as a permanent one. It is a strained view to relate " ensuing " back to " expiration " ; it should be related back to " giving."

GREER, L.J. : In this case the plaintiff was the secretary of the defendant company ; he brought an action for wrongful dismissal, and the question to be determined is what is the true construction of a letter dated Dec. 24, 1925. At the beginning of Nov., 1918, the plaintiff was engaged as secretary to the company at a salary of £400 a year, and he had had, before the time that we have to consider, two rises, one of £100 a year, first of all, to £500 per annum, and on May 27, 1921, a further increase of £100 per annum, which was to be " retrospective." Whether that meant that it was to go back 12 months from May 27, 1921, or was to be retrospective from the end of the financial year, is a little difficult to determine, but I am inclined to think that it meant that it was to be retrospective from the end of the company's financial year, which was Dec. 31 in each year. On Dec. 24, 1925, a letter was written by the managing director of the company, with the object of altering the terms upon which the secretary was engaged, and that letter is in the following terms :

In accordance with your interview with the directors last week, I have pleasure in confirming the agreement to renew your engagement as secretary of this company for a further minimum period of 3 years at the present remuneration provided always that the company shall have the right to cancel this agreement in case of wilful disobedience to any lawful order of the directors.

Now, that arrangement appears to have been made just before the conclusion of the financial year of the company, and in my judgment the 3 years began to run from Dec. 31, 1925; and of course it was a great advantage to the plaintiff to have an engagement which could not be determined for any reason except misconduct during a period of 3 years. Then the letter goes on to say :

It is also understood that the company shall have the right to terminate the agreement for the engagement after the expiration of the above-mentioned period—

That is, after the expiration of the 3 years, as I understand it, from Dec. 31, 1925—

by giving 6 months' notice in writing prior to the ensuing Dec. 31—

I read that as meaning prior to Dec. 31 ensuing after the date of the renewal of the engagement or after the date of the termination of the 3 years—

and in the absence of such notice the engagement to remain in force as a permanent one subject to your continuing to perform your duties to the satisfaction of the directors.

Mr. Blanco White says that "permanent" does not mean permanent, but it means an agreement which could be determined at any time by notice expiring on Dec. 31 or at any other time in the year. I cannot so read the document. I think it means, quite clearly, that at the end of the 3 years he is to have a quite different status from that which he had before the beginning of the 3 years, namely, that he is to have a permanent employment, that is to say, it is to be an employment for life, subject to the proviso which is mentioned in the last words of the letter, "subject to your continuing to perform your duties to the satisfaction of the directors."

The company then kept him on on those terms until June 26, 1935, and then, apparently after taking advice on the subject, they wrote him a letter dated June 26, 1935, in which they said :

In accordance with our agreement with you and with reference to the second paragraph of our letter to you dated Dec. 24, 1925, we hereby give you 6 months' notice expiring on Dec. 31, 1935.

I am clearly of opinion that the time for the company to give their notice had long expired, and that this is a bad notice, which did not terminate the engagement; but they acted upon the notice, and the plaintiff ceased to be their secretary, and he now claims damages on the basis that his employment was wrongfully determined. The learned judge decided in favour of a construction of the letter, which I think is a wrong construction of the letter, and therefore the case must go back in order that evidence may be heard with reference to what are the appropriate damages.

This is the case of a man who had, according to my view, got an engagement which was to last for life, or at any rate for the joint lives of himself and the company, but I think for his life, because I think there are authorities to the effect that if a company winds up, that is a dismissal of the servants, and they can then prove for damages and get their dividend, whatever it may happen to be. Fortunately, the company has not been wound up, but in estimating the damages, of course the tribunal estimating them will have to take into consideration the fact that at any time after June 26, 1935, it might have appeared to the directors that they had good reasons for terminating the plaintiff's services, reasons connected with his conduct. The present value of what his salary would be for the rest of his life must also be considered, and there must also be taken into account the fact that he is a man who might at any time terminate his service by his life coming to an end, and other matters with which I need not deal.

There will be an order for a new trial, unless the parties agree to a reference as to the amount of the damages to one of the official referees. If there is no such agreement, the case will go back to the trial judge.

SLESSER, L.J. : I agree.

SCOTT, L.J. : I agree.

Solicitors : *William Charles Crocker* (for the appellant); *Stones, Morris & Stone* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

BENDIR AND OTHERS *v.* ANSON.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.), **October 19, 1936.**]

Practice—Joinder of plaintiffs—“Transaction or series of transactions”—Action for interference with light—R.S.C., Ord. 16, r. 1.

Two plaintiffs were interested in No. 4, B. Street, and two plaintiffs in No. 6, B. Street. These buildings were not adjacent, there being an intermediate structure. The defendant was erecting new premises on the other side of B. Street and both plaintiffs alleged an interference with ancient lights. Both sets of plaintiffs joined in one action against the defendant as plaintiffs having a right to relief in respect of or arising out of the same transaction or series of transactions within the meaning of R.S.C., Ord. 16, r. 1:—

HELD: in the exercise of the discretion of the court the plaintiffs should elect within 14 days which of the two sets of plaintiffs should be allowed to proceed in the action, and upon election being made, there should be struck out of the writ and statement of claim all parts thereof referring to the other set without prejudice to their issuing a new writ claiming relief pertinent to their premises, both actions to come into the list before the same judge on the same day to be dealt with as he thinks fit, the party issuing the new writ to stand in the same position as if that writ was issued on the date of the original writ.

SEMBLE: without expressing any final opinion as to whether the joinder of these causes of action is permitted by R.S.C., Ord. 16, r. 1, or on the meaning of the word “transaction” therein, that word would seem to mean an act the effect of which extends beyond the agent to other persons, and the building of the new premises is such an act in that its effect extends to other premises as an interference with an easement. The authorities support this view, and they have clearly extended its meaning from that of a mere contractual relationship.

[EDITORIAL NOTE.] This case clearly shows that the owners and occupiers of separate premises cannot be joined as co-plaintiffs in an action in respect of an interference with light unless the interference is in both cases identical; but, at the same time, it is proper to bring the actions on at the same time before the same judge so that he can deal with them as he thinks best. As to the exact position under R.S.C., Ord. 16, r. 1, and the meaning of the words “transaction or series of transactions” therein, the Court of Appeal refrained from expressing any final opinion, but the judgment of LORD WRIGHT, M.R., herein is an expression of opinion that should be before the court when the matter arises for decision, and must until then be a useful guide to the profession on this point.

AS TO JOINDER OF PLAINTIFFS, see HALSBURY, 1st Edn., Vol. 23, Practice, p. 104, para. 183; and FOR CASES, see DIGEST, Practice, pp. 399-403, Nos. 1011-1050.]

Cases referred to:

- (1) *Stroud v. Lawson*, [1898] 2 Q.B. 44; Digest, Practice, 401, 1020.
- (2) *Drincqhier v. Wood*, [1899] 1 Ch. 393; Digest, Practice, 402, 1024.
- (3) *Oxford & Cambridge Universities v. Gill (George) & Sons*, [1899] 1 Ch. 55; Digest, Practice, 402, 1022.
- (4) *Bedford (Duke) v. Ellis*, [1901] A.C. 1; Digest, Practice, 416, 1133.
- (5) *Markt & Co., Ltd. v. Knight S.S. Co., Ltd.*, *Sale & Frazar v. Knight S.S. Co., Ltd.*, [1910] 2 K.B. 1021; Digest, Practice, 399, 1011.

APPEAL from an order made by FARWELL, J., on July 21, 1936, that the plaintiffs should elect within one month which of them should proceed with the action and that the writ and statement of claim be amended by striking out all reference to the claim of the other plaintiffs.

The plaintiff, A. G. Bendir, was the freeholder of No. 6, Old Burlington Street, Westminster. The plaintiffs, Ladbroke & Co., Ltd., were lessees and occupiers of No. 6. The plaintiff, B. B. Van Praagh, was the owner for the residue of a term of years of No. 4, as trustee for the plaintiff, F. S. Gaylor, who was the occupier of No. 4. The defendant began to build an hotel opposite both these premises, and the plaintiffs complained that it obstructed the access of light to certain specified windows, which were ancient lights, in the two sets of premises respectively, and brought an action for an injunction jointly under R.S.C., Ord. 16, r. 1. This rule reads :

All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where if such persons brought separate actions any common question of law or fact would arise ; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the court or a judge in disposing of the costs shall otherwise direct.

On a summons taken out by the defendants and heard on July 21, 1936, FARWELL, J., ordered that the plaintiffs should elect within one month which of them should proceed with the action, and upon such election being made that the writ and the statement of claim should be amended by striking out all parts thereof referring to the claim of the other plaintiffs and in default of such election the action should be dismissed. In his judgment, he said that the question was whether there was here a transaction or series of transactions the same *vis-à-vis* the four plaintiffs. *Stroud v. Lawson* (1) left the question open as to what was meant by a transaction. The erection of the building was not a transaction, and the erection of the same building in such a way as to constitute a nuisance was different *vis-à-vis* the first two plaintiffs and the second two plaintiffs. Different considerations might arise in each case, and the defendant might be embarrassed. The action was not brought in respect of the building of a house simply, but in respect of the building of a house in such a way as to cause a nuisance to the plaintiffs.

The plaintiffs appealed.

Andrew Clark for the appellant plaintiffs.

Thomas Cunliffe for the respondent defendant.

Clark : "Transaction" does not necessarily mean a dealing between two people, but any act. The cause of action here is the erection of the building so as to cause a nuisance ; the transaction is the erection of the building. In *Stroud v. Lawson* (1) at p. 53, CHITTY, L.J., said that in a case where it was alleged that damage was done to a graveyard by a common act, all the owners of graves in it were allowed to join against the person who was said to have disturbed the graves. The present case is on all fours. That is the only case in which this rule has been discussed, and in his judgment CHITTY, L.J., laid down the following test (at p. 52) :

It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule.

Those conditions are fulfilled in the present case. In *Drincqbier v. Wood* (2) four persons, each of whom separately took debentures on the faith of the statements in a prospectus and covering letter issued by the directors of a company, joined as co-plaintiffs in an action against the directors, claiming damages for misrepresentations contained in the prospectus and covering letter ; it was held by BYRNE, J., that as the several causes of action were the same and arose out of the same transaction, and were against the same defendants, the action was properly constituted. In that case "transaction" did not necessarily mean something done between two persons. *Stroud's* case (1) is the only authority in which the rule is discussed.

LORD WRIGHT, M.R., cited *Oxford & Cambridge Universities v. Gill* (3), in which the two universities claimed an injunction to restrain the defendants from publishing books called "The Oxford and Cambridge Publications" ; and in which it was held, that the action arose out of the same series of transactions ; that common questions of fact would arise ; that therefore the conditions mentioned in *Stroud v. Lawson* (1) as being necessary to bring a case within R.S.C., Ord. 16, r. 1, were fulfilled, and that the plaintiffs were therefore entitled to join.

ROMER, L.J. : LORD MACNAGHTEN (*Bedford v. Ellis* (4)) and other learned judges have read the rule as though it ran :

Where the claim to relief arises in respect of or out of the same transaction or a series of similar transactions,

not "out of the same series of transactions." One plaintiff may have a cause of action arising out of a transaction, or out of a series of transactions. A strict interpretation of the rule might demand that where one plaintiff's cause of action arose out of a series of transactions, the other plaintiffs should join with him to show that their claim to relief

arose out of the same series of transactions. That, however, is putting a construction on the rule which I do not think its framers could possibly have intended. LORD MACNAGHTEN appears to have treated the words "series of transactions" as embracing a case where the claim of each plaintiff arose out of a transaction peculiar to himself and where all those transactions constituted a series of transactions very similar one to the other; *e.g.*, the case of creditors each of whom have a claim against a single debtor and the only identity is that of the debtor.

LORD WRIGHT, M.R., cited *Markt & Co., Ltd. v Knight Steamship Co., Ltd.* (5).

Clark: In the present case there is a series of transactions, and a claim to relief arises out of a series of similar transactions. Two alternatives are open to the court: to construe "transactions" out of its ordinary sense, as was done by BYRNE, J., or to say, as LORD MACNAGHTEN has said, that a series of transactions does not mean the same series of transactions, but a series of similar transactions.

Cunliffe: The learned judge's judgment shows that he regarded the joinder as embarrassing, although that view does not appear in the order.

LORD WRIGHT, M.R.: This is an appeal from an order of FARWELL, J., made in the action. The action was brought by four plaintiffs; one pair of plaintiffs were interested in one building, No. 4, Old Burlington Street, Westminster, and the other pair of plaintiffs were interested in another building, No. 6, Old Burlington Street, Westminster. They were not adjoining buildings; there was an intermediate structure. The action was brought against the defendant as the building owner of new premises being erected by him on the other side of Old Burlington Street, the side which had been occupied by the Burlington Hotel; and the claim is for interference with ancient lights. In the one building—No. 4,—there are five separate sets of windows, 17 windows in all, in different parts of the building, which were said to be affected by the new building. In No. 6 there are 18 windows said to be prejudicially affected by the new building. The question was whether this joinder of these four plaintiffs—who may be reduced for practical purposes to two, because, as I have said, each couple have joint interests in the respective premises—ought properly to proceed as plaintiffs in one action in respect of the separate injuries which they respectively allege they had suffered. The learned judge, according to the order which has been drawn up, being of opinion that the alleged injury by the defendant to No. 4, Old Burlington Street, was not the same transaction as the alleged injury to No. 6, Old Burlington Street, so as to entitle these several plaintiffs to join their claims, ordered that they should elect which of them be allowed to proceed in this action.

The short report of the learned judge's judgment in *THE SOLICITORS' JOURNAL*, 1936, Aug. 1, p. 612, seems to show that the learned judge not only proceeded on the construction of Ord. 16, r. 1, but also took into account—though he does not develop the point, so far as appears in the brief report—that the defendant might be embarrassed by the joinder. So far as I am concerned, I am far from satisfied that the joinder was such as not necessarily to be within the words of R.S.C., Ord. 16, r. 1. These words are :

All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where if such persons brought separate actions any common question of law or fact would arise.

The language of this rule cannot be regarded as very well chosen. The phrase "transaction or series of transactions" is not a term of art, and I cannot find in the authorities any precise definition of the exact scope of those words. But it is quite clear that the tendency of the decisions has been to give a literal interpretation to the rule and to apply it in any cases where you have a claim to relief by more than one person in respect of what has been treated as the effect of the words "transaction or series of transactions, whether the relief claimed is jointly, severally, or in the alternative." The word "transaction," I think, necessarily means an act, the effect of which extends beyond the agent to other persons. For instance, to take this particular case, the building of the premises by the defendant is an act which from one point of view is limited to the builder and to the area covered by the premises ; but its effects on other premises extend also to those premises in respect of which a nuisance or an interference with an easement may be created by the building. In that sense the building of the premises may be regarded as a transaction, and I find on the authorities that that view seems to have been taken. As I have already said, I do not think that the word is very happily chosen. It seems to have been used in the first instance rather with reference to cases in which there was something in the nature of a contractual relation, or some relation of that nature between parties, but it has quite clearly been extended from that more limited connotation.

I very much doubt, however, whether in this case there was any common question of law or fact which would arise. The law as to what constitutes an interference with light or air is now well established, and I do not see how any question of law could be said to arise in this respect. As to the facts, it seems obvious enough that the position of each building may be quite different from that of the other building—the position, I mean, from the point of view of whether or not its ancient lights were interfered with by the new construction. But I do not think it necessary to express any decided opinion on whether the case comes within the rule

or not. It is enough, I think, for me to say here that, exercising the discretion which is vested in the court in applications of this character, I think that the joinder of these two plaintiffs in the one action would produce a condition of things very likely to embarrass the judge. I think that the judge would be much more capable of dealing with each building separately—as indeed it involves quite separate questions—in an action brought in respect of that building apart from the other action brought in respect of the other separate building.

That being so, I think that the appeal should be dismissed, but the order of the learned judge should be varied. The proper order, I think, in the circumstances of this case is that the order of the learned judge stand in so far as he requires the plaintiffs to elect on or before 14 days from to-day which of them be allowed to proceed in the action; and then the order should provide that upon such election being made the writ and the statement of claim should be amended by striking out all parts thereof referring to the other plaintiffs, but the other plaintiffs thereupon be entitled to issue a new writ claiming relief pertinent to their premises, and that a defence be delivered to that writ, and that the action should not proceed in the ordinary way, but that the two cases should come on for trial together—that is, assuming that the other plaintiffs, the plaintiffs who have been struck out, issue their writ and proceed in due course—and be in the list before the same judge on the same day, and that he should deal with them in such a way as he thinks fit. The order should further state that the plaintiff who does not proceed with the present action, but who issues a new writ should stand in the same position as if he had issued his new writ at the date on which the original writ was issued. The costs of the joint action to the date of severance will be dealt with by the judge who tries the two actions, and there will be no costs of this appeal, because it seems to the court that the order of the learned judge needs some further amplification such as I have indicated in order to adapt it to all the circumstances. In addition to that, this court does not accept that part of the opinion which says that the alleged injury in No. 4 is not the same transaction as the injury alleged in No. 6 so as to entitle the plaintiffs to proceed. This court desires to express no opinion on that part of the judge's order.

The costs of the application in the court below have not been dealt with at all in the order of the learned judge, but both parties before us have accepted that they were treated as costs in the cause and that this direction was left out of the order by an oversight. This court, accepting that statement, will not interfere with the costs of this application in the court below.

ROMER, L.J.: I agree, and, like LORD WRIGHT, M.R., desire to express no opinion at all on the interesting question whether the joinder of

these causes of action is or is not permitted by the term of R.S.C., Ord. 16, r. 1, because I agree with him that it would be extremely embarrassing to try these two causes of action in one and the same action. In those circumstances the order that LORD WRIGHT, M.R., has indicated will be made. The order, as his Lordship has pointed out, will be varied, and varied in that sort : that there will be omitted from the order the words beginning " Being of opinion " and ending with the words " join their claims in this action," so that the order, after the ordinary leading-in, will be as follows :

And this court doth order that the plaintiffs do on or before—

then a new date will be inserted : instead of Aug. 21, 1936, it will be " 14 days from to-day." Then I also agree that the order should in terms provide that the costs of the application to the court below should be costs in the action before the severance, and dealt with by the judge who deals with this case.

I only want to add this, in relation to what was said by Mr. Andrew Clark just now. The practice of the court where, on an interlocutory application, the order makes no direction as to costs, is stated in the ANNUAL PRACTICE, 1936, p. 1460, in notes to R.S.C., Ord. 65, r. 23. Certainly, so far as regards a motion on an interlocutory judgment, I have never heard it doubted that the rule as there stated is the true rule. When nothing is stated as to the costs of a motion, then, if the motion is successful and the defendant opposed the motion, the plaintiff's costs are the plaintiff's costs in the action ; the defendant does not get any costs in the action. If the motion is unsuccessful, then the defendants' costs are his costs in the action and the plaintiff gets no costs of the motion. Where there is no opposition to the order at all, then both the parties' costs are costs in the cause. The note goes on to say that the same rule is applied in both divisions of the court to all interlocutory applications, and I have no reason to suppose that that is not so.

MACNAGHTEN, J. : I am of the same opinion.

Appeal dismissed. Order made in the form stated in the judgments.

Solicitors : *Steadman, Van Praagh & Gaylor* (for the appellants) ;
Nicholson, Freeland & Shepherd (for the respondent).

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

LONDON MIDLAND AND SCOTTISH RAILWAY CO. v. GREAVER AND ANOTHER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and du Parcq, JJ.),
October 27, 1936.]

Carriers—Railway—Bye-law—Validity—Prohibition of transfer of ticket.

K. purchased for 10s. an excursion return ticket, which was not transferable. The ordinary single fare for the same journey was 23s. On arrival at his destination K. handed to G. the return half of his excursion ticket which G. intended to use to avoid payment of his fare. Informations were preferred against K. and G., under the bye-law set out below, charging them respectively with having unlawfully transferred and unlawfully received a partly used ticket. The bye-law provided: "No person shall . . . transfer or receive any partly-used ticket . . . to or from any other person with intent that any person shall use the same for the purpose of travelling . . . on the railway, unless the ticket shall at the time of issuing thereof purport to be transferable." The magistrate dismissed the informations on the ground that, as the bye-law was framed to cover cases where there was no fraudulent intent, it was void and *ultra vires* as being repugnant to the general principles of law:—

HELD: inasmuch as the purpose of the bye-law was to prohibit transactions which must in general be fraudulent, the bye-law was a valid one.

[EDITORIAL NOTE.] The bye-laws in the present case were impugned because they made offences of acts which it was contended would not necessarily be fraudulent. Acts relating to tickets in order to be statutory offences are required to be fraudulent and for that reason bye-laws which make acts not tainted by fraud offences under their provisions have generally been held to be *ultra vires* and void. Here the court, while agreeing that the bye-law might fit an exceptional case in which there was no element of fraud, held that the acts prohibited must in general be fraudulent and the bye-law upon this view could be supported.

AS TO VALIDITY OF CARRIERS' BYE-LAWS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 82-84, para. 122; and FOR CASES, see DIGEST, Vol. 8, pp. 110-113, Nos. 741-763.]

Cases referred to:

- (1) *Gentel v. Rapps*, [1902] 1 K.B. 160; 8 Digest 113, 759.
- (2) *Reynolds v. Beasley*, [1919] 1 K.B. 215; 8 Digest 109, 733.
- (3) *Huffam v. North Staffordshire Ry. Co.*, [1894] 2 Q.B. 821; 8 Digest 112, 753.

APPEAL by way of case stated by the London Midland & Scottish Railway Co., from a decision of a metropolitan magistrate sitting at Clerkenwell Police Court.

Keohane, on Feb. 16, 1936, having purchased a return excursion ticket from Manchester to London, travelled on the appellants' railway from Manchester to Euston. The excursion ticket was not transferable, and its price was 10s. The ordinary single fare from Manchester to Euston was 23s. Keohane and Greaver met at Euston, where Keohane handed the return half of the excursion ticket to Greaver. The respondent Keohane transferred the partly used ticket to Greaver, and Greaver received the same with the intent that Greaver should use the

ticket for the purpose of travelling on the appellants' railway from London to Manchester without having previously paid his fare and in order to avoid such payment.

Informations were preferred by the appellants, charging Greaver with having, on Feb. 16, 1936, unlawfully received from Keohane at Euston Station a partly used ticket with intent to use such partly used ticket for the purposes of travelling on the appellants' railway, contrary to bye-law 6 of the London Midland & Scottish Railway Co.'s bye-laws and regulations, and charging Keohane with having unlawfully transferred a partly used ticket to Greaver with intent that Greaver should use such ticket for travelling on the appellants' railway, contrary to the same bye-law.

The bye-law which the appellants had passed under powers given them under the provisions of the Railways Clauses Consolidation Act, 1845, the Railways Clauses Act, 1863 and the Railways Act, 1921, was as follows :

No person shall sell or buy or attempt to sell or buy any ticket (which expression in this bye-law includes any passenger ticket, season ticket, dog ticket, bicycle ticket, book of passenger tickets, and any portion detached from the remainder of any such ticket or book) or transfer or receive any partly used ticket or any season ticket to or from any other person with intent that any person shall use the same for the purpose of travelling or conveyance upon the railway, unless the ticket shall at the time of issuing thereof purport to be transferable, and no person shall knowingly and wilfully use or attempt to use any ticket which has been sold, bought, transferred or received in contravention of this bye-law. Provided that the sale or attempted sale by or the purchase or attempted purchase from a duly authorised servant or agent of the company is excepted from the provisions of this bye-law.

On behalf of the appellants it was contended that each of the respondents had in the premises committed a breach of the bye-law. The respondent Greaver did not appear but wrote a letter addressed to the court, in which he pleaded guilty. The respondent Keohane appeared and pleaded guilty. The learned magistrate was of the opinion that bye-law 6 was void and *ultra vires* on the ground that it was repugnant to the general principles of law in that it purported to make unlawful the transfer or receipt by any person of a partly used ticket with the intent that any person should use the same for travelling upon the appellants' railways ; that no act or omission can be a crime unless *mens rea* is present or there is express statutory provision that such act or omission is a crime without criminal intent or that the mere act or omission is in itself an offence ; that in this case the essence of the offence created by the Regulation of Railways Act, 1889, s. 5 (3), is the intent to avoid payment of fare ; that the intent averred in bye-law 6 is :

with intent that any person shall use the same for the purpose of travelling or conveyance upon the railway at the time of the issuing—

and that this intent appeared to him to be a lawful intent and unlike

the unlawful intent which the Regulation of Railways Act, 1889, s. 5 (3), makes necessary, and which is found in each of the cases cited ; that in *Huffam v. North Staffordshire Ry. Co.* (3) no intent was averred, and the bye-law was held to be *ultra vires* ; that because the bye-law changes the law by expressly making an intent, which in itself was lawful, namely, "the purpose of travel or conveyance upon the railway," punishable as a criminal offence, he could not hold it to be good, and therefore dismissed the information. The railway company appealed.

Noel Goldie, K.C., and Clive Burt for the appellants.

The respondents did not appear.

LORD HEWART, L.C.J. : This is a case stated by one of the learned magistrates of the police courts of the metropolis. It arises from informations preferred by the London Midland and Scottish Railway Co. under bye-law 6 of their bye-laws and regulations. One information was that one of the respondents on a day in Feb., 1936, at Euston railway station, did unlawfully receive a partly used ticket from the other of the respondents with intent to use that ticket for the purpose of travelling on the railway contrary to bye-law 6 of the railway company. The other informations charged the other respondent on the same day with unlawfully transferring a partly used ticket to the first named respondent with intent that he should use it contrary to the same bye-law. The learned magistrate, having heard the informations, dismissed them ; and the question is whether in so doing he came to a correct determination in point of law.

Upon the facts of the case there was no dispute. One of the respondents on the day named travelled on the appellants' railway from Manchester to London, having purchased an excursion ticket which was not transferable and the price of which was only 10s. In contrast with that price the ordinary single fare for the journey between Manchester and London on the appellants' railway was at this time 23s. Having arrived at Euston station that respondent handed his partly used ticket, that is to say the return half of the excursion ticket, to the other respondent ; and then the case goes on to find this fact :

Both respondents were guilty of fraud in that the respondent Keohane transferred the said partly used ticket to the respondent Greaver and the respondent Greaver received the same with the intent that the respondent Greaver should use the said ticket for the purpose of travelling on the appellants' railway from London to Manchester without having previously paid his fare, and in order to avoid the payment thereof.

In other words, in order that one of these two might accomplish a journey for which the single fare was 23s. by buying the return half of a ticket of which the price for both journeys was exactly 10s. On the facts of the case, therefore, it is quite obvious that there was a fraudulent intention,

but the question before the learned magistrate was not that ; it was whether the prosecution was good under bye-law 6 of the appellants' bye-laws and regulations, and if it was not good under bye-law 6 of those bye-laws and regulations, then it matters not that it would be good under some other provision of the law. In order to appreciate the difficulty in the case, if I follow the learned magistrate's very careful statement of his views, it amounts really to this, that in his opinion this bye-law, although aptly framed to cover a case of fraud, was at the same time so wide in its terms as to cover cases in which no element of fraud appeared ; and for that reason he came to the conclusion that the bye-law was too wide and was *ultra vires*. He came to that conclusion, be it observed, notwithstanding that in the particular case before him and on the facts before him he was satisfied that there was a fraudulent act. This case therefore raises, with reference indeed to the particular facts but not solely with reference to them, the question of the validity of this bye-law. The bye-law is framed under the Railway Clauses Consolidation Act, 1845, sect. 108 of that Act providing that it shall be lawful for the company from time to time to make regulations for a series of purposes and, various particular purposes having been enumerated, the section goes on to add :

and generally for regulating the travelling upon or using and working of the railway.

It is said that the bye-law here was a bye-law within that section because it was a bye-law for regulating the travelling upon the railway. Such bye-laws, however, are subject to the provisions of sect. 109 of the statute, and that section contains this proviso :

Provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect.

What exactly is this bye-law ? It consists manifestly of various parts, and is dealing with transactions of more than one kind. First of all, it deals with selling or buying or attempting to sell or buy any ticket ; then it goes on to deal with transferring or receiving any partly used ticket or any season ticket, and those acts are dealt with not *simpliciter*, but where they are done with intent that any person shall use the ticket for the purpose of travelling or conveyance upon the railway ; and then follow words of exception which, in my opinion, apply to each one of the verbs which have gone before :

unless the ticket shall at the time of issuing thereof purport to be transferable.

Then follows a proviso which seems to throw a clear light upon the purpose and function of the bye-law as a whole :

Provided that the sale or attempted sale by or the purchase or attempted purchase from a duly authorized servant or agent of the company is excepted from the provisions of this bye-law.

In other words, as it seems to me, the bye-law is seeking to prohibit the sale of railway tickets by anyone who is not a duly authorised servant or agent of the company or the purchase of railway tickets from anyone who is not a duly authorised servant or agent of the company. Looking at the bye-law in that way, I think it deals with these acts, selling or buying or attempting to sell or to buy any ticket and, again, transferring or receiving any partly used ticket or any season ticket, always with the intent that a person shall use the same for the purpose of travelling upon the railway. Having prohibited those acts, the bye-law goes on to provide that :

no person shall knowingly and wilfully use or attempt to use any ticket which has been sold, bought, transferred or received in contravention of this bye-law.

The bye-law, therefore, is dealing with non-transferable tickets, and it is dealing with those tickets where they are being sold by or bought from persons not duly authorised as agents of the company. It is said that the bye-law throws the net too wide, and is invalid as being *ultra vires*. In my opinion, it undoubtedly does throw the net very wide indeed, but I am not prepared to say that the learned magistrate was right in holding that the bye-law was *ultra vires*. Light, I think, and a good deal of light, is thrown upon the matter by the provisions of the Act of 1889. By the Regulation of Railways Act, 1889, s. 5 (3), it is expressly provided that :

If any person—(a) travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof—

he shall be guilty of an offence ; and I cannot doubt in this particular case that if these informations had been laid under that section a conviction must have followed upon the finding that both respondents were guilty of fraud. But what does that section mean ? It has been judicially interpreted, and it is established now that the words “ without having previously paid his fare ” mean without having paid his fare to the railway company or to a duly authorised servant or agent of the railway company ; in other words, it is an offence under the statute of 1889 to travel or attempt to travel on a railway without having previously paid the fare to the railway company or an agent of the railway company. That provision seems to me to throw light upon this bye-law. The bye-law, it may be, was founded in relation to that provision but, however it may be, they co-exist, and in my opinion this bye-law represents a very careful endeavour on the part of the railway company to prevent the sale of railway tickets by a person who is not a duly authorised servant or agent and to prevent the purchase of a ticket from anyone who is not a duly authorised servant or agent. Why ? Because I imagine that in 99 cases out of 100, whatever the exceptions may be, transactions in railway tickets not between the person concerned and the railway

company or its agent are transactions for the purpose of avoiding either payment of the fare or, what is really the same thing, except in degree, payment of some proper part of the fare ; it is to prevent the buying and selling of railway tickets upon terms which will prevent the railway company from getting its fair and proper payment. Looking at the matter in that way, I think that this bye-law can be supported. It is to be observed that, although the words "sell," "buy," "attempt to sell or buy," "transfer or receive" are very wide words, they are limited in this bye-law in the sense which I have indicated ; the intent is set out, the exceptions are referred to. So, for example, the case which at first blush occurs to the mind that a man might come within this bye-law if he bought a ticket for another person for convenience, does not really come within the bye-law because in that case the purchaser would be purchasing as the agent of the recipient. Here the bye-law was invoked in order to deal with a transaction in the partly used ticket and there the opportunities of fraud seem to me to be perfectly obvious. Whether what is being dealt with is an excursion return ticket or a workman's ticket, or a season ticket, there is manifestly a strong motive on the part of some person to purchase a return half. Why ? In order to avoid making to the railway company the full payment which would otherwise have to be made.

Our attention has been directed, and properly directed, to the case of *Gentel v. Rapps* (1), which was a case of a bye-law relating to a nuisance upon a tramway car, where it was held that the bye-law was good which prohibited a certain act, swearing and using offensive language upon a tramway car, although the bye-law did not add the words "so as to be a nuisance or annoyance to other persons." In giving judgment in that case, CHANNELL, J., at pp. 165 and 166, said this :

I think that the recent cases [he is speaking of the year 1901] have clearly settled that, where an authority, or body of persons, have been given power to make bye-laws for the preventing of nuisances, they have also power to declare that particular things, if capable of being nuisances, are when done in their district nuisances. The very power which is given to them involves their having authority to say what, in particular places and under particular circumstances, shall be nuisances. I do not think they need add in their bye-law words such as "so as to be a nuisance or annoyance to other persons." There are obvious reasons why words of that kind should not be added, except, possibly, where the bye-law applies to a very large area ; so that what is a nuisance in one part of it may possibly not be so in another. On the question of repugnancy I repeat what I have said before. A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land.

There is no element in the general law which says that the purchase or sale of railway tickets otherwise than purchase or sale where the other

party is a duly authorised servant or agent of the company is lawful, and it seems to me that this bye-law is valid in restricting the sale and transfer of non-transferable tickets to duly authorised servants and agents of the company because, although you can conceive an individual exception, the purpose of transactions of the sort that we have here must be fraudulent. The case of hardship is suggested where a person through no fault of his own is prevented from using the return half of his ticket and in good faith transfers it, although it is marked "non-transferable," to somebody else. But there is no real hardship because that person if he is really prevented from using the return half of his ticket can send it back to the railway company and recover from the railway company what was due to him upon it and purchase another ticket.

Perhaps it is unfortunate that on these facts the appearance of guilt is so manifest because that fact rather tends to colour the way in which the bye-law is to be regarded, but I cannot for the life of me understand why the prosecution did not take place under the section of the statute instead of under the bye-law. If it had taken place under the section of the statute the question would not have been arguable. Nevertheless, I am not satisfied that the learned magistrate was right in questioning the validity of the bye-law. I think, therefore, that this appeal ought to be allowed and that the case ought to go back to the magistrate with a direction to find that the offence which was charged was proved.

I will only add that if there were any defect in this bye-law it could quite easily be cured by the simple introduction of the words "with intent to defraud," but I take it that in the minds of those who are responsible for the framing of it, the intent to defraud, if the act was committed, was apparent.

SWIFT, J. : I agree that this bye-law is valid for the reasons given by my Lord and I do not wish to add anything. I agree that the case must go back again for a conviction to be recorded.

DU PARCQ, J. : I also agree, and I desire to add only a few words. The learned magistrate was right, I think, to be vigilant in a case of this kind and to consider carefully this bye-law, which is certainly very wide in its terms, although the defendants were not legally represented and were not themselves in a position to argue points of law. But I think, having considered the matter carefully, the learned magistrate took a wrong view, and it is not difficult, I think, now that we have had the assistance of learned counsel and considered the matter afresh, to see what the error was. The question which the learned magistrate properly considered was whether this bye-law was repugnant to the

general principles of law. The general law of the land is to be found in statutes as well as in the decisions that have made up the common law and the learned magistrate's attention was called to the Regulation of Railways Act, 1889, s. 5 (3). That Act, as my Lord has already pointed out, makes it an offence to travel without having previously paid one's fare and with intent to avoid payment thereof. By the decision of this court in *Reynolds v. Beasley* (2), it has been made clear that "paid his fare" means paid his fare to the railway company, and a man who pays what cannot properly be called his fare but an amount which may be equivalent to the fare, not to the railway company but to somebody else, has not "paid his fare"; and if he travels with intent to avoid payment of the fare to the railway company, or, of course, to an authorised agent of the railway company, though he may have paid an amount equivalent to the fare to somebody else who has no authority to receive it, then, as I understand the decision in *Reynolds v. Beasley* (2), he will have committed an offence. It may not be an offence which would strike anybody as a very grave moral offence or it may be; that will depend upon the circumstances. The learned magistrate went on to say this, that in the section to which I have just referred the intent is to avoid payment of the fare, but he said: "In bye-law 6" (the bye-law we are now considering) "the intent was to use the ticket for the purpose of travelling or conveyance upon the railway at the time of the issue," and, said the learned magistrate, "This intent appears to me to be a lawful intent." There I think, with great respect, the learned magistrate fell into error. Of course, to travel upon a railway is a lawful intent and the railway company would be the last people to argue to the contrary, but what the bye-law aims at, as is obvious from its terms, is travelling upon the railway with a ticket the price of which has not been paid to the railway company, so that the person using it has not paid his fare. When that is borne in mind, it appears to me that the intent referred to in bye-law 6 is, in substance, precisely the same as the intent mentioned in the Regulation of Railways Act, 1889, s. 5 (3), when one remembers the construction of that section which has already been put upon it by this court.

I think, therefore, that the learned magistrate was wrong in saying that there is anything repugnant to the general law in this bye-law; on the contrary, it seems to me to be consonant with the section of the Act of Parliament to which I have referred, for the reasons I have suggested and for the further reasons which were given by my Lord in his judgment.

Case sent back for re-trial.

Solicitor: *Alexander Eddy* (for the appellant).

[Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.]

Re R. GERTZENSTEIN, LTD.

[CHANCERY DIVISION (Bennett, J.), **October 28, 1936.**]

Companies—Winding up—Joint liquidators—Solicitor liquidator—Acting on behalf of liquidators in litigious proceedings—Costs—Profit costs—Companies (Winding-up) Rules, 1929, r. 158.

One of two liquidators in the voluntary winding up of a limited company was a solicitor, who acted on behalf of the other liquidator and himself in certain proceedings. The proceedings resulted in a compromise by which, *inter alia*, the liquidators' costs were to be paid. On taxation of the costs it was objected that as the solicitor was one of the liquidators he could not charge any profit costs for the work done by him in the proceedings. The liquidators contended that profit costs should be allowed on the principle that where one of two trustees acts on behalf of himself and his co-trustee in litigious proceedings he is entitled to charge his profit costs. The registrar held that that principle did not apply to one of two joint liquidators, on the ground that it was excluded by the Companies (Winding-up) Rules, 1929, r. 158 :—

HELD : (i) the Companies (Winding-up) Rules, 1929, r. 158, prohibits any arrangement for any remuneration beyond the remuneration to which a liquidator is entitled under the Companies Act, 1929, or the Companies (Winding-up) Rules, 1929.

(ii) there must have been some arrangement made between the two liquidators, whereby the solicitor had become entitled to some remuneration beyond that to which he was entitled under the Act or rules, and the solicitor was therefore prohibited from receiving profit costs whilst acting as solicitor for himself and his co-liquidator.

[EDITORIAL NOTE.] The rule that a trustee is not allowed to make any profit out of the trust is well known, as is also the exception to the rule known as the rule in *Cradock v. Piper* (1). It is here held that the Companies (Winding up) Rules, 1929, r. 158 prevents the application of the latter rule to the case of the employment of a joint liquidator who is a solicitor in litigious proceedings in a winding up.

AS TO REMUNERATION OF LIQUIDATORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 609-611, paras. 1001, 1002; and FOR CASES, see DIGEST, Vol. 10, pp. 992, 993, Nos. 6874-6878; and AS TO THE RULE in *Cradock v. Piper* (1), see HALSBURY, Hailsham Edn., Vol. 14, p. 425, para. 804; and FOR CASES, see DIGEST, Vol. 24, pp. 604, 605, Nos. 6350-6358.]

Cases referred to :

- (1) *Cradock v. Piper* (1850), 1 Mac. & G. 664; 42 Digest 117, 1144.
- (2) *Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675; 42 Digest 118, 1148.
- (3) *Re Gallard, Ex p. Gallard*, [1897] 2 Q.B. 8; 4 Digest 242, 2291.

SUMMONS to review taxation of costs in the winding up of R. Gertzenstein, Ltd. A resolution for a members' voluntary winding up of the company was passed on Jan. 10, 1933, and there were appointed as joint liquidators Arthur Mellors Stray and Herbert Baron, the applicants in the present proceedings. Herbert Baron was a partner in Herbert Baron & Co., the firm of solicitors, who for many years had acted as solicitors for the company, and he continued to act as solicitor for the joint liquidators in certain proceedings, based on a fraudulent preference,

brought by them in the winding up against the respondents to the present summons. Those proceedings resulted in a compromise whereby the respondents were to pay certain sums to the liquidators and to pay the liquidators' costs, to be taxed if not agreed. On taxation of those costs the respondents took the point that, as Herbert Baron was one of the joint liquidators, he could not charge any profit costs for the work done by him in the proceedings. That contention having been accepted by the taxing officer the applicants brought in objections to it before Mr. Registrar Stiebel, the main ground of their objections being that the case fell within the rule in *Craddock v. Piper* (1) which is to the effect that where one of two trustees acts on behalf of himself and his co-trustee in litigious proceedings he is entitled to charge his profit costs. The learned registrar, however, upheld the view that the rule in *Craddock v. Piper* (1) did not apply to one of two joint liquidators, holding that it was excluded by the provisions of the Companies (Winding-up) Rules, 1929, r. 158, the terms of which are set out in the judgment herein. It was also contended on behalf of the respondents that rule 191 (2), which provides that where a liquidator is a solicitor he may contract that the remuneration for his services shall include all professional services, applied to the present case, but that the contract there provided for is a lump sum contract for costs and remuneration and not one which deals with profit charges at all. It was further alleged that no evidence of any contract had been put in.

Cyril Radcliffe, K.C., Sir George Jones and C. F. J. Baron, for the applicants : The liquidators are in the position of trustees and therefore, unless there is something in the Companies (Winding-up) Rules to prevent it, the rule in *Craddock v. Piper* (1) will apply. For the exact nature of that rule see *Re Corsellis, Lawton v. Elwes* (2). It only applies where there are co-trustees, and is presumably based upon the principle that in such a case there is another trustee who can protect the property, and that principle is applicable to the present case. Upon the true interpretation of rules 158 and 191 (2) there is nothing in them to prevent the rule in *Craddock v. Piper* (1) applying. Rule 158 is not directed to this class of case at all. The only person with whom Mr. Baron can be said to have made an arrangement that he should be employed as solicitor in the proceedings is his co-liquidator, and the rule is not concerned with arrangements between two joint liquidators. It is concerned with arrangements between the liquidators on the one hand, and certain persons who are going to render professional services on the other. Its object is to prevent the sharing of commission between these two groups, and neither of the liquidators here has entered into any transaction of that kind. It is not even as if the other liquidator was personally liable to Mr. Baron. His profit costs are a charge on the assets of the company. But not only are the facts of this case not within the wording of the rule, they are not within its spirit. The liquidator is not seeking

to supplement his remuneration as liquidator, but is asking for his profit costs for solicitor's work, as a result of which the trust property has benefited. Rule 159 shows what the real object of these rules is. See also the Bankruptcy Act, 1914, s. 82, and rule 335, which deals with the limit of remuneration receivable by a trustee in bankruptcy. The slight alteration in the wording of rule 158 is in the applicants' favour, as it would not prevent a liquidator making an arrangement with a creditor.

As to rule 191, which corresponds to the Bankruptcy Act, 1914, s. 83 (2), subsect. (1) has obviously nothing to do with this case.

BENNETT, J. : Subsect. (2) is permissive. I suppose that if a liquidator does make a contract, then he would be allowed in addition to his remuneration to take profit costs. But there is no point of that sort in this case, is there ?

Humphrey King, for the respondents : I rely on it only indirectly. The superficial reading of rule 158 contended for on behalf of the applicants, which suggests that it relates only to transactions between the liquidators and certain named persons, is not correct. On its true construction it applies also to relations between a liquidator and the company. The intention of the rule is that all arrangements for additional remuneration shall be made only with creditors or contributories. That that was what was contemplated is apparent from the Bankruptcy Act, 1914, s. 82 (5), from which rule 158 is derived, and in which it is expressly stated that the trustee cannot make any arrangement with the bankrupt. There are in fact two branches to rule 158 : (i) the liquidator shall not make *any* arrangement for any extra remuneration ; (ii) he shall not accept from certain named persons any extra remuneration. The first branch is directed generally against contracts or arrangements for increasing remuneration, and the second branch is directed against profit sharing under special arrangements. The second branch of the rule is necessary because commissions are frequently given without any previous arrangement having been made, or, if made, being provable. Nothing could be wider than the prohibition in the first part of the rule, and there is no ground for restricting that very wide provision by limiting it by something which is specifically forbidden in particular cases. The argument put forward on behalf of the applicants depends upon altering the wording of the rule, and making it read "shall not . . . make any arrangement *with* or accept from . . ." instead of "shall not . . . make any arrangement *for*, or accept from . . ." That makes the prohibition against arrangements superfluous, since the mischief against which provision is being made in respect of the named persons is the acceptance of commissions, not the arrangement to accept them.

BENNETT, J. : Then what is the interpretation of the second limb of the rule ?

King : I agree that that is directed to profit sharing. This is where rule

191 (2), which is exactly like the Bankruptcy Act, 1914, s. 83 (2) comes in. Under the winding up rules the remuneration of a liquidator must be on a percentage basis, and it has been held under the Bankruptcy Act, 1914, s. 83 (2), that if the trustee does make any contract to increase his remuneration it must be done by way of increasing his percentage.

As to the rule in *Cradock v. Piper* (1), that does not apply where the trusteeship is not an ordinary one, and rules 158 and 191 (2) prevent the liquidator's trusteeship being an ordinary one. This contention is supported by the position of a member of a committee of inspection, who, if he is a solicitor cannot get any costs for work done by his firm for the committee: see *Re Gallard, Ex p. Gallard* (3).

BENNETT, J.: But are we concerned with that rule in this case?

King: Only because that rule corresponds to the rules in winding up, forbidding a liquidator to make any arrangement for any remuneration other than that to which he is entitled under the Act or the rules. The rule dealing with committees of inspection in winding up is rule 161, and the existence of that rule shows that it was not intended that the principle of *Cradock v. Piper* (1) should apply to winding up, since a member of a committee of inspection, who is one of several people in a fiduciary position, is excluded from its benefit. Therefore the rule in *Cradock v. Piper* (1) is excluded by rule 158. The reason for rule 158 is obvious. One can never be quite sure in a winding up whether there may not be a surplus, in which various people may be interested, and an arrangement made with one person might damage the others.

Radcliffe, K.C., in reply: I do not hesitate to submit that the two parts of rule 158 are related one to the other. The persons with whom the liquidator must not share his remuneration are the same as those with whom he may not make an arrangement. What the rule is striking at is that the liquidator shall not add to his remuneration by making an arrangement or by taking something, not that if he works not as liquidator, but in a separate capacity, he shall not be paid for what he does. If the argument put forward on behalf of the respondents is right, it would mean that, although a liquidator is prevented from making an arrangement for extra remuneration with anyone, he is not prevented from accepting extra remuneration except from the persons named.

The reason why the special provision in rule 161 is necessary is because members of committees of inspection are not trustees since they have no assets in their hands. But there is no arrangement in this case which falls within rule 158. A liquidator is not personally liable for the acts of a solicitor employed by him: see BUCKLEY ON THE COMPANIES ACTS, 11th Edn., p. 422, and so the arrangement between the two liquidators was not that one was to receive something from the other, but that he was to act as solicitor and look to the company for his charges.

What he gets out of the assets of the company in that way cannot be described as remuneration.

BENNETT, J.: This is an application by the two liquidators of the company, R. Gertzenstein, Ltd., to review the taxation of their costs which were ordered to be taxed under an order of Feb. 26, 1936. The company, R. Gertzenstein, Ltd., is in voluntary liquidation under a resolution passed by the company on Jan. 10, 1933. The liquidation is a members' liquidation. One of the liquidators, Mr. Stray, is a chartered accountant, and the other, Mr. Herbert Baron, is a solicitor, and in discharge of their duties as liquidators on Oct. 28, 1935, these two gentlemen took proceedings by originating summons in the liquidation against the respondents to the summons with which I am dealing, Messrs. S. Green and Isaac Millward, impeaching certain transactions which had taken place between the company and Messrs. Green and Millward upon the ground that those transactions were fraudulent preferences. The applicant, Mr. Baron, in these proceedings acted as solicitor for his co-liquidator Mr. Stray and for himself, and the outcome of them was a compromise order made on Feb. 26, 1936, whereby Messrs. Green and Millward undertook not to prove or make any claim in the liquidation of the company, but were by consent ordered to pay a sum of money to the joint liquidators in settlement of their claim, and were ordered to pay to the joint liquidators their costs, such costs to be taxed if not agreed. Now the costs of the liquidators ordered to be paid by that order were brought in for taxation, and among the costs were the costs of Mr. Baron, who, in the proceedings had acted as solicitor for himself and his co-liquidator Mr. Stray. In taxing the costs the taxing officer disallowed all Mr. Baron's profit costs, and objections to that taxation were carried in by the liquidators, but were overruled by the learned registrar. It is from his decision, overruling the objections, that this matter now comes before this court.

The learned registrar disallowed the profit costs upon the ground that Mr. Baron, being a liquidator, was prohibited from receiving them by the terms of the Companies (Winding-up) Rules, r. 158. The rule is in these terms :

Except as provided by the Act or the rules, a liquidator shall not under any circumstances whatever, make any arrangement for, or accept from any solicitor, auctioneer, or any other person connected with the company of which he is liquidator, or who is employed in or in connection with the winding up of the company, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration to which under the Act and the rules he is entitled as liquidator, nor shall he make any arrangement for giving up, or give up any part of such remuneration to any such solicitor, auctioneer, or other person.

And the learned registrar has interpreted that rule as prohibiting a

liquidator from receiving profit costs whilst acting either for himself as solicitor or as solicitor for himself and a joint liquidator.

The case seems to stand in this way. There is between a liquidator, or two liquidators, and either the shareholders or the creditors of the company of which he is or they are the liquidators, a fiduciary relationship, which prevents the liquidators from making a profit out of their trust. That fiduciary relationship would prevent a liquidator, who was a solicitor, receiving ordinary profit costs in non-litigious legal business done by him as a solicitor. But to that general rule there is an established exception, an exception established by the decision of *Craddock v. Piper* (1), and it arises in the case of profit costs in litigation in which one trustee acts as solicitor for himself and a co-trustee. It is established that in these circumstances the solicitor trustee may receive out of the trust estate his profit costs, and the applicants here say that the present case is one within the exception established by the decision of *Craddock v. Piper* (1), and that there is nothing in the winding up rules to exclude the application of the rule in *Craddock v. Piper* (1).

The case turns, in my judgment, entirely upon the proper construction of the language of rule 158, and the argument of the applicants, which seeks to have the decision of the learned registrar set aside, is that the purpose of rule 158 is this: to prohibit any arrangements being made between the liquidators on the one side and a solicitor, auctioneer or any other person connected with the company which is in liquidation on the other side, under which either the liquidator shares his remuneration with the persons with whom he makes an arrangement, or those other persons share their remuneration with the liquidator. That, say the applicants, is the real purpose of the rule, and that does not exclude, nor would it in my judgment, the application to the present case of the decision in *Craddock v. Piper* (1).

On behalf of the respondents to the summons, represented by Mr. King, the argument is that upon the true interpretation of the rule, it prohibits the liquidator not merely from taking a part of the remuneration payable to other persons concerned in the winding up of the company, but that it prohibits any arrangement by which in any circumstances a liquidator can get more than the remuneration to which he becomes entitled under the Act and the rules as liquidator. In my judgment one can only get at the true intention and purpose of the rule by endeavouring, as far as one can, to construe it in accordance with the rules of grammar, and although there are difficulties suggested by Mr. Radcliffe on behalf of the applicants, I think upon the proper interpretation of the language of the rule that it does prohibit any arrangement for any remuneration whatever beyond the remuneration which under the Act and the rules the liquidator is entitled to as liquidator. In this case there must have been some arrangement made between the two liquidators

whereby one of them, the applicant Mr. Baron, has become entitled to some remuneration beyond that to which under the Act and the rules he is entitled as liquidator, the remuneration being his profit costs. In my judgment, therefore, upon the true interpretation of the rule, the answer given by the learned registrar to the applicants' objections to the taxation is the right one. The summons fails and must be dismissed with costs.

Summons dismissed. Leave to appeal.

Solicitors: *Abbott Hudson & Anderson* (for the applicants); *Reeve, Reid & Johnson* (for the respondents).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

Re MARGOLIN'S REGISTERED DESIGN.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
October 28, 29, 1936.]

Practice—Costs—Infringement of design—Defence of invalidity—Motion to expunge intended as auxiliary to defence—Action discontinued—Motion withdrawn—Independent motion.

An action was brought in respect of an alleged infringement of a registered design. The defendants pleaded invalidity as a defence, and to strengthen their position they issued an originating motion to have the register rectified by expunging the registration of the plaintiff's design therefrom. The plaintiff then applied to have his action dismissed, and it was dismissed and costs awarded in favour of the defendants. The defendants then applied to withdraw their motion, but asked for an order that the plaintiff should pay the costs of the motion. The judge made the order asked, giving as his reason that the motion was launched as a precaution and to make sure that the defence of invalidity could be raised at the trial:—

HELD: the motion was an independent proceeding and it was open to the defendants to proceed with it whatever happened to the action. The judge therefore had no jurisdiction to make an order for costs against the plaintiff, who was the successful respondent to the motion, and if he had such jurisdiction, there was no ground upon which he could exercise his discretion in favour of the defendants.

[EDITORIAL NOTE.] In this matter a motion was launched by the defendants purely to safeguard their defence of invalidity. The plaintiffs then discontinued their action, but the defendants, so the court thought, should have continued the motion to a determination and the costs of the motion would have depended upon whether it was successful or not. In short, the motion was an independent proceeding and the defendants could only withdraw it at their own risk as to costs.

AS TO COSTS IN THE DISCRETION OF THE JUDGE, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 178-180, paras. 324-328; and FOR CASES, see DIGEST, Practice, pp. 851-858, Nos. 3969-4036.]

Cases referred to :

- (1) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732; 43 Digest 335, 1570.
- (2) *Smith v. Grigg, Ltd.*, [1924] 1 K.B. 655; 41 R.P.C. 149; 43 Digest 262, 1005.

- (3) *Gramophone Co., Ltd. v. Magazine Holder Co.* (1911), 28 R.P.C. 221; 43 Digest 259, 976.
- (4) *Re Foster v. Great Western Ry. Co.* (1882), 8 Q.B.D. 515; Digest Practice, 851, 3970.
- (5) *Dicks v. Yates* (1881), 18 Ch. D. 76; Digest, Practice, 925, 4682.
- (6) *Doble v. Spaendonck* (1910), 27 R.P.C. 440; 43 Digest 261, 997.
- (7) *Werner Motors, Ltd. v. Gamage (A. W.), Ltd.*, [1904] 2 Ch. 580; 21 R.P.C. 43 Digest 246, 883.

APPEAL from an order made by BENNETT, J., upon an originating motion, on Mar. 31, 1936, dismissing the motion, but awarding costs against the respondent to the motion.

Abraham Margolin registered a design as No. 784,366 in Class 3. Believing that a company known as Rentertainments, Ltd., had used this design without his consent on gramophone cabinets, he brought an action to restrain the company from infringing the design. In his statement of claim he alleged that the design was new and original, that the defendants had without licence or consent applied the design or a fraudulent and obvious imitation of it and had knowingly published the infringement on gramophone cabinets, and claimed an injunction, damages, and delivery up of infringements. The defendants pleaded that the design was not new or original or a proper subject for registration, and was not infringed.

They then, in order to make sure that they would be able at the trial to raise the defence that the design was not new and original, and therefore ought never to have been registered, moved the court by originating motion to rectify the register by expunging the design.

The plaintiff, after service of the defence, gave notice that he would discontinue the action. At the hearing of the motion by BENNETT, J., on Mar. 31, 1936, the defendants moved that their motion be dismissed and that the plaintiff, respondent, pay the costs of the motion. The learned judge ordered that the motion stand dismissed and that the plaintiffs pay the costs, with £3 3s. the agreed costs of the comptroller. In his judgment he said that the result sounded "a little odd," but that, as the motion was really launched by way of defence to the action, it did not seem to him unreasonable that the plaintiff, who caused all the trouble, should pay the costs of it. He refused leave to appeal, and leave was later given by the Court of Appeal.

Rudolph Moritz, K.C., and *A. D. Russell-Clarke* for the appellant Margolin, the respondent to the motion.

John Horridge for the respondents to the appeal, the applicants.

Moritz, K.C.: The learned judge was misled in thinking that it was necessary for the defendants in the action to launch the motion; and he acted without jurisdiction. In an action, as opposed to a motion, the court in awarding costs draws a sharp distinction between a plaintiff and a defendant. If a plaintiff loses his action, the judge never has

jurisdiction to order the defendant to pay costs, though there may be circumstances in which, even if the defendant loses, the plaintiff may be ordered to pay costs. The *ratio* is that the plaintiff pulls the defendant to court against his will. Precisely the same rule ought to apply on an originating motion: if the applicant fails, in no circumstances ought the respondent to be condemned in costs, though the converse need not be true. The judge had no jurisdiction or discretion to make the order he made.

In *Re Foster v. G.W.R. Co.* (4) BRETT, L.J., at p. 522, quoted a judgment of JAMES, L.J., in *Dicks v. Yates* (5), in which the learned Lord Justice said at p. 85:

A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there.

As the applicants did not desire to proceed with their motion, they had no title to bring the respondent to court. *Smith v. Grigg, Ltd.* (2) may be distinguished: in that case the Court of Appeal, after discussing whether a defendant in an action for infringement of a design could raise the defence of invalidity without a cross-motion for rectification, expressly left the point undecided, but did not have its attention drawn to several cases in which this had been done: *Gramophone Co., Ltd. v. Magazine Holder Co.* (3); *Doble v. Spaendonck* (6); *Werner Motors, Ltd. v. Gamage (A. W.), Ltd.* (7). In each of those cases an action was brought for an infringement of a registered design, and in none of them was there a cross-motion for rectification, but in each the court held that the design was invalid.

The confusion has arisen because in trade mark actions it has long been the practice for a defendant who desires to say that the trademark is invalid to join to this defence a cross-motion for rectification, whether one is necessary or not. The reason is that under the Trade Marks Act, the registered proprietor of a trade mark apparently—though authority is lacking—has an indefeasible right to succeed if he can prove infringement. It, therefore, appears necessary for the defence to move for the mark to be taken off the register, and the originating motion is invariably ordered to be heard with the action. In design actions the position is entirely different. There is no wording in the Patents and Designs Act to make a cross-motion seem necessary: the defendant may admit infringement and plead lack of novelty or of originality—as in this case. The cross-motion here was a luxury, and the appellant ought not to pay for it.

Horridge: In the uncertain state of the law it was reasonable for the defendants to launch this motion, not as a separate proceeding but as a part of their defence. Application was, as usual, made to have it heard with the action, but the plaintiff, by discontinuing his action,

cured the defendants' grievance, the subject of their motion. As a matter of procedure the defendants had title to move their motion, because the plaintiff had first attacked them.

Moritz, K.C., was not called upon to reply.

LORD WRIGHT, M.R. : This is an appeal from an order of BENNETT, J., and it is made without leave from him to bring the appeal. I mention that, because it is an appeal solely on the question of costs, against an order for costs in a case to which the peculiar rules applicable to jury trials do not apply and can, as a rule, only be brought by leave. In this particular case the objection made by Mr. Moritz to the order is that either the order was made without jurisdiction, or that if there was a jurisdiction and the matter was one of discretion, there were no materials on which the learned judge could exercise his discretion as he did. In either of these cases, it is clear that an appeal lies, even without leave. I need not quote the authorities, because they are familiar to most practitioners. I will only refer to the full discussion of this question in *Donald Campbell & Company v. Pollak* (1). The question, therefore, here is whether there was any jurisdiction or whether, if there was jurisdiction and if there was a discretion, there were any materials on which the learned judge could exercise his discretion as he did.

The facts may be shortly summarised. There was an action brought by the present appellant against the defendants for infringement of his registered design, and the defence to that action raised the issue that the design was not at the date of its registration a new or original design, which had not been previously published in the United Kingdom, was not proper subject-matter for registration and was not a new or original design at the time of registration by reason of prior common knowledge and so on. There is then given a long list of particulars of objections. The defendants in the action also issued an originating motion to have the register rectified by expunging therefrom the plaintiff's registered design, which was in question. The plaintiff, for some reason which is not known and which indeed is immaterial, applied for leave to have his action dismissed. Accordingly it was dismissed and judgment was entered in favour of the defendants with the costs of the action. That left the question of the motion. The defendants could have proceeded with that motion if they had desired and, if they had proceeded, then the point raised by the motion would have been determined. It would have been determined whether the design ought or ought not to remain on the register, the motion might have succeeded and the design might have been expunged from the register. I have no idea what would have happened, nor have I any idea why the defendants in the action desired to withdraw their motion instead of proceeding with it to some decision. They did apply to withdraw the motion and in that

application they asked to have an order that the respondent to the motion, the plaintiff in the action, should pay the costs of the motion. The learned judge has acceded to that application and the reason he gives is this. He says :

According to the evidence which has been filed in support of this motion, as a matter of precaution and by way of making sure that they would be able to raise that defence [the defence of invalidity] at the trial, the defendants launched the present motion for the purpose of having the design expunged from the register.

The learned judge says that that appears to be a wise precautionary measure. He refers to some inconclusive observations made in *Smith v. Grigg, Ltd.* (2), in which the learned Lords Justices there refused to express any view on the question whether in an action for infringement of a design the defendants are entitled to raise the defence of invalidity. Mr. Moritz has strongly contended that they can, and has referred to various cases in which in fact that defence has been dealt with by the court, in particular *Gramophone Company, Ltd. v. Magazine Holder Company* (3).

I do not think it here necessary to express any view on that point. It is enough here to say that whatever the position in the action, this motion was, in my judgment, an independent proceeding, whatever the result of the action and in particular, in a case like this where the action was entirely inconclusive, it was open to the present respondents to proceed with their motion. If they had, they would either have succeeded or failed and then the learned judge would have had jurisdiction to make the appropriate order as to costs. In the events which have happened, what the learned judge is doing is to order that a successful defendant, successful it is true only by reason of something in the nature of a non-suit, shall pay the costs of the plaintiff or the respondent on the motion who has abandoned his proceedings in the action, and, therefore, is in the position of being successful in these proceedings. It is quite immaterial as to why he took that course. I think in accordance with the well known rule laid down a long time ago in *Re Foster v. Great Western Railway Company* (4), and in a number of other cases, that there is no jurisdiction to order a defendant to pay costs of proceedings brought by an unsuccessful plaintiff. I think that rule applies here and that the learned judge had no jurisdiction to make the order that he did ; but, even if that rule does not apply and even if there was a discretion in the matter in the learned judge, I think he exercised his discretion without any relevant material upon which he could exercise it. On the facts of this case his discretion could not be judicially exercised in the way he did exercise it and on that ground, again I think the order cannot be upheld.

In my judgment the appeal succeeds and should be allowed with costs,

and instead of the order made by the learned judge, it be ordered that the present appellant on this appeal should have the costs of the motion.

ROMER, L.J. : I agree.

GREENE, L.J. : I agree.

Solicitors : *Cedric H. Akaster* (for the appellant) ; *Frere, Cholmeley & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

R. v. CAMBRIDGESHIRE COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and du Parcq, JJ.), **October 28, 1936.**]

Land Drainage—Rate—Precept—Estimated product of 2d. rate—Land Drainage Act, 1930 (c. 44), ss. 20, 22 (2).

A catchment board issued a precept to a county council whose area was comprised in the catchment area, demanding a sum calculated on the basis of 2d. in the pound on the total of the rateable value of the area concerned. The county council objected (i) that the amount demanded was not an "estimated amount" within the Land Drainage Act, 1930, s. 22 (2), but that the drainage board had merely proceeded on a mathematical calculation, and (ii) that the expression "estimated amount which would be produced by a rate of 2d. in the pound" in the same subsection meant the amount which would be produced after making due allowance for costs of collection and bad debts :—

HELD : (i) as the calculation was based on the product expected from a rate in a future year, it was an estimate.

(ii) upon a proper construction of the Land Drainage Act, 1930, s. 22 (2), the catchment board had made a proper calculation and no allowance for costs of collection or bad debts ought to be made.

[EDITORIAL NOTE. The construction of the Land Drainage Act, 1930, is not without difficulty and the present case will solve the problem in this regard concerning the maximum amount of the precept which may be made upon county councils by a catchment board. The distinction between the wording and the construction of the Rating and Valuation Act, 1925, s. 9 (2) (d) and the Land Drainage Act, 1930, s. 22 (2) should be noted.

AS TO RATES OF DRAINAGE BOARDS, see HALSBURY Supp., Sewers and Drains, paras. 1325-1355. FOR THE LAND DRAINAGE ACT, 1930, ss. 21-22, see HALSBURY COMPLETE STATUTES OF ENGLAND, Vol. 23, pp. 542-545.]

APPLICATION to make absolute a rule *nisi* for mandamus.

The River Great Ouse Catchment Board into whose area extended the county of Cambridge issued a precept to the Cambridgeshire County Council requiring payment of an amount computed by multiplying 2d. by the figures of rateable value supplied by the council to the catchment board. The county council contended that the words "the estimated amount which would be produced by" in the Land Drainage Act, 1930, s. 22 (2), meant that the catchment board could not demand more than

the amount which would be produced by a rate of 2*d.* in the pound levied on the rateable hereditaments in the area and that allowance would therefore have to be made for the costs of collection and for bad debts. The county council paid the amount so estimated to the catchment board on account. The council also contended that the word "produced" in sect. 22 meant the product of a rate and not a poundage rate, and did not mean "a sum equivalent to 2*d.* for every pound of rateable value."

The catchment board obtained a rule *nisi* for mandamus for the enforcement of the precept and the payment of the balance, being the difference between the amounts demanded by the board and the amounts paid by the county council.

F. Van den Berg, K.C., and *Gerald Howard* for the county council showed cause against the rule.

R. M. Montgomery, K.C., and *Hubert Hull* for the catchment board in support of the rule.

LORD HEWART, L.C.J. : This is a rule *nisi* for a writ of mandamus to be directed to the council of the administrative county of Cambridge :

commanding them pursuant to the statutes in that behalf to pay to the River Great Ouse Catchment Board the sum of £126 7*s.* 11*d.*, being the balance of a sum of £7,073 18*s.* 8*d.* demanded of the said council under a precept issued by the said catchment board on or about Sept. 6, 1935.

There are two grounds stated in the rule. The first is :

That on Sept. 5, 1936, and under and in pursuance of the Land Drainage Act, 1930, s. 22, the said catchment board issued a precept to the said council requiring the payment of the sum of £7,073 18*s.* 8*d.* being the amount apportioned upon the said council under sect. 20 of the said Act.

and the second ground is :

That the said council have paid to the said catchment board the sum of £6,947 10*s.* 9*d.* under the said precept, but have wrongfully neglected and refused and still neglect and refuse to pay to the said catchment board the balance of the sum due thereunder, that is to say, the sum of £126 7*s.* 11*d.*

The controversy, which, if I may say so, has been very ably explained in the argument of Mr. Van den Berg, and conducted with great ability in the correspondence which passed in the year 1932 between the clerk of the catchment board on the one hand and the clerk of the county council on the other hand, turns upon the meaning of an expression in the Land Drainage Act, 1930, s. 22 (2). The scheme of the Act is plain enough. In part IV, which has to do with financial provisions, it is provided by sect. 20 that :

the expenses under this Act of a catchment board in so far as they are not met otherwise, shall—

and then what is dealt with first is the case where "the catchment

area is wholly comprised within, or is co-terminous with, one administrative county," which is not this case, and, secondly,

in any other case, be apportioned by the board among the councils of the several counties and county boroughs which are situate within, or extend into, the catchment area on the basis of the totals of the rateable values of all such hereditaments in the respective areas of those councils as are situate within the catchment area.

That is the basis, and it is provided accordingly by sect. 20 (4) :

The councils of the several counties and county boroughs which are situate within or extend into the catchment area of a catchment board shall, from time to time, if and when so required by the catchment board, furnish to the catchment board a true and correct statement of the totals of the rateable values of all such hereditaments in the respective areas of those councils as are situate within the catchment area of the catchment board.

There, then, is an express and clear provision as to the nature of the information which, in order to enable the apportionment to be made, must, upon request, be supplied from the several counties and county boroughs to the catchment board. Then follows sect. 22, with regard to the issue of precepts by the board. That section says :

(1) A catchment board may issue precepts to the councils of counties and county boroughs and to internal drainage boards requiring payment of any amount payable by, apportioned upon, or required to be contributed by those councils and boards under either of the two last preceding sections, and, subject to the provisions of subsect. (2) of this section, a council or an internal drainage board shall pay, in accordance with any precept so issued to it, the amount thereby demanded.

Then comes the important subsection out of which this controversy has arisen :

(2) The aggregate amount which may be demanded under this part of this Act in any one financial year by a catchment board from the council of any county or county borough shall not, except with the consent of the majority of those members of the catchment board who are appointed by the councils of counties and county boroughs, exceed the estimated amount which would be produced by a rate of 2*d.* in the pound levied on that part of the county or county borough which is within the catchment area.

That is the expression upon which the discussion has turned : "the estimated amount which would be produced by a rate of 2*d.* in the pound levied," etc. What do those words mean ? Now it is to be observed that what is being set out here is the maximum which is not to be exceeded. The catchment board may not require more, but it does not follow that it must require so much. The limit to that which may be asked is "the estimated amount which would be produced by a rate of 2*d.* in the pound." What was it that happened in this case ? The several pieces of information from the different counties and county boroughs were supplied. The statement of the totals of the rateable values for the areas concerned was duly arrived at. There, then, came

into existence what is called in sect. 20 (1) (b) the basis which was to found the calculation, the basis contained in the totals of the rateable values of those hereditaments. The catchment board, then having in its possession the information which supplied the statutory basis, proceeded to calculate the maximum, the maximum calculated after the rate of 2*d.* in the pound upon the total of rateable value. It is argued on the part of the Cambridgeshire County Council that to proceed in that fashion, whatever else it was, was not to proceed upon an estimate; on the contrary, it is said that, to proceed upon a mere mathematical calculation by the application of the figure of 2*d.* to the total rateable value is not really an estimate, but that it is a calculation which arrives at a precise and merely mathematical result. That, I think, is the argument of the Cambridgeshire County Council. But that seems to involve, if I may say so, the fallacious suggestion that, in order that a calculation may properly fulfil the character of an estimate, there must be in it some ingredient of necessary inaccuracy and uncertainty. I cannot possibly take that view. The amount which is spoken of is undoubtedly an estimated amount of the product of the rate. But when one reflects that what was being dealt with was not the product of a rate in a past year but the product expected from a rate in a future year, and that that matter is being looked at for the mere purpose of fixing the maximum, I think that a calculation carried out in the manner prescribed contains all the features of an estimate. It cannot be actual, because it is an anticipation of the future. It would be idle to say the amount produced by a rate of 2*d.* in the pound, because the amount produced last year may be different from the amount to be produced next year; and as this maximum is to be ascertained by a calculation of what is to happen in the future, it seems to me to be nothing to the point to say it has in fact been ascertained by taking the total rateable value and multiplying the figure of the pounds by the figure of 2*d.* In our opinion, the learned clerk to the catchment board answered the crux of the matter very neatly in the last paragraph of his letter dated Apr. 9, 1932. Mr. Van den Berg appeared to have difficulty in appreciating the meaning of this paragraph. But, with great respect, I should have thought the meaning was sufficiently plain. The clerk of the board wrote:

It seems that the words "estimated amount which would be produced" by a 2*d.* rate can be accounted for by the fact that under sect. 20 the rateable value on which the expenses are to be apportioned is fixed as that shown on the first day of the account period, but clearly when it comes to a question of the rating authorities actually raising the money the valuation list on which they levy their rate may have altered since the date of the precept, and therefore the figures which the catchment board are bound to use are in fact only estimated and cannot in any case be actual.

That seems to me to be a very pertinent observation. Really, the argument to the contrary is not, when one analyses it, that this result is not

the result of an estimate, but that the estimate has been arrived at in a way in which the Cambridgeshire County Council desires to take exception.

What is the alternative which is suggested? It is that under the provisions of the Rating and Valuation Act of 1925 and a rule or order made in pursuance of it, the expression "estimated amount which would be produced by a rate" was familiar 5 years before the passing of the Land Drainage Act of 1930. In the Rating and Valuation Act, 1925, s. 9 (2) (*d*), one finds these words:

For the purpose of enabling councils of counties and boards of guardians to issue their precepts in manner required by this subsection, every rating authority shall before Feb. 1 in each year transmit to every county council and board of guardians having power to issue a precept to that rating authority an estimate of the amount, calculated in the prescribed manner, which would be produced in the next financial year by a rate of 1*d.* in the pound levied in the rating area or part thereof, as the case may be—

and it is suggested that those words, "the amount which would be produced in the next financial year by a rate," if not a term of art, were at any rate so familiar 5 years after the Rating and Valuation Act of 1925 that they ought to be taken as the meaning of the words "estimated amount which would be produced by a rate" in the Land Drainage Act, 1930, s. 22 (2). It is an ingenious argument; but it is to be observed that the Rating and Valuation Act of 1925 is not only a different statute but it is a statute enacted *alio in tuitu*, and it is careful, when it is describing how that estimate is to be arrived at, to introduce the words "calculated in the prescribed manner." If the words "estimated amount which would be produced by a rate of 2*d.* in the pound" in the Act of 1930 ought to be expanded into some such expression as "the amount estimated by the several rating authorities concerned as likely to be produced by a rate of 2*d.* in the pound," a very great element of uncertainty must of necessity be produced. *Non constat*, no two rating authorities would arrive at their estimate in the same way; *non constat* that, in dealing with the factors, for example, of bad debts and cost of collection, any clear rule would universally or generally apply and the matter would be wholly out of the hands of the catchment board itself. I do not think that any assistance can be got from attempting to read into the Land Drainage Act, 1930, s. 22 (2), anything from the Rating and Valuation Act of 1925. These words seem to me to mean exactly what they say, and the persons who are being spoken of are the members of the catchment board. They, I think, are to make the estimate, and they are to make the estimate upon the materials which they have, and part of those materials is the statement which at any time they may ask for, relating to the totals of the rateable values in the several areas. It matters not, I think, that having those

materials and being engaged—and this, I think, is a vital matter—upon the task of fixing a maximum and not any other amount, they have taken the total rateable value, multiplied it by 2, and so arrived at their sum in pence. The ingredient which differentiates an estimate from an actual calculation is, I think, clearly supplied by the fact from which there is no escape, that the board, when it makes its calculation, no matter by what method it makes it, is seeking to dip into the future and must have regard, not to the product of the rate of that figure in some preceding year, but to the estimated amount which the rate would be likely to produce in a year in future.

I think, therefore, that, ingenious as is the argument which has been made by Mr. Van den Berg, and the argument which is adumbrated in this very excellent correspondence, the construction contended for by the catchment board is right, and that this rule ought to be made absolute.

SWIFT, J. : I agree, and I have nothing to add.

DU PARCQ, J. : I also agree, and for the same reasons.

Rule absolute, with costs.

Solicitors : *A. Tabrum*, Cambridge (for the Cambridgeshire County Council) ; *E. T. L. Baker*, Cambridge (for the River Great Ouse Catchment Board).

[*Reported by* HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

IRELAND *v.* WILSON.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and du Parcq, JJ.), **October 28, 1936.**]

Public Health—Bye-law—Validity—Conduct of drivers of hackney carriages.

By a local Act, a local authority was empowered to make such bye-laws as it thought fit for, *inter alia*, the regulating of hackney carriages and carts plying for hire within the borough and for regulating the conduct of the drivers thereof reasonably. A bye-law was accordingly made which provided: "Every driver of a hackney carriage shall when working or plying for hire . . . conduct himself in a proper civil and decorous manner at all times." In a prosecution under the bye-law it was contended that the bye-law was uncertain as to the standard required and unreasonable, and that it was therefore void and unenforceable:—

HELD: the bye-law was neither uncertain nor unreasonable and was therefore valid and enforceable.

[EDITORIAL NOTE.] Local authorities are called upon to make and enforce a large number of bye-laws upon a varied number of topics, and in many cases to make such bye-laws in very precise terms would be to leave the door open to evasion. For this reason the court adopts a benevolent construction of such bye-laws and in particular assumes that they will be reasonably administered.

AS TO BYE-LAWS OF LOCAL AUTHORITIES, see HALSBURY, 1st Edn., Public Health, Vol. 23, pp. 393-397, paras. 782; and FOR CASES, see DIGEST, Vol. 38, pp. 157-167, Nos. 52-124.]

Cases referred to:

- (1) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 13 Digest 326, 631.
- (2) *Nash v. Finlay* (1901), 66 J.P. 183; 38 Digest 163, 89.
- (3) *A.-G. v. Hodgson*, [1922] 2 Ch. 429; 36 Digest 250, 30.
- (4) *London Passenger Transport Board v. Sumner* (1935), 99 J.P. 387; Digest Supp.
- (5) *Scott v. Pilliner*, [1904] 2 K.B. 855; 25 Digest 436, 333.
- (6) *Strickland v. Hayes*, [1896] 1 Q.B. 290; 38 Digest 164, 97.

APPEAL by way of case stated against a conviction by the recorder of the city of Liverpool.

The appellant was a licensed driver of a hackney carriage and plied for hire in Liverpool. Two ladies were on the footwalk in one of the streets of Liverpool when the appellant, driving his cab, drew up to them and said, "Do you want a lift?" One of the ladies replied, "Who do you take us for?" The appellant then said, "Oh! you go to hell." The appellant was reported by one of the ladies and he was convicted at the borough sessions of the city of Liverpool under a bye-law made by the city council by virtue of the powers invested in them by the Liverpool Improvement Act, 1842, s. 220.

R. H. Forrest, for the appellant: The test as to whether a bye-law is valid is laid down in *Kruse v. Johnson* (1): it must be certain and it must be reasonable. This test was approved in *A.-G. v. Hodgson* (3), *London Passenger Transport Board v. Summer* (4), *Scott v. Pilliner* (5).

In *Nash v. Finlay* (2) it was held that a bye-law against annoying others in the street was not certain. There are so many different standards of manners that such terminology as is used in this bye-law is necessarily vague as to what is or what is not required. In *Strickland v. Hayes* (6), LINDLEY, L.J., held as uncertain a bye-law prohibiting profane or obscene songs. The words "shall conduct himself in a proper, civil and decorous manner at all times" in this bye-law fall in the same class and are uncertain as to the standard required.

W. Clothier, K.C., and *Sandy Miller*, for the respondent, were not called upon.

LORD HEWART, L.C.J. : In my opinion, this appeal fails. I think the decision of the learned recorder of Liverpool was manifestly correct. The question is whether a certain bye-law was or was not valid. Under the Liverpool Improvement Act, 1842, s. 220, it is provided that the council may make such bye-laws as they think fit, for various purposes, and may make, among others, bye-laws for the regulating of hackney carriages and carts plying for hire within the borough and for regulating the conduct of the drivers thereof reasonably. In pursuance of that section a bye-law was made in these terms :

Every driver of a motor hackney carriage shall when working or plying for hire keep himself sober clean and decently clothed, and conduct himself in a proper civil and decorous manner at all times and no driver shall smoke tobacco or any such like substance when driving such carriage.

In the particular case out of which the question arose the driver had manifestly used language which no one would describe as civil. But it is said the bye-law goes too far. I think the proper canon to be applied is that which is stated by LORD RUSSELL OF KILLOWEN, L.C.J., in the well known case of *Kruse v. Johnson* (1), where he said at p. 99 :

When the court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered.

In my opinion, there is nothing in this appeal which makes it either uncertain or unreasonable, and reasonably administered it is a most salutary bye-law. The case relied upon of *Nash v. Finlay* (2) dealt apparently with quite a different case. There particular annoyances had been specified and there were so many of them that there was nothing left for the general prohibition. That was the point of the decision of this court. I think, therefore, that this appeal fails and ought to be dismissed.

SWIFT, J. : I think Mr. Forrest made the very best of a very bad case. I cannot see any ground for attacking this bye-law, and I agree that the appeal should be dismissed.

DU PARCQ, J. : I agree with all that has been said by my Lords.

Appeal dismissed with costs.

Solicitors : *Wild, Collins & Crosse*, agents for *Neville & Co.*, Liverpool (for the appellant); *F. Vennor & Co.*, agents for *W. Moon*, Town Clerk, Liverpool (for the respondent).

[*Reported by* HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

CROYDON CORPORATION v. OLDAKER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and du Parcq, JJ.), **October 21, 1936.**]

Highways—Street works—Recovery of expenses—“Owner in default”—Public Health Act, 1875 (c. 55), ss. 150, 257—Croydon Corporation Act, 1884 (c. cxli), s. 39.

By the Croydon Corporation Act, 1884, s. 39, it is provided that whenever the corporation put in force the provisions of the Public Health Act, 1875, s. 150, “they may before themselves executing any works as therein provided recover in a summary manner the amount of the estimated cost thereof from the owners in default.” On June 27, 1935, the local authority served a notice, under the Public Health Act, 1875, s. 150, upon the respondent, the owner of premises fronting on a certain road, requiring him to do certain street works. On June 28, 1935, the respondent conveyed the premises to a third person. On Oct. 4, 1935, the local authority served a notice upon the respondent, under the Croydon Corporation Act, 1884, s. 39, demanding payment of certain sums in respect of the estimated cost of the works, which works had not then been executed. The respondent refused to pay any part of the amount claimed and the local authority thereupon on Dec. 20, 1935, lodged a complaint claiming payment. The magistrates were of opinion that there could be no default until the expiration of the time given in the notice to repair, and that as at the expiration of that time the respondent was no longer the owner of the premises, the respondent was not the “owner in default” within the Croydon Corporation Act, 1884, s. 39, and they held that he was not liable to pay the amount claimed. The local authority appealed:—

HELD: “owner” in the Croydon Corporation Act, 1884, s. 39, refers to the owner at the time of the service of the notice to execute the street works, and if such owner fails to execute the works, he becomes and remains for the purposes of that section the “owner in default,” notwithstanding a conveyance of the property to a third person. The respondent was therefore liable to pay the amount claimed by the local authority.

[EDITORIAL NOTE.] Under the general law on this point there is no default by the owner until the works are completed; but by the special provisions of the local Act here in question, as construed by the court, the owner is in default from

the time he fails to provide the estimated cost of the works. It is immaterial, therefore, that after that time he sells or conveys the property since the liability has then accrued.

AS TO "OWNER IN DEFAULT," see HALSBURY, Hailsham Edn., Vol. 16, pp. 446-448, para. 647; and FOR CASES, see DIGEST, Vol. 26, p. 533, Nos. 2319-2322.] Cases referred to:

- (1) *Millard v. Balby-with-Hexthorpe Urban Council*, [1905] 1 K.B. 60; 26 Digest 533, 2322.
- (2) *R. v. Swindon Local Board* (1879), 4 Q.B.D. 305; 26 Digest 533, 2319.
- (3) *West Ham Corpn. v. Grant* (1888), 40 Ch. D. 331; 26 Digest 551, 2472.
- (4) *Re Bettesworth & Richer* (1888), 37 Ch. D. 535; 26 Digest 536, 2359.
- (5) *Tottenham Local Board v. Williamson* (1893), 57 J.P. 614; 26 Digest 551, 2470.
- (6) *East Ham Urban Council v. Aylett*, [1905] 2 K.B. 22; 26 Digest 533, 2321.
- (7) *Belfast Corpn. v. Hill*, [1903] 2 I.R. 105.

APPEAL by way of case stated by two of the justices of the peace for the borough of Croydon. The facts are fully set out in the case stated, which, so far as is material, was as follows:

4. The Croydon Corporation Act, 1884, s. 39, provides as follows:

(1) Whenever the corporation put in force the provisions of the Public Health Act, 1875, s. 150, they may before themselves executing any works as therein provided recover in a summary manner the amount of the estimated cost thereof from the owners in default according to the frontage of their respective premises and in such proportion as is settled by the surveyor of the corporation or (in case of dispute) by arbitration in manner provided by the Public Health Act, 1875.

(2) If the actual cost of such works shall be less than the amount of the estimated cost the corporation shall reimburse to each person from whom a proportion of the estimated cost shall have been recovered the difference between his proportion of such actual cost and the amount recovered from him.

(3) If the actual cost of such works shall be greater than the amount of the estimated cost, the corporation may recover in a summary manner or as private improvement expenses the difference between such actual cost and the amount of such estimated cost from the owners in default in the same proportions as they had been liable to contribute before the works were executed.

(4) The corporation shall keep separate accounts of all moneys recovered and expended by them in the execution of the provisions of this section.

5. Upon the hearing of the said complaint the following facts were proved or admitted before us:

(a) On June 25, 1935, the appellants by resolution passed in pursuance of the Public Health Act, 1875, s. 150, authorised notices to be served upon the respective owners of the premises fronting, adjoining or abutting on such parts of "The Close" in the county borough of Croydon (being a street not repairable by the inhabitants at large) as required to be sewerred, levelled, paved, metalled, flagged, channelled or made good, requiring them to carry out the necessary works within a time to be specified in such notice.

(b) That before giving such notice the other steps required to be taken under that section, and an estimate of the probable cost thereof, were duly taken by the appellants.

(c) That such notice to repair was served upon the respondent on June 27, 1935, as owner of two narrow strips of land (hereinafter called "the said lands") having respectively frontages to the said street, requiring the works specified in the notice to be carried out within 3 months from the service thereof.

(d) That the respondent was "owner" of the said lands within the meaning of the said sect. 150 at the date of service upon him of the notice to repair.

(f) That on June 28, 1935, the said lands were properly and effectively conveyed by the respondent to one Thomas Grant, his former coachman.

(g) That while it is not recited in the deed of conveyance, the respondent did in fact pay to the said Thomas Grant the sum of £5 on completion of the conveyance.

(h) That the said notice to repair was not complied with by the respondent.

(i) That in pursuance of the Croydon Corporation Act, 1884, s. 39, the corporation served a notice upon the respondent on Oct. 4, 1935, demanding payment of the sums of £130 19s. 1d. and £130 6s. 3d., being the proportion of the estimated cost of executing the said works attributable respectively to the said lands, settled by the appellants' surveyor in accordance with the provisions of the said section.

(j) That the appellants also served demands for payment of the said sums in respect of the said lands upon the said Thomas Grant.

(k) That at the date of the said demand the appellants had not themselves executed the works referred to in the said notice to repair.

(l) That the respondent refused to pay any part of the amount claimed by the appellants, who thereupon (on Dec. 20, 1935) lodged a complaint claiming the sum of £261 5s. 4d. from the respondent, and he was summoned to appear before us on Mar. 17, 1936.

6. On the part of the appellants it was contended that :

(a) The respondent being the owner of the said lands at the date of service of the notice requiring him to repair the street, and the person who as owner was required to do the work, was in default by not having done it, and was thus the "owner in default" within the meaning of the Croydon Corporation Act, 1884, s. 39.

(b) A person who becomes owner after the date of service of notice to repair cannot be an "owner in default" for the purpose of the said sect. 39, not having been served with a notice requiring him to repair the street from which he could default.

(c) The Public Health Act, 1875, s. 257, which enables the local authority to recover private street works expenses incurred by them from the person who is the "owner" when the works are completed does not apply where it is sought to recover estimated expenses.

(d) The appellants were entitled to recover from the respondent in a summary manner the estimated cost of the said works apportioned against the said lands.

7. On the part of the respondent it was contended that :

(i) The cost of the said private street works can only be recovered summarily under the provisions of the Croydon Corporation Act, 1884, s. 39, from a person who is in law an "owner in default."

(ii) The respondent at the date of the conveyance of the said lands to the said Grant was not an owner in default within the meaning of the Public Health Act, 1875, s. 150, or of the Croydon Corporation Act, 1884, s. 39, because the period of 3 months which was specified in the notices requiring street works to be done had not expired.

(iii) An owner cannot be an owner in default until the expiration of the period specified in the notices within which the street works are to be done.

(iv) At the expiration of the period of 3 months specified in the said notices the respondent was not the owner of the said lands and was not therefore an owner in default within the meaning of the Public Health Act, 1875, s. 150, and/or of the Croydon Corporation Act, 1884, s. 39.

(v) The appellants were not entitled to recover from the respondent in a summary

manner the estimated cost of the said street works apportioned against the said land.

9. Being of opinion that there could be no default until the expiration of the time given in the notice to repair and it having been established that at the expiration of that time the respondent was no longer the owner of the premises, we were of opinion that the respondent was not the "owner in default" within the meaning of the Croydon Corporation Act, 1884, s. 39, we therefore decided that the respondent was not liable to pay to the appellants the amount claimed by them, and we dismissed the complaint without costs and made no order for payment.

S. G. Turner, K.C., and T. G. Talbot for the appellants.

R. M. Montgomery, K.C., and A. Capewell for the respondent.

Turner, K.C.: The whole case depends on meaning of "owner in default." The Public Health Act, 1875, s. 257, does not apply where there is a separate right to recover by a special statute for estimated expenses: *West Ham Corporation v. Grant* (3). It is not necessary for the work to be done before recovery can be made. In this case, recovery does not depend on the Public Health Act, s. 257, but on sect. 150 of that Act, and the Croydon Corporation Act of 1884, s. 39. Expenses under the Public Health Act, 1875, s. 150, cannot be recovered from anyone who, although owner at the time of service of a notice has ceased to be owner at date of completion of work: *R. v. Swindon Local Board* (2). If the owner has changed between the time of the service of the notice and the completion of work, the money payable becomes a charge on the premises at the date of completion: *Re Bettesworth & Richer* (4), in which it was held to be a charge on the premises at the date of completion and was payable by the vendor. If the Public Health Act, 1875, s. 150, stood alone, the owner in default is the person failing to comply with the notice served on him. In *Millard v. Balby-with-Hexthorpe Urban Council* (1), Millard was the owner at the date of completion of the work, but he had ceased to be the owner at the date of the serving of the notice for payment and it was held that failure to execute works made him in default. An "owner in default" under the Public Health Act, 1875, s. 150, is an owner failing to do the works and as sect. 257 of that Act does not apply, it is necessary to look at the Croydon Corporation Act, 1884, s. 39. *Tottenham Local Board v. Williamson* (5) is a similar case where a local Act applied as well as the Public Health Act. *East Ham Urban Council v. Aylett* (6), is a case under the Public Health Act alone. The date of completion of the works is the material date when sects. 150 and 257 of the Public Health Act alone apply. If sect. 150 only applied the owner at the date of notice would be liable. If the Public Health Act, 1875, s. 150, applies and sect. 257 of that act does not, but the Croydon Corporation Act, 1884, s. 39, applies, then the only person liable is the person on whom the notice is served.

Montgomery, K.C.: The Croydon Corporation Act defines "owner" as "owner for time being." A person cannot be an "owner in default"

unless he is owner at the time the notice to do the work expires. The critical time is the time of expiry of the notice. If a man is the owner at the time of service of the notice and continues as owner until expiry, he will be an "owner in default." "Owner in default" is confined to a man who is the owner, both when notice is served and when the default occurs. This man was not the owner at the time the default occurred. Obligation does not arise by mere service of notice. Notice merely tells the owner to do the work. There cannot be any default until the time given by the notice expires. Here the respondent has avoided an obligation which he otherwise might have incurred. "Owner in default" does not mean a man on whom a notice is served unless he remains the owner until the critical period. The local Act merely gives power additional to sect. 150, of Public Health Act, 1875, and does not affect the words, "the owner for the time being must be served." The question is: what is the meaning of the owner for the time being in default? There can be no default until the time when the money can be recovered from him. The "owner in default" under the Public Health Act, 1875, s. 150, or under sect. 39 of the local Act, must be at least a person who is the owner at the time of the notice expiring, but he must be an owner: *R. v. Swindon Local Board* (2), where the persons concerned had ceased to be the owners at the time the work was completed and demand was made in that case under the Public Health Act, 1875, s. 150. It is not right to say proceedings in this case do not come under sect. 150. An owner is not in default under sect. 39 of the local Act until the expiry of the time given in which he can do the work, and sect. 39 of local Act is an addendum to sect. 150 of the Public Health Act, 1875: *R. v. Swindon Local Board* (2) is a clear authority that a person must be found who is also an owner and in default.

Turner, K.C., in reply: Liability to do work arises the moment notice is served, and there is default *per die in diem* so long as the work is not done. Also a transfer of land rendering a person incapable of carrying out work makes him an "owner in default." This case turns on the true meaning of sect. 39 of the local Act. [Counsel also referred to *Belfast Corporation v. Hill* (7).]

LORD HEWART, L.C.J.: The judgment which I am about to read is the unanimous judgment of the court.

The answer to the question put to the court in this special case depends upon the true construction of the Croydon Corporation Act, 1884, s. 39. This section adds to the powers which the corporation already possess under the Public Health Act, 1875, s. 150, and enables them, "before themselves executing any works as therein provided," to recover the amount of the estimated cost thereof from "the owners in default." It cannot now be contended that in order to comply with the section a person who was required to execute work during his ownership, and

omitted to do what was required of him, must also be shown to be "owner" at the time when it is sought to recover the cost of the work from him. A similar contention was rejected by the Court of Appeal in *Millard v. Balby-with-Hexthorpe Urban Council* (1). It was said by SIR R. HENN COLLINS, M.R., in that case, at p. 64, that the default contemplated was "default in executing the works required to be done by the notice, not default in payment of the sum demanded." The court expressly disapproved a *dictum* of COCKBURN, L.C.J., in *R. v. Swindon Local Board* (2) to the effect that the "owner in default" must be a person who continued to be owner when the money was demanded. It was contended, however, on behalf of the respondent in this case, that the expression "owner in default" was not apt to include a person who ceased to be owner after the service of the notice and before the expiration of the time limited by the notice for the execution of the work. In support of this contention, counsel for the appellants relied on the decision of this court in the *Swindon* case (2). In his judgment in the Court of Appeal in *Millard's* case (1), STIRLING, L.J., used these words, at p. 67:

We are really asked not to apply the decision in the case of *R. v. Swindon Local Board* (2), but to extend it to a case in which it is not in point. If we were satisfied with the reasoning in this case, it might be right to do so; but, not being so satisfied, I do not think we ought to give effect to it as governing the present case.

This court is bound by the decision in the *Swindon* case (2), which was not overruled in the Court of Appeal, but we are not bound, nor in our opinion are we entitled, to treat it as an authority for more than the precise point which it decided. There the local authority, having done work in pursuance of the provisions of the Public Health Act, 1875, s. 150, were seeking to recover the cost of it from a person who was owner of the premises when the notice was served, but had ceased to be owner at the time when the work was completed. Sect. 257 of the same Act empowers the local authority to recover such expenses "from any person who is the owner of such premises when the works are completed." The court was of opinion, in the words of COCKBURN, L.C.J., that sect. 257 might "be brought in to supplement what would otherwise be a different state of things if sect. 150 stood alone." It was accordingly held that the "owner in default," in the circumstances of that case, "must be a person who continues to be the owner at the time the work is completed."

In the present case sect. 257 has no application. It is manifestly impossible to read the words "owner in default" in the Croydon Corporation Act, 1895, s. 39, as meaning the owner "when the work is completed," and we can find no adequate reason for giving to those words in that section the restricted meaning suggested by Mr. Montgomery. In our opinion the "owner" at whom sect. 39 is aimed is the

person who was owner when the notice was served requiring him to execute the work. If for any reason he fails to execute it he becomes and remains for the purposes of this section the "owner in default." He does not excuse himself from doing the work, or cease to be in default, because he has, from whatever motive, conveyed the property to a third person after receiving the notice. We are accordingly of the opinion that the appeal must be allowed, the determination of the justices reversed, and the matter remitted to them with a direction that the respondent is liable to pay to the appellants the amount claimed by them.

Appeal allowed with costs. Leave to appeal.

Solicitors : *Smith, Rundell, Dods & Bockett*, agents for *J. M. Newnham*, Town Clerk, Croydon (for the appellants); *Cooper, Walker & Hall* (for the respondent).

[*Reported by* HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

Re BULMER, THE TRUSTEE AND THE COMMISSIONERS OF INLAND REVENUE v. NATIONAL PROVINCIAL BANK, LIMITED.

[CHANCERY DIVISION (Clouston and Farwell, JJ.), **November 2, 1936.**]

Practice—Bankruptcy—Appeal—Secured creditor—Election by trustee—Application for extension of time for exercise of election—Refusal—Order as to costs—Time for appeal—Bankruptcy Rules, 1915, r. 130.

On Dec. 31, 1935, a secured creditor gave notice to a trustee in bankruptcy calling upon him to exercise his right of election under the Bankruptcy Act, 1914, sched. 2, r. 13 (c). In June, 1936, the trustee applied for an extension of the time within which to exercise his election. The application was dismissed on June 25, 1936, and the trustee was ordered to pay the creditors' costs. After some correspondence the order was drawn up dismissing the application and containing provisions by which the trustee should be reimbursed out of the estate for the costs which he had been ordered to pay. On Aug. 5, 1936, notice of appeal was given. The creditors raised a preliminary objection that the notice of appeal was out of time under the Bankruptcy Rules, 1915, r. 130. The trustee contended that the direction as to costs had the effect of making the order a compound and not a simple order, and that he was entitled to see the order before making up his mind as to an appeal:—

HELD: the refusal of the application for extension of time was a simple refusal and the appeal ought to have been brought within 21 days of such refusal.

[**EDITORIAL NOTE.** The time for appealing from an application in general runs from the time the application is heard and not from the time the order is drawn up. In certain cases it has been held proper that the party should wait for the order to be drawn up, so that he may know the precise terms of the order before deciding to appeal. The practice in bankruptcy is here decided to be upon precisely the same lines as the ordinary High Court practice.

FOR CASES ON THE POINT, see DIGEST, Practice, pp. 803-805, Nos. 3661-3681 :

and FOR A DISCUSSION OF THE SUBJECT, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 1272, 1273.]

Cases referred to :

- (1) *International Financial Society v. City of Moscow Gas Co., City of Moscow Gas Co. v. International Financial Society* (1877), 7 Ch. D. 241 ; Digest, Practice 803, 3664.
- (2) *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 ; Digest, Practice 805, 3676.
- (3) *Re Smith, Hooper v. Smith* (1884), 26 Ch. D. 614 ; Digest, Practice 804, 3668.

APPEAL from a decision of a county court judge dismissing an application by a trustee in bankruptcy for extension of time in which to exercise election under the Bankruptcy Act, 1914, sched. 2, r. 13 (c). The application was dismissed on June 25, 1936, and notice of appeal was given on Aug. 5, 1936. The respondents raised a preliminary objection that the notice of appeal was out of time. The Bankruptcy Rules, 1915, r. 130, provides :

Subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the court shall be brought after the expiration of 21 days. The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected, or in the case of the refusal of an application, from the date of such refusal.

R. F. Roxburgh, K.C., and *P. B. Morle* for the National Provincial Bank, Ltd.

Sir Gerald Hurst, K.C., and *Gerald Upjohn* for the trustee in bankruptcy.

Roxburgh, K.C. : I have a preliminary objection, namely, that the notice of appeal is out of time. An order was made on June 25, 1936, dismissing the trustee's application for an extension of time within which to exercise his right of election under the Bankruptcy Act, 1914, sched. 2, r. 13 (c). Under that rule a secured creditor, having valued his security, can call upon the trustee to exercise an election within 6 months as to whether he will redeem the security or not. If the period of 6 months expires without the trustee having exercised his election, the mortgagee has a statutory right of foreclosure. On Dec. 31, 1935, the bank gave such a notice which expired on June 30, 1936. On June 18, 1936, a motion was launched for the purpose of having the time extended. On June 25, 1936, the county court judge dismissed the application with costs. Notice of appeal was given on Aug. 5, 1936. The objection depends upon the construction of the Bankruptcy Rules, 1915, r. 130. The point has frequently arisen in the Court of Appeal, although there is no authority on this point in bankruptcy. R.S.C. Ord. 58, r. 15, contains words which are indistinguishable from the rule in bankruptcy referred to. The conclusion is irresistible that the order made on June 25, 1936, by the county court judge was a simple refusal

of an application notwithstanding the direction as to costs which were to be allowed out of the estate. The special direction as to costs does not affect the respondents in any shape or form. The fact that the trustee gets an order to be reimbursed out of the estate in no way affects the bank's position. [Counsel referred to *Re Smith* (3).]

Hurst, K.C. : The order was signed on July 18, 1936. It was necessary for the trustee in bankruptcy to see the order. The direction as to costs had the effect of making it a compound and not a simple order. The way in which the costs were directed to be borne was an important matter and material to the decision. [Counsel referred to *International Financial Society v. City of Moscow Gas Co.* (1), *Shelfer v. City of London Electric Lighting Co.* (2).]

CLAUSON, J. : In this case the creditor served a notice on the trustee in bankruptcy calling upon him to exercise the discretion which he has under the rules. That notice must be complied with in 6 months, and in the present case it expired on June 30, 1936. The trustee was minded to ask the court for an extension, and a motion asking for an extension came before the county court judge on June 25, 1936. The extension was refused and it was ordered that the trustee should pay the costs of the respondents. It appears that it was suggested that it might be convenient if the order stated that the trustee should be entitled to be reimbursed the costs which he had to pay to the respondents. After some correspondence the order was drawn up, which not only refused the application but contained certain provisions by which the trustee should be reimbursed out of the estate, the costs which he had been ordered to pay. After that order was perfected, the notice was given which it was now sought to bring before the court. If time ran from the date that the application was refused, it had clearly expired when notice was given. The provision of the rule is perfectly plain. The rule states that in the case of a refusal of an application, the period within which an appeal may be brought shall be calculated from the date of such refusal. The application was refused on June 25, 1936. It is suggested that this was not a simple refusal but that it was mixed up with other matters, and it is suggested that it ought to be treated as a compound refusal. But it is a perfectly simple refusal, and the fate of the application is not mixed up with other matters at all. The fate of the application is perfectly clear and as it was put by JAMES, L.J., in *International Financial Society v. City of Moscow Gas Co.* (1), at p. 244 :

Where the application for final judgment or order is simply refused, although refused with costs, he knows exactly the fate of his application, and then he has a twelvemonth from the time at which he knows that the order with which he is dissatisfied has been made,

In another case, *Shelfer v. City of London Electric Lighting Co.* (2), LINDLEY, L.J., at p. 307, puts the matter in this way :

Where, as here, he has partly succeeded and partly failed, and where the costs are set off, one set against another, it is only reasonable that before appealing he should wait to see the order as drawn up. The order may be so simple that the appellant does not want to see it. Every case turns upon whether it is reasonable to stop and see what the order is.

In this case I cannot understand why it is suggested that it was reasonable to wait to see the order. The only question that concerns the matter is that the application was dismissed. In my opinion the preliminary objection must be allowed and the appeal dismissed with costs.

FARWELL, J. : I agree.

Solicitors : *Wilde, Sapte & Co.* (for the respondents) ; *Helliwell & Co.* (for the appellant).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

COLLINGS v. CHARLES BRADBURY, LTD.

[CHANCERY DIVISION (Clauson, J.), **October 23, 27, 1936.**]

Money and moneylending—Memorandum—Promissory note payable by instalments—Post-dated cheques in respect of instalments.

A lady of no business experience borrowed money from moneylenders, and in respect of the loan gave them a promissory note payable by instalments and post-dated cheques in respect of the instalments. The cheques were handed over with the note before the transaction was completed. The interest secured by the notes was 81.23 per cent., and the moneylender knew the borrower was a lady of some means but made no further inquiry on the matter:—

HELD : (i) the handing over of the cheques formed a term of the contract and must be mentioned in the memorandum of the contract of loan given in accordance with the provisions of the Moneylenders Act, 1927, s. 6. As they were not referred to therein, the loan was unenforceable by the moneylender.

(ii) the transaction was harsh and unconscionable within sect. 10 of the Act and the interest must be reduced to 25 per cent.

[**EDITORIAL NOTE.** It seems that in this case the cheques were given merely as a convenience between the parties ; but it is clear that to some extent they form an additional security, and if they are part of the transaction of loan a reference to them must be made in the memorandum under the Act.

AS TO MONEYLENDING CONTRACTS, see HALSBURY, Supp., Money and Moneylending, para. 91 ; and FOR CASES, see DIGEST Supp., Money and Moneylending, Nos. 353a-353v.]

Cases referred to :

- (1) *Samuel v. Newbold*, [1906] A.C. 461 ; 35 Digest 212, 377.
- (2) *Reading Trust, Ltd. v. Spero*, [1930] 1 K.B. 492 ; Digest Supp.
- (3) *Parkfield Trust, Ltd. v. Dent*, [1931] 2 K.B. 579 ; Digest Supp.
- (4) *Carringtons, Ltd. v. Smith*, [1906] 1 K.B. 79 ; 35 Digest 215, 409.

ACTION for relief under the Moneylenders Acts, 1900-1927, in respect of five transactions by each of which the plaintiff borrowed the sum of £50 from the defendants. She signed a promissory note in respect of each sum and also gave, in respect of each sum 12 post-dated cheques of £6 each payable in consecutive months. It appeared that the post-dated cheques in respect of the first transaction were asked for and handed over after the memorandum was signed and the transaction completed. The plaintiff signed a memorandum which contained no reference to the post-dated cheques. The interest upon the money borrowed was stated to be 81.23 per cent. calculated in accordance with the provisions of the Moneylenders Act, 1927, sched. I. The plaintiff claimed :

- (a) a declaration that the respective transactions were harsh and unconscionable,
- (b) an order that the transactions be reopened,
- (c) that relief be given in respect of the interest payable,
- (d) an order that the defendants repay to her any sum in excess of the amount found to be due,
- (e) an injunction to restrain the defendants parting with any securities in their possession,
- (f) an order for the cancellation of any such securities,
- (g) an account.

J. P. Eddy, K.C. and *Harold S. Simmons* for the plaintiff.

Cyril Salmon for the defendant company.

Eddy, K.C. : The transactions were harsh and unconscionable within the meaning of the Moneylenders Acts. There was no note or memorandum which complied with the Moneylenders Act, 1927, s. 6 (2). There was a note, but it did not comply with the section. The case is governed by the Moneylenders Act, 1927, s. 10. It is impossible to lay down any hard and fast rules. Each case must be considered on its merits. In the present case the moneylenders were running no real risk at all. [Counsel referred to *Carringtons, Ltd. v. Smith* (4) ; *Samuel v. Newbold* (1) ; *Parkfield Trust, Ltd. v. Dent* (3).]

CLAUSON, J. : The plaintiff, a lady, is suing the defendants, who are moneylenders, for relief under the Moneylenders Acts, 1900-1927. The lady had five transactions with the defendants. The first transaction was on Oct. 20, 1932, the second in Mar., 1934, the third in Jan., 1935, the fourth in July, 1935, and the fifth in Dec., 1935.

This action was started on May 5, 1936, and it is said that these were

transactions against which she is entitled to certain relief by virtue of the Moneylenders Acts.

The transactions were of this nature. The moneylender handed the lady £50, and she signed a memorandum about the loan. I have four of the memoranda here. The one relating to the first transaction is not forthcoming. But every one is agreed that I should assume that the document in relation to the first transaction was the same as the others. She signed a memorandum in each case which states that the rate of interest was to be 81.23 per cent., and that a promissory note was to be given and she was to pay £72 by 12 consecutive monthly instalments. I am told that if the payments were made in accordance with the terms, the interest does work out at the figure stated. It is not disputed that she signed the memoranda and the relative promissory notes. She signed something else, too. On each occasion she gave a number of post-dated cheques corresponding with the monthly instalments to be paid. The post-dated cheques in each case did not bear the date on which the payments became due, but they were dated the first of the following month or some slightly later date. If it was part of the transaction that not only should a promissory note be given but that post-dated cheques should also be given, that would be a term of the contract that is not stated in the memorandum. The effect of that is that by the Moneylenders Act, 1927, s. 6 (2) the moneylender is debarred from suing for repayment of the money lent. By the Moneylenders Act, 1927, s. 10, it is provided :

where it is found that the interest charged exceeds the rate of 48 per cent. per annum [and in this case it does] the court shall, unless the contrary is proved, presume that the interest charged is excessive and that the transaction is harsh and unconscionable.

So, unless the contrary is proved, the circumstances of this case force me to presume that the interest of 81.23 per cent. is excessive and the transaction is harsh and unconscionable. The words "harsh and unconscionable" have been construed by the highest possible authority, namely, by LORD MACNAGHTEN in *Samuel v. Newbold* (1), where his Lordship points out at p. 470 :

the court must be satisfied that the transaction is "harsh and unconscionable" that is, unreasonable, and not in accordance with the ordinary rules of fair dealing.

So I start with this. The transactions are unreasonable and not in accordance with the ordinary rules of fair dealing on the facts as I have stated. On this part of the case I have to say whether it has been proved that the transactions are conscionable and in accordance with the rules of fair dealing. In applying the law, I have some guidance though not very much. I have the guidance of a reported case, *Reading Trust, Ltd. v. Spero* (2) in the Court of Appeal, where it was held that the contrary was proved ; the contrary being proved by showing that the borrower was a

business man of 40 borrowing to get capital for speculative business. He could give no security but his personal promise to repay. There is no statement as to undue influence. In applying that case to the present and considering what assistance that case is, this seems to spring to light at once. Whereas the borrower there was a business man of 40, the borrower in the present case is a lady with no business knowledge. She was not borrowing to provide working capital for a speculative business, but because she was in financial difficulties. She was not engaged in any business, but she had twice made some money by advising persons as to the decoration of their houses. She was ready to earn similar fees in the future. Nothing in the *Reading Trust* case (2) seems to me to be of any assistance in the present case. There is a little further light on the matter. There was a case decided by SWIFT, J., *Parkfield Trust, Ltd. v. Dent* (3), where His Lordship pointed out that the court might consider the fact that the borrower has never suggested that the interest was excessive or the transaction harsh or unconscionable. The lady did not say this until she was suing in this action. What are the facts? The lady, as I have said, was in pecuniary difficulties. It appeared that she stated, and there was no cross-examination about it, that she was quite willing, as the price of getting cash down, not only to make herself liable to pay 81.23 per cent. interest but to make a present of no less than £10 which she divided between two persons who appear to have acted as moneylenders' touts, with the net result that she was getting £40 and was making herself liable to pay 81.23 per cent. interest. The only sum she in fact got was £40. That is a measure of the lady's business capacity. The fact that that is her business capacity does not seem to me to prove the contrary of that which I am bound to assume, that this transaction was unreasonable and not in accordance with the rules of fair dealing. What other evidence have I? I have this; that the moneylenders knew that she had been engaged in betting and that she was in debt—it turns out to be some figure like £60—to bookmakers. Further, she had given some information about her income. It was normally something about £700 per annum but it was temporarily decreased. The moneylender was told that she had something in the nature of a settlement and the moneys and the trustees were mentioned. He made no inquiries about that at all. He was told that she had some furniture. He made no inquiries about that. I am bound to assume, on the face of it, that the transaction is unreasonable and not in accordance with the rules of fair dealing. What steps ought the moneylender to take if he hopes to establish that the transaction is not unreasonable and is in accordance with the ordinary rules of fair dealing. He deliberately abstained from making any inquiry or from forming any view in his own mind as to whether it was a reasonable thing for the lady to pay these large sums. On the facts of this case, as proved before me, I do not see how I can

possibly hold that the transaction was reasonable. The interest was more than the legislature is of opinion should be the outside figure normally to be charged when the transaction is reasonable and in accordance with the ordinary rules of fair dealing. I cannot see that there is anything to justify me to hold that the contrary has been proved. The result is that the lady must be relieved from the obligation of paying 81.23 per cent. but that must be on the terms that she is to repay the sum which she has received, with proper arrears. The proper interest I hold to be 25 per cent. She has received £250; she has repaid £294. It is not suggested that she has repaid more than the figure which would be reached if the interest were calculated on the various payments she has received at the rate of 25 per cent. In other words, the plaintiff is not asking to have anything returned to her by the moneylender. In these circumstances, the order that I ought to make is this. I ought to declare that the transactions mentioned in the statement of claim were harsh and unconscionable within the meaning of the Moneylenders Act, 1927. I ought to order the delivery up of the promissory notes and of the outstanding cheques, and to make no order on the claim for return of money from the defendants.

The defendants counterclaim in respect of the last two promissory notes. This is quite a separate point. It is a fact that with regard to each of these transactions, the lady handed over post-dated cheques. The memorandum contains no reference to post-dated cheques. If it was one of the terms of the transaction that post-dated cheques should be given, the moneylender is precluded by the Moneylenders Act, 1927, s. 6, from enforcing the contract against the lady. The position is that the lady's evidence is quite clear that she did not get the money until she had handed over the cheques. The moneylender's evidence is that on the occasion of the first transaction, the money was handed over to her after she had signed the memorandum and the promissory note and that afterwards, it was suggested that the best thing would be that she should give post-dated cheques and they could be sent in to her bank, and that arrangement was superadded after the first transaction was over. As regards the other transactions, he does not say that at all. All he said was that on the other occasions there was no discussion about post-dated cheques but they were given automatically. That seems to be in accordance with her evidence that all the documents were signed and then the money was handed over. I cannot find anything contrary to the evidence the lady has given that it was part of the bargain that the cheques should be signed and handed over.

There is doubt as to the first transaction. It is possible that the moneylender's statement is accurate and that the lady has not clearly in her mind the difference between the first and the last four transactions. The first transaction is not invalidated by sect. 6. In this case, whichever

way I hold, the counterclaim must be dismissed. As regards the first transaction, I should hold, if necessary, that the moneylender's evidence was correct. But I also hold that, as regards the other transactions it was part of the bargain that the cheques should be handed over. Accordingly, sect. 6 operates to prevent the moneylender recovering. The net result will be that the counterclaim will be dismissed. I think it will be convenient, if I make a declaration that the plaintiff is under no further liability to the defendants, and that the transactions are harsh and unconscionable within the meaning of the Moneylenders Acts. The moneylender must pay the costs of the action and of the counterclaim. There will be an order that the promissory notes and cheques be marked by the registrar "Cancelled by order of the Court."

Solicitors: *Thomas Griffiths* (for the plaintiff); *M. A. Jacobs & Sons* (for the defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re BRAND ESTATES, LTD.

[CHANCERY DIVISION (Bennett, J.), **October 29, 1936.**]

Contract—Existence of contract—Discretion freeing one party from obligation.

Certain builders requested a firm of publishers to publish a builders' guide in connection with their estate, and by the terms of documents signed by both parties it was agreed that the publishers should prepare and publish the guide free of charge to the builders. It was further agreed that the publishers should be freed from the obligation of publishing the guide should in their opinion insufficient advertisement be obtained to justify publication. The publishers proceeded to carry out the terms of the documents thereby incurring expense. The builders then passed a resolution for a voluntary winding up, and the liquidators informed the publishers that they did not wish them to proceed with the guide. The publishers sought to be admitted as creditors in the winding up, alleging breach of the contract embodied in the above-mentioned documents, and they claimed damages in respect of the expenses incurred and loss of profits. The liquidators contended that the discretion given to the publishers by the terms of the document was so wide and of such a nature that no real obligation rested upon them, and that there was no binding contract between the parties:—

HELD: it must be implied in the documents that the publishers should only be freed from their obligations if in their reasonable and honest opinion insufficient advertisements were obtained and the obligations under the documents could not under this clause be arbitrarily determined by them. There was therefore a binding contract and the publishers were entitled to be admitted as creditors in the winding up.

[EDITORIAL NOTE.] Generally speaking arrangements which leave a person with the option whether he will fulfil his part of the transaction or not, have been considered not to be contracts. The real test, however, in such a matter is whether the parties intended to enter into an agreement which should be enforceable at law and, if this be so, it may be possible by the implication of the reasonable exercise

of discretionary powers to avoid uncertainties arising from vague language or what is, on the face of it, a wholly one-sided bargain.

AS TO THE POINT OF LAW, see HALSBURY, Hailsham Edn., Vol. 7, pp. 65, 66, para. 83; and FOR CASES, see DIGEST, Vol. 12, pp. 20, 21, Nos. 1-5.]

Case referred to :

- (1) *Allcroft v. London (Lord Bp.)*, *Lighton v. London (Lord Bp.)*, [1891] A.C. 666; 19 Digest 343, 1555.

APPLICATION by Property Publications, Ltd., who claimed to be creditors of Brand Estates, Ltd., a company in liquidation, asking that the decision of the joint liquidators of the company, Roland Jennings and A. E. Quaife, the respondents herein, rejecting the proof amounting to £193 11s. 6d. of the applicants, might be reversed. The applicants' claim to be admitted as creditors of Brand Estates, Ltd., was based upon two alleged contracts made between Brand Estates, Ltd., and the applicants in the following circumstances. The applicants carried on, under the name of "The Home Publishing Co.," the business of publishing estate and other guides and brochures and the obtaining of advertisements for insertion in such guides and brochures, for which advertisements they received payment. On Jan. 2 and 4, 1935, respectively, Brand Estates, Ltd., and the applicants, each signed a document the terms of which are set out in the judgment herein, and on Jan. 31 and Feb. 4, respectively, they signed a similar document, relating to certain other estates. The applicants proceeded to carry out the terms of the two documents, thereby incurring expense, and obtained a number of contracts with advertisers for the insertion of advertisements in the guides, out of which they would have made a net profit of £113 19s. 6d.

On Feb. 10, 1936, Brand Estates, Ltd., passed a resolution for a voluntary winding up, the respondents herein being appointed joint liquidators, and they on Feb. 24, 1936, informed the applicants that they did not wish them to proceed with the guides, the compilation of which had been provided for by the two documents of Jan. 2 and Jan. 31, 1935. The applicants therefore sought to be admitted as creditors in the winding up of Brand Estates, Ltd., alleging that the two documents of Jan. 2 and Jan. 31, 1935, constituted contracts between themselves and Brand Estates, Ltd., and that such contracts had been repudiated by the liquidators on Feb. 24, 1936, with the result that the applicants had suffered damage through work done by them towards compilation of the guides and the loss of the profits they would otherwise have made out of their contracts with advertisers the amount of such damage being agreed to be £193 11s. 6d. The joint liquidators rejected the applicants' proof on the grounds : (i) that there was not nor had there been any binding contract between Brand Estates, Ltd., and the applicants ; (ii) the arrangements evidenced by the two documents of Jan. 2 and Jan. 31, 1935 were not contracts, no consideration having moved from the

applicants; (iii) if the said documents were intended to be of a contractual nature, no liability was to fall upon Brand Estates, Ltd., until the applicants had fulfilled the condition precedent of publishing the guide referred to in the said documents and that they had failed to fulfil such condition.

From that decision the applicants appealed.

I. Cruchley (*G. F. Kingham* with him), for the applicants, stated the facts.

M. L. Lyell, for the respondents, the joint liquidators: There is no consideration for the agreement to publish. Paras. 2 and 5 of the documents must be read together, and the undertaking in para. 2 is qualified by para. 5, which must be taken to mean that the applicants were not under any obligation to publish the guides unless they thought it would be worth their while. See *Allcroft v. London (Lord Bp.)* (1) for the meaning to be given to the words "in their opinion." In that case the House of Lords refused to fetter the bishop's opinion whatever they might have thought of it.

BENNETT, J.: What do you say this document is?

Lyell: I say it is an agreement to make an agreement. The applicants wanted to leave themselves free and so they did not enter into a binding agreement. The utmost Brand Estates, Ltd., did was to make an offer, which would not have bound them unless the applicants had gone so far as to accept it irrevocably by publishing the guides. The applicants' discretion as to publication was absolutely unfettered, and as the documents are the applicants' documents they must be construed strongly against them. The court cannot interfere with the applicants' discretion since to do so would amount to a substitution of their own opinion for that of the *persona designata* in the documents.

BENNETT, J.: This is a summons in a liquidation, by which a company called Property Publications, Ltd., asks for an order that the decision of the liquidators of Brand Estates, Ltd., rejecting the applicants' proof amounting to £193 11s. 6d., may be reversed and that the proof may be allowed in full. The matter arises out of two documents, both in the same form and one dated Jan. 2, 1935, and the other Jan. 31, 1935. The applicants are a publishing company. The documents in question are, in terms, orders addressed by Brand Estates, Ltd., to the applicants and read as follows:

ORDER FOR THE PUBLICATION OF A BUILDERS' GUIDE.

1. Please publish for us a builders' guide for our estate at South Godstone, on which we plan to erect 113 houses and deliver 2,000 copies.
2. It is agreed that the publishers shall prepare and publish the guide entirely free of charge to us and that the copies are to be delivered as quickly as possible free to our offices.
3. It is also agreed that the publishers will prepare and publish the guide as

regards design and make-up generally to our reasonable requirements and that the pages in the publication are to be $8\frac{1}{2}$ by $5\frac{1}{2}$.

4. We in our turn undertake to distribute the guides to the best advantage and to give your representative all the assistance in our power to obtain advertisements for the guide, and to supply the names and addresses of purchasers of our houses, 14 days prior to occupation, exclusively to advertisers in this guide.

5. It is agreed that the publishers shall be freed from the obligation of publishing the guide, should, in their opinion, insufficient advertisements be obtained to justify publication:

6. This agreement to remain in force for the duration of the building and selling of the houses on the estate in the first instance and to be binding on both parties. Revised editions of the guide to be issued every two years.

7. During the continuance of this agreement we agree not to lend our name or give assistance in connection with any publication of a competitive character circulating in the same area.

Those documents were signed by the company in liquidation, Brand Estates, Ltd., and there is embodied in each the signature on behalf of the applicants over the words: "We accept the above order and agree to the terms stated thereon." Those documents, having been signed by the applicants and by Brand Estates, Ltd., the latter went into voluntary liquidation on Feb. 10, 1936, and on Feb. 18 the applicants wrote to Brand Estates, Ltd. asking them whether they were in a position to carry out the terms of the contract in connection with the publication of the brochure for their estates at Godstone and Ewell, to which the liquidator replied on Feb. 24:

We beg to inform you that we were appointed joint liquidators to the above company on the 10th inst. We have your letter of the 18th inst. and beg to inform you that we do not wish to proceed with the brochure of the company's estates at South Godstone and Ewell.

That letter, it is contended, and I agree with the contention, amounted to a repudiation by Brand Estates, Ltd., of the contract if there was one. The applicants claim that there was a contract, and that, as a result of the repudiation and breach by Brand Estates, Ltd., of that contract, they have sustained damage to the extent of £193 11s. 6d. It is agreed, if there be a contract, that that is the amount of damage for which the applicants ought to be admitted to prove in the liquidation of Brand Estates, Ltd. The only question, therefore, is whether the documents in the terms I have read, signed on behalf of Brand Estates, Ltd., and the applicants, creates between the two companies a contractual relationship. In my judgment the answer should be in the affirmative. The argument for the liquidators is that although clause 2 bound the publishers to prepare and deliver a guide as quickly as possible, yet the terms of clause 5, by which it is agreed that the publishers are to be freed from the obligation to publish the work should, in their opinion, insufficient advertisements be obtained to justify publication, are of such a nature and give so wide a discretion to Property Publications, Ltd., that

it is impossible to say that any real obligation rests upon them, the basis of the argument being that, whatever the facts may be, if Property Publications, Ltd., choose to say that in their opinion insufficient advertisements have been obtained, they get out of any obligation. I do not take that view. I think there must, as a matter of necessity, be implied into the provisions of clause 5, words to the effect that if the publishers in their "reasonable and honest" opinion, or some such words as those, and if those words are to be implied it is plain that there is a contract.

For these reasons I think the application succeeds, and that the applicants are entitled to the order for which they ask. The decision of the liquidators must be reversed and there must be an order that the applicants are entitled to prove for the amount agreed. And the respondents must pay the costs of this application out of the assets.

Solicitors : *Fortescue, Adshead & Guest* (for the applicants) ; *C. Hampton Vick* (for the respondents).

[Reported by C. M. YOUNG, Barrister-at-Law.]

Re LAWTON, GARTSIDE v. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Bennett, J.), **October 29, 1936**]

Charities—Charitable trust—Disclaimer by trustees—Particular trustees not of the essence of the trust—Cy præs.

By her will a testatrix bequeathed to the trustees of a certain Methodist Chapel £1,000 or half her residuary estate whichever should be the lesser amount with the direction that the trustees should purchase a field which they should permit to be used as a recreation ground by the children attending the Sunday School in connection with the chapel and others as the trustees should approve. The executors set aside sufficient to satisfy this legacy and distributed the residue of the estate. The trustees of the chapel disclaimed the legacy. The trustees thereupon took out a summons to determine whether the bequest failed and fell into the residuary estate of the testatrix or whether by reason of the charitable nature of the trust attached to it the bequest ought to be applied *cy præs* :—

HELD : (i) as it was not of the essence of the bequest that the trustees of the chapel should be the trustees of the charity, the bequest did not lapse, but ought to be applied *cy præs*.

(ii) the costs of the proceedings should be paid out of the £1,000.

[EDITORIAL NOTE. The *cy præs* doctrine is applicable where the gift fails for any reason. Here the failure is a disclaimer by trustees and that is quite simply provided for by a scheme. The executors had in the present case distributed the residuary estate and it was unsuccessfully suggested that they rather than the charitable gift should bear the costs.

AS TO THE CY PRÆS DOCTRINE, see HALSBURY, Hailsham Edn., Vol. 4, pp. 221-229, paras. 323-338 ; and FOR CASES, see DIGEST, Vol. 8 pp. 344-351, Nos. 1365-1460.]

Case referred to :

(1) *Reeve v. A.-G.* (1843), 3 Hare, 191 ; 8 Digest 337, 1248.

ADJOURNED SUMMONS for the determination of the effect of a disclaimer of a charitable bequest contained in the will dated May 17, 1934, and proved, with a codicil thereto, in the Manchester District Probate Registry on Nov. 26, 1934, of Mrs. Helena Lawton, who died on Oct. 7, 1934. By her will the testatrix, after providing for the payment of her debts and funeral and testamentary expenses, gave and bequeathed to the trustees for the time being of the Methodist Chapel at Greenfield in the county of York the sum of £1,000 or one half of the net amount, when ascertained after payment of her debts and funeral and testamentary expenses, whichever should be the lesser amount, and she directed that the said trustees should apply the bequest, or such part thereof as was necessary, in the purchase of a field or other plot of land, which they should permit to be used by the children attending the Methodist Sunday School in connection with the Greenfield Chapel and such other children of the vicinity (of day school age only) as the trustees should approve, as and for a recreation ground or playing field. The testatrix then gave a number of pecuniary legacies and left the residue of her property to certain named persons and institutions.

The net amount of the testatrix's estate, after payment of her debts and funeral expenses, was sufficient to allow for the payment in full of the sum of £1,000 in respect of the legacy bequeathed to the trustees of the Greenfield Methodist Chapel, and the executors of her will, the plaintiffs in the present proceedings, duly paid all the pecuniary legacies bequeathed by the will and codicil, other than the said £1,000, which they retained (less legacy duty payable thereon), and duly distributed the testatrix's residuary estate in accordance with the terms of her will. But when the executors tendered the £1,000 to the trustees of the Greenfield Methodist Chapel, they, in consequence of the trusts and conditions attached to the bequest, declined to accept it, and ultimately signed a written disclaimer and renunciation of all right, interest and title to the legacy owing to the nature thereof. In those circumstances the executors were desirous of having the direction of the court as to whether or not the said legacy should be treated as having lapsed in favour of the residuary legatees or whether in the alternative and by reason of the charitable nature of the trust attached to such legacy the same ought to be applied *cy près* and, if so, to have a scheme for such application settled by the court.

G. Maddocks for the plaintiffs, the executors of the testatrix's will, stated the facts.

Andrewes Uthwatt, for the Attorney-General: The only question is whether the acceptance by the trustees of the Greenfield Chapel of the trust is an essential part of the gift itself: see *TUDOR ON CHARITABLE TRUSTS*, 5th Edn., p. 138, and *Reeve v. Attorney-General* (1).

BENNETT, J. : That seems a clear authority for the proposition that disclaimer does not destroy the gift unless the discretion of the particular trustees is of the essence of the gift. In this particular case the trust is clear. If all these Methodist chapels ceased to exist there would be no difficulty in applying the gift.

T. A. C. Burgess, for the other defendants, the residuary legatees : But see *TUDOR*, p. 151. There was in relation to this gift a discretion in the trustees, the words of the will being " which they shall permit to be used." It was not a question of their purchasing land which was to be used immediately for a recreation ground. The trustees, moreover, have the duty of deciding what other children are fit to associate with the Methodist children, since the ground is to be used for such other children of the vicinity " as the trustees approve." There is no general intention to provide a playground, the gift is purely ancillary to the purposes of the Greenfield Chapel. That being so, and there being a discretion in the trustees which it is essential that they should perform, the gift, as the result of their disclaimer, goes altogether.

BENNETT, J. : The gift that has to be considered in this case is " to the trustees for the time being of the Methodist (formerly Wesleyan Methodist) Chapel, situate at Greenfield in the county of York," of " the sum of £1,000 or one half of the net amount when ascertained as above," i.e., after payment of the testatrix's debts and funeral and testamentary expenses and conversion of investments and other properties into money " (whichever is the lesser amount) " with the direction :

that the said trustees shall apply the same or such part thereof as is necessary for the purchase of a field or other plot of land which they shall permit to be used by the children attending the Methodist Sunday School in connection with the said Greenfield Chapel and such other children of the vicinity (of day-school age only) as the trustees approve as and for a recreation ground or playing field.

The trustees of the Methodist Chapel at Greenfield have disclaimed and renounced all right, interest and title to the legacy owing to the nature thereof. Upon that fact the question arises, and is asked by the summons, whether the bequest failed and falls into the residuary estate of the testatrix. The gift is a charitable gift. That is conceded, and it is settled that the disclaimer by the trustees of a charitable gift is immaterial unless it is of the essence of the gift that the trustees selected by the testatrix should be the trustees of her gift. I can see nothing, either in the facts or in the terms of this gift, which affords any foundation whatever for the suggestion that it was of the essence of this gift that the trustees of this chapel should be the trustees of the charity, and accordingly I decide that the bequest has not lapsed and that the legacy does not fall into the testatrix's residuary estate.

Andrewes Uthwatt : I must submit that the costs of this summons should

be paid by the executors, who ought not to have distributed the residue of the testatrix's estate before this question had been determined, and recovered by them from the residuary legatees.

Maddocks : This question has not arisen owing to any act of the testatrix or under the administration of the estate. Even if there had been no distribution of residue the costs of this summons ought to have been thrown upon the legacy of £1,000, because they have been occasioned by the action of the persons to whom it was given. It was quite proper that, having set aside sufficient to satisfy this legacy, the executors should not have kept the other beneficiaries waiting. Moreover, up to the time when this difficulty arose the executors were acting without legal advice.

BENNETT, J. : Of course, if they were acting without legal advice, they have saved the estate something. The order will be, stay of further proceedings against the defendants other than the Attorney-General, the trustees to bring in a scheme for approval, and costs of all parties down to and including the date of this order to be taxed as between solicitor and client and paid out of the £1,000.

Solicitors : *Armstrong, Taylor & Whittaker*, Oldham (for the plaintiff and last defendants) ; *Treasury Solicitor* (for the Attorney-General).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

DUNLOP RUBBER COMPANY, LTD. v. W. B. HAIGH & SON.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 30, 1936.**]

Bankruptcy—Assignment for benefit of creditors—Assent by creditors—Limited company—Debts due to two branches—Assent by one branch—Dissent by other branch.

The plaintiffs, a limited company, had a branch in L. and another in B., both of which branches had dealings with the defendants. The defendants executed a deed of assignment in favour of their creditors. At the time of the execution of this deed certain sums were due from the defendants to both the L. branch and the B. branch of the plaintiff company, and the trustee under the deed duly informed both branches of the execution of the deed and sent them a form of assent to the deed for signature. The L. branch duly assented to the deed and stated the amount of their claim. The B. branch declined to assent to the deed and commenced proceedings against the defendants for the amount of their claim. The defendants admitted the debt, but contended that the plaintiffs had assented to the deed of arrangement and were bound by its terms, including a release of all claims against the defendants. The representative of the plaintiffs in L. had full authority to deal with the debt owed to the L. branch, but no express authority to deal with the affairs of the B. branch, both branches being run independently and neither having any knowledge of the state of the accounts of the other :—

HELD : (i) the assent by the L. branch of the plaintiff company bound the plaintiffs in respect of all debts due to them.

(ii) the rights of the plaintiffs under the deed were not limited to the amount of the claim stated in the assent of the L. branch, but extended to all debts owing to the plaintiffs at the time of the execution of the deed.

[EDITORIAL NOTE.] In the case the point arises for the first time whether one branch of a company can bind the whole company and all its branches by an assent to a deed of arrangement where such assent was made only with reference to the debt of the particular branch. It is held that the assent binds all the branches of the company, but, on the other hand, a branch which does not assent may come in and prove for its debt under the deed by virtue of the assent of any other branch, including a branch which has refused its assent to the deed.

AS TO ASSENTING CREDITORS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 444, 445, para. 607; and FOR CASES, see DIGEST, Vol. 5, pp. 1124-1127, Nos. 9138-9166.]

Cases referred to :

- (1) *Margetson v. Aitken* (1828), 3 C. & P. 338; 5 Digest 1137, 9236.
- (2) *Holmer v. Viner* (1795), 1 Esp. 132.
- (3) *Bain v. Cooper* (1842), 9 M. & W. 701; 12 Digest 509, 4194.
- (4) *Exchange Bank of Yarmouth v. Blethen* (1885), 10 App. Cas. 293; 5 Digest 1128, 9173.
- (5) *Re Stray, Ex p. Stray* (1867), 2 Ch. App. 374; 4 Digest 128, 1178.

ACTION for £59 2s. 8d., the price of goods sold and delivered.

The plaintiff company carry on an extensive business and for that purpose have many branches and in particular have one in Liverpool and one in Birmingham. The defendants were in debt to both these branches, but each branch manager only had knowledge of the debt owed to his particular branch. The defendants executed a deed of assignment for the benefit of their creditors. The cashier of the Liverpool branch, to which the defendants were indebted in the sum of £2 4s. 5d., acting within his authority so far as that branch was concerned, assented to the deed in the following terms :

To MR. CHARLES H. BAKER,
Accountant and Auditor.

W. B. HAIGH & SON.

We, the undersigned, agree to a deed of assignment executed by the above-named debtor for the benefit of the general body of the creditors, to Mr. Charles Henry Baker as trustee, and we agree that the trustee be authorised to pay the costs of suing creditors and that the trustee be not required to find the security as required by the Deeds of Arrangement Act, 1914.

Dated 24th day of August, 1936.

Amount of debt £2 4s. 5d.

Signature of Creditor

Per pro DUNLOP RUBBER CO., LTD.

W. JENNINGS (*Cashier*),

Footwear Division, Walton, Liverpool.

The deed of assignment contained the usual clause whereby the creditors released the debtors from all debts, claims and demands of the creditors respectively against the debtors of whatsoever nature or kind the same may be.

The defendants were indebted to the Birmingham branch of the plaintiff company in the much larger sum of £59 2s. 8d., and that branch instead of assenting to the deed, replied that they had had an unfortunate experience in connection with such deeds and would not assent thereto, and on Sept. 8, 1936, they commenced the present action by special indorsed writ. In an affidavit filed in opposition to an application for summary judgment, the debtors relied upon the above assent to the deed of arrangement.

Patrick Devlin for the plaintiffs.

C. N. Tindale Davis for the defendants.

MACNAGHTEN, J. : In this action the Dunlop Rubber Company, Ltd., sue Messrs. W. B. Haigh & Son (a firm) to recover a sum of £59 2s. 8d., the balance of the price of goods sold and delivered by the plaintiffs to the defendants. The existence of the debt is not disputed. The defence, and the only defence, set up by the defendants is that the plaintiffs have assented to a deed of assignment executed by the defendants for the benefit of their creditors, dated Aug. 20, 1936, and that by assenting to that deed they have precluded themselves from suing the defendants for this debt. The case raises a point of law on which there is no exact authority.

The facts are that the Dunlop Rubber Company, Ltd., which is, as everyone knows, a very large and important company, has among others places of business at Birmingham and at Liverpool. This debt of £59 2s. 8d. which the plaintiffs are seeking to recover is a debt which became due in respect of goods bought by the defendants from the Birmingham branch of the plaintiff company. The defendants also dealt with the Liverpool branch of the plaintiff company, and at the date of the execution of the deed of assignment, a small sum of £2 4s. 5d. was due from the defendants to that Liverpool branch. The defendant firm got into difficulties, and they were, apparently, sued by a number of their creditors. According to the correspondence, some of the creditors were already in a position to levy execution against the defendants, when on Aug. 20 of this year they executed the deed of assignment which is relied upon as a defence to the claim. That deed is expressed to be made between the defendants of the first part, Mr. Charles Henry Baker, an accountant, therein called "the trustee," of the second part, and the several persons companies partnerships and firms being creditors of the debtors [the defendants] whose names and addresses are set forth in the schedule hereto and all other persons (if any) who are now creditors of the debtors and shall assent hereto in writing or otherwise all of which parties are hereinafter called "the creditors" of the third part.

The deed recites the indebtedness of the debtors to the creditors, and that the debtors have proposed to make over all their property for the

benefit of the creditors, and proceeds to convey the whole of their property to the trustee for that purpose. By clause 12 of the deed it is provided that the creditors, subject to a proviso which is not material for the present purpose :

do and each of them doth hereby release the debtors from all debts claims and demands of the creditors respectively against the debtors of whatsoever nature or kind the same may be.

It is said by the defendants that the plaintiff company have assented to this deed of assignment, and thereby they are entitled to the benefits, and are bound by the obligations imposed upon them by that deed, and one of the obligations imposed upon them is that they shall not sue for their debt due to them from the defendants. The question is : Have the plaintiffs assented to that deed ? Immediately upon the execution of the deed on Aug. 20, Mr. Baker, the trustee named therein, sent a circular letter to all the creditors of whom he had knowledge, setting out the fact that the deed had been executed and enclosing a form of assent to be signed by the creditor to whom it was sent if he was willing to do so. Mr. Baker, it appears, sent one copy of this circular letter, with the form of assent accompanying it, to the plaintiff company at Liverpool, and another copy to the plaintiff company at Birmingham. The gentleman in charge of the office at Liverpool decided that it would be advisable to assent to the deed, and accordingly the assent was signed by him for and in the name of the company on Aug. 24, 1936. In the form of assent he stated the amount of the debt to be £2 4s. 5d., and on Aug. 26 that assent was sent by the accounts department of the Liverpool branch of the plaintiff company to the trustee, Mr. Baker, and was duly received by him in the course of post. The Birmingham branch of the plaintiff company did not deal with the matter so expeditiously ; it was not until Aug. 28 that they sent any reply to the circular letter—the circular letter being dated Aug. 21—or a further letter of Aug. 25, in which Mr. Baker had reported the result of a meeting of the creditors which had been held at his offices on that day. On Aug. 28 the Birmingham branch of the plaintiff company replied to Mr. Baker saying that they had suffered disappointment on a previous occasion in the case of a realisation under a deed of assignment, and that they did not, therefore, propose to assent to the deed in this case, and that they were instructing their solicitors to issue a writ, instructions which were duly given, and which resulted in the writ in this action being issued on Sept. 8 of this year.

It is not disputed that the representative of the plaintiff company at Liverpool had full authority to deal with the debt that was due from the defendants to his branch, the Liverpool branch of the plaintiff company, and, subject to any qualification that may be necessary in consequence of the action of the Birmingham branch, that his assent to the

deed of assignment in respect of the debt due to the Liverpool branch was an assent which he was qualified and authorised to give, and that if there had been no other debt due from the defendants to the plaintiffs, then the assent so given by him was a binding and valid assent, and that the plaintiff company would have been debarred from issuing any writ in respect of that debt. I am not sure that the admission does not go so far as to say that notwithstanding the refusal of the Birmingham branch to assent, that assent is still valid at any rate so far as the Liverpool debt is concerned, and that no action could be brought nor proceedings taken in respect of that debt unless and until (I suppose) the deed of assignment is avoided, as perhaps it may be avoided by subsequent events.

It is contended on behalf of the defendants that the assent which was given by the Liverpool branch on Aug. 26 was final and irrevocable, and although in the assent the debt is stated to be only £2 4s. 5d., it is an assent which covers the whole of the indebtedness of the defendants to the plaintiff company, whatever it may be. In my opinion, that contention is right. The deed binds all those creditors who assent to it in writing or otherwise, as the deed expresses it, and the fact that a creditor has understated his debt does not in the least affect the authority or the effect of his assent. By assenting to the deed the whole of the indebtedness of the assignors to a creditor is covered, and the trustee under the deed must admit the creditor as a creditor for the full amount of his indebtedness, whatever it may be. I do not think that proposition is disputed, or that if the Birmingham branch had merely ignored the application of Mr. Baker, the trustee, and had not replied to it at all, and the debt had become valid and effective, the trustee would have been bound to admit the debt sued for in this action, £59 2s. 8d., as a debt which was to share with the other debts in the distribution of the estate of the assignors. But it is said that the fact that, after the Liverpool branch had given assent to the deed, the Birmingham branch expressly dissented from the deed alters the position. A second point which was taken was that the Liverpool branch had no authority to give any assent in respect of the debt due to the Birmingham branch, a point that was taken secondly by Mr. Devlin in his admirable argument, and with which I will deal first, as it seems to come first logically.

There has been no oral evidence given in this case before me. As I understand, when the case came before the master, and was put into the short cause list, it was thought by both parties that there would be no need to have any oral evidence because the relevant facts of the case were sufficiently disclosed by the documents, as to which there was no dispute; but I think it is reasonable to assume that the two branches at Birmingham and Liverpool are not only separate but that their businesses are kept separately, and that the Liverpool branch has no

cognisance of the state of the accounts in the Birmingham branch and that the Birmingham branch has no cognisance of the state of the accounts in the Liverpool branch. I certainly should assume that, when the Liverpool branch assented to the deed and stated that £2 4s. 5d. was the amount of the debt that the defendants owed to the plaintiffs, there was no one at Liverpool who had any knowledge that the defendants were indebted to the Birmingham branch at all; they would not be aware of the amount of the indebtedness. I presume that because, if they had known that £2 4s. 5d. did not represent the whole of the indebtedness, and they had intended to make their assent to apply to that also, they would have stated that debt in the letter of assent. I assume, too, that, so far as actual express authority is concerned of the manager, or cashier, or whatever may be the description of the responsible officer of the company at Liverpool, it is limited to dealing with the affairs of the Liverpool branch. It would seem fantastic to suppose that the Liverpool branch had any express authority to deal with the affairs of the Birmingham or any other branch, and it seems fantastic to suppose that the Birmingham branch had any authority to deal with the affairs of the Liverpool branch, for both have been described in the argument before me as branches of the plaintiff company, but neither has been described as being the head or principal office of the company. Assuming, therefore, that the Liverpool branch has no express authority to deal with the affairs of the Birmingham branch, the question argued by Mr. Devlin is that the assent given by the Liverpool branch only applies to the debt due to the Liverpool branch, and that after that assent had been given by the Liverpool branch it was still open to the Birmingham branch to refuse its assent, with the result that they can maintain this action for the debt due to the Birmingham branch. In spite of the excellent argument of Mr. Devlin, I am not satisfied that that is so. There is but one Dunlop Rubber Company, Ltd., one single legal person in the eyes of the law, and the assent that it gives when it gives it by a Liverpool agent or by a Birmingham agent, or by the whole board of directors, is a single assent. It is an assent not in respect of any particular debt; it cannot be an assent in respect of any particular debt. If assent be given, as admittedly assent was given, in respect of the Liverpool debt, that, in my view, amounts to assent to the deed which covers every debt; and after that assent had been given it was not open to the plaintiff company to sue in respect of any other debt which might be due to the Birmingham branch or to any other branch of the plaintiff company. Having authority to assent to the deed in respect of the debt due to the Liverpool branch, that assent when once given was necessarily an assent to the deed for all purposes and for all debts, and it was not possible for the company, either the Birmingham branch or any other branch, to express dissent. So much for the point that there was no

authority to give assent to the deed except in respect of the Liverpool debt.

The other point that was raised by Mr. Devlin, I find some difficulty in apprehending. He put it that the letter from the trustee was an offer of a contract, and that the contract was only accepted in respect of the Liverpool debt. I do not think that that is a sufficient description of a deed of assignment by an insolvent firm for the benefit of their creditors. It was a contract and it was a covenant, but the parties to it are not merely the debtor and each individual creditor; the rights and obligations undertaken by the creditors are rights and obligations not only as against the estate of the debtor, not only as against the trustee, but also as between themselves. Each creditor, by assenting to the deed, enters into obligations towards each of the other creditors. A creditor who assents to a deed cannot take any consideration from the debtors for so doing, and they assent to the deed on the footing of share and share alike in the property held by the trustee. The simple question in this case is: Did the Dunlop Rubber Company, Ltd., assent to the deed? The answer, in my view, is: They did assent to it, and, having once assented to it, they were precluded from maintaining this action. The action therefore fails, and must be dismissed with costs.

Solicitors: *Clifford-Turner & Co.* (for the plaintiffs); *Corbin, Greener & Cook*, agents for *Hepworth & Chadwick*, Leeds (for the defendants).

[*Reported by C. St. J. NICHOLSON, Esq., Barrister-at-Law.*]

SIR EVAN WILLIAMS (BART.), THOMAS EVANS, SIR DAVID RICHARD LLEWELLYN (BART.) (TRUSTEES FOR THE EXECUTIVE BOARD CONSTITUTED UNDER THE SOUTH WALES DISTRICT (COAL MINES) SCHEME, 1930)
v. CRUMLIN VALLEY COLLIERIES, LTD.

[KING'S BENCH DIVISION (Lawrence, J.), **October 23, 1936.**]

Mines—Coal mines—Regulation by quota—Excess of sum of export and inland supply over output quota—Coal Mines Act, 1930 (c. 34).

Under the Coal Mines Act, 1930, and the South Wales District (Coal Mines) Scheme, 1930, the collieries in South Wales were assigned certain quotas in respect of coal production. The defendants were assigned separate quotas for export supply, inland supply and the supply of coal for consumption in the working of the colliery or the supply of the workmen. The whole was called the output quota. One particular colliery was not limited to its own quota, if it could acquire the whole or part of the quota of another colliery. The contention of the defendants was that it could exceed its output quota so long as it did not exceed its export and inland supply quotas, they having, in fact, exceeded their output quota by some 4,000 tons by reason of the fact that they had been able to acquire from other collieries more additional export and inland quotas than output quotas:—

HELD: there had been a breach of the scheme by the defendants,

and they were liable to penalties under sect. 50 thereof in respect of the excess of output.

[EDITORIAL NOTE.] Though this case deals only with the scheme for the regulation of the output of coal in South Wales, it is of general interest to all industries subject or likely to be subject to regulation by quota. The collieries were subject to a double form of regulation: (a) a regulation or restriction of total output, and (b) a regulation or restriction of export and inland supply, with the privilege of being allowed to take over any output or supply which for any reason another colliery might be willing to transfer. The colliery in question secured a transfer of more export and inland supply than it could secure of output quota, and it is held that upon the proper construction of this scheme it was not allowed to exceed the total output quota original and transferred.

FOR THE COAL MINES ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, pp. 371-391.]

ACTION for penalties.

The plaintiffs claim as trustees for the Executive Board of the South Wales District (Coal Mines) Scheme, 1930, the sum of £479 17s. 6d. by way of penalty for the defendants' breach of the provisions of the South Wales District (Coal Mines) Scheme of 1930. The defendants denied that they had broken any of the provisions of the scheme, and contended that if they had broken any of the provisions of the scheme, then the scheme did not provide for the payment of any penalty in respect of the breach of those provisions.

Lionel F. Heald for the plaintiff.

H. V. Rabagliati for the defendants.

The facts and arguments are fully set out in the judgment.

LAWRENCE, J.: This is a puzzling case, but fortunately the Executive Board have the power of putting right any hardship which may be occasioned by my judgment, if there is any hardship.

The action is brought for penalties by the trustees of the Executive Board of the South Wales District (Coal Mines) Scheme, 1930, against the Crumlin Valley Collieries, Ltd., for £479 17s. 6d. penalties, calculated at the rate of 2s. 6d. per ton upon the excess of output which the defendant colliery produced in a certain quarter of the year over and above the output quota which it was authorised to produce. Under the Coal Mines Act of 1930, a scheme in general was provided for under which the central council allocate to the executive boards in the various districts certain quantities of coal which the districts may produce, and the executive boards of the districts divide up the amount of coal which is so allocated to their districts between the various collieries by applying a percentage of the standard tonnage which has been decided by the executive board to be the standard tonnage of the particular colliery. The original Act only dealt with output, but the schemes which have been drawn up under the Act have dealt not only with output but with supply, and have laid down that there is to be a quota for output, a quota for export supply and a quota for inland supply, and all those

quotas are fixed by the executive board by reference to the percentage of standard tonnages which each colliery is entitled to raise and supply for those various categories. Output includes export supply and inland supply, and also coal which is needed for the working of the colliery and for the supply of workmen and workmen's dependants who are entitled to get cheap, or free, coal. The Coal Mines Act of 1930 itself provided that arrangements might be made whereby the output of coal might exceed the quota fixed for a mine, so long as the output of coal from some other mine in the district was lower than the quota fixed for that other mine, and that provision was carried into the scheme which had been made under the Act. So that the individual collieries are not limited absolutely to the quota which has been laid down by the executive board for them for output or for export supply or for inland supply; they are entitled, if they can, to make arrangements with any other collieries in the district to increase their output quota or their export supply quota or their inland supply quota, provided the other colliery with whom they make arrangements reduces its respective quota.

In the present case the defendant colliery company was allotted an output quota of 51,227 tons, an export supply quota of 7,756 tons, and an inland supply quota of 43,118 tons, leaving a small balance by which the output exceeded the export and inland supply. They subsequently entered into arrangements by which they increased their output quota to the figure of 69,579 tons, and they increased their export supply and their inland supply quotas so that their sum exceeded the amount of the output quota by 4,000 odd tons, and they were unable to acquire output quota to make up that amount. They produced up to, or nearly up to, their export supply and inland supply quotas, and so exceeded the amount of their output quota by some 4,000 odd tons. It is in respect of that admitted excess that penalties have been imposed and this action is brought for those penalties.

The defendants contend that they are not liable for those penalties, and say that the amended scheme which applies to South Wales, which has, of course, the weight of a statute, does not on its true interpretation impose any penalties on a colliery company which exceeds its output quota, provided that it does not exceed either its export supply quota or its inland supply quota. That question turns upon the construction of clause 32 and clause 50 of the amended scheme. Clause 32 provides that no owner shall produce or supply, as the case may be, more coal than its quota except "(a) under any arrangement made under the provisions of clause 33 of the scheme," and says "any owner acting in contravention hereof shall be liable to the penalties prescribed in clause 50 of the scheme." Clause 33 provides for arrangements being made by which output or export or inland supply quotas may be altered by arrangement, and in subsect. (2) it is provided: "If the output of or tonnage supplied

from any undertaking exceeds any limit so agreed, then for the purposes of clause 50 of the scheme the corresponding quota shall be deemed to be exceeded by the amount of the excess over such limit." Then clause 50 says: "The following penalties shall be payable by any owner contravening or failing to comply with the scheme, that is to say: (1) for exceeding any quota of output or quota of coal for export supply or inland supply respectively such penalties as may from time to time be specified in rules made by the Board and published or notified to the owners before the commencement of the allocation period in respect of which they are to be enforced." . . . I can leave out the next sentence. . . . "Until the Board specify the penalties by rules the following provisions shall apply: (a) There shall be ascertained in respect of each owner the number of tons whereby the tonnage of coal (or of any class thereof as the case may be) supplied for export supply and for inland supply from his undertaking exceeds the respective quotas thereof and any excess tonnages so ascertained shall be added together and shall be compared with the amount whereby the output of coal (or of that class thereof) produced from the undertaking is in excess of the output quota of coal or of that class, and the penalties shall be calculated on the greater of the said two amounts in respect of coal or of each class of coal." Then (b) is: "If there is no excess output but an excess only over a quota for inland supply or for export supply or over both the penalty shall be calculated on the aggregate number of tons whereby the said several quotas are exceeded," and (c) says: "The said penalty shall be at the rate of 2s. 6d. per ton or part of a ton of the excess so ascertained." Now, the argument for the defendants, as I understand it, is that (a) has no application here because there is no excess tonnage so ascertained within the meaning of the first part of subsect. (1) (a), which says: "There shall be ascertained in respect of each owner the number of tons whereby the tonnage of coal (or of any class thereof as the case may be) supplied for export supply and for inland supply from his undertaking exceed the respective quotas thereof," and so on. In fact, here the defendants did not exceed the quotas for export or inland supply, and the defendants say, therefore, that the section has no application, that there is nothing to compare with the excess of output quotas and that the words "the penalties shall be calculated on the greater of the said two amounts," have no application, because the word "amounts" is not properly applicable to a figure of "0," and they also contend that subsect. (b) supports their argument. But I have come to the conclusion that that argument of the defendants is erroneous, and that the words of subsect. (a) are really applicable to the present case and that it is not impossible to compare "0" with the figures of excess of output quota. I do not think it is doing violence to the language of the subsection to say that you can ascertain an excess tonnage which does not exist, and

having ascertained it, then if it is nothing you can compare that with the excess output of coal, and that subsect. (b) is introduced for the purpose of providing that where there is no excess output you do not make comparison but you make a simple addition of the two excesses, if there are two excesses, of the inland and export supply. That is introduced, I think, for the purpose of providing for that case, subsect. (a) having provided that there shall be that addition and a comparison between output and supply—an addition between the two forms of supply—and a comparison of that added figure with the excess of output, if any, and that the penalties should be paid on the higher of the two figures so ascertained. Subsect. (b) provides that the penalties shall be calculated, if there is no excess output, not by comparison, but upon a simple addition. That seems to me to be a very intelligible and fair reading of the clause and accords with the prohibition which is contained in clause 32 against an owner producing more than his quota of output. There are various difficulties on either view which are suggested. It is said on behalf of the defendants that there is no penalty if there is an excess of output and no excess of export or inland supply, but it is admitted that there would be a penalty if one ton excess were produced for export and one ton for inland supply. I think it follows, according to the defendants' argument, that there would be no penalty if there was an excess of output and an excess of export supply of one ton, but no excess of inland supply. But, of course, these difficulties are difficulties which may arise on the construction of the section, and do not necessarily show that the defendants' interpretation of the section is wrong.

I have come to the conclusion that it is not doing any violence to the language of the section to put the construction upon it for which the plaintiffs contend and which in my judgment, is in accordance with the general intention of the Act and the scheme and particularly having regard to the power which the individual collieries have to make arrangements for acquiring extra quota both as to supply and as to output.

It was further argued on behalf of the defendants that the provisions of clause 11 of the central scheme support their view by indicating the way in which the matter might be expressed if it had been intended to affect the view presented by the plaintiffs—but the framing of that clause is quite different from clause 50, and I do not think that it ought to be given any great weight in construing clause 50.

I have come to the conclusion that clause 50 has the meaning contended for by the plaintiffs and I therefore give judgment for the plaintiffs for the sum claimed with costs.

Solicitors: *Savage Cooper & Wright*, agents for *W. H. F. Barklam*, Cardiff (for the plaintiffs); *Furniss Stephen & Co.*, agents for *A. J. Prosser*, Cardiff (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

LONDON POWER CO., LTD. v. LAMB.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 19, 1936.**]

Workmen's Compensation—Accident—Admission that incapacity due to accident—Declaration of liability—Application for review—Evidence that incapacity would have been the same even if there had been no accident.

A workman suffered injury by accident in Dec., 1932, and was under treatment until Aug., 1933, when he underwent an operation. Compensation was paid on the basis of total incapacity from Dec., 1932, until Apr., 1934, when payments were discontinued. An application for compensation was then made. The employers denied liability on the ground that since the date of the application the workman had not been incapacitated for work by reason of the injury, but they submitted to a declaration of liability. The judge found in favour of the workman and made an award on the basis of total incapacity. In Feb., 1936, the employers applied for a review. Evidence was given that the workman would have had to undergo the operation even if there had been no accident and the employers contended that at the time of the review it could no longer be shown that the incapacity was due to the accident. The judge allowed the application and terminated the employers' liability. The workman appealed :—

HELD : as the employers, by submitting to a declaration of liability, had made an unqualified admission that the incapacity was due to the accident, it was not open to the judge, without a change of circumstances, to hear new evidence on a matter which had already been decided.

[EDITORIAL NOTE.] A review of the question of incapacity due to an accident is a matter to which the doctrine of estoppel or *res judicata* applies only in a limited sense (*Sharman v. Holliday & Greenwood, Ltd.*, [1904] 1 K.B. 235; 34 Digest 452, 3711). There can, of course, be no review where payments have been finally ended, and in the present case where the employers have admitted liability, they cannot ask for a review upon the footing that the injury was not due to the accident.

AS TO WHEN RIGHT TO REVIEW IS BARRED, see WILLIS' WORKMEN'S COMPENSATION, 30th Edn., pp. 316, 317; and FOR CASES, see DIGEST, Vol. 34, p. 452, Nos. 3707-3710.]

Cases referred to :

- (1) *Old v. Furness, Withy & Co., Ltd.* (1934), 27 B.W.C.C. 266; Digest Supp.
- (2) *Ramsay v. Gramophone Co., Ltd.*, [1936] 2 All E.R. 752; Digest Supp.
- (3) *Linthorpe Dinsdale Smelting Co., Ltd. v. Hoy* (1917), 10 B.W.C.C. 350; 34 Digest 454, 3723.

APPEAL from a decision of His Honour JUDGE SNAGGE, given in the Westminster County Court on Feb. 21, 1936, in which he allowed an application for a review of weekly payments.

A telephone operator, while working for his employers, fell down 8 stairs and jarred his right hip joint. The accident occurred on Sept. 23, 1932. On Aug. 4, 1933, he underwent an operation and was discharged from hospital in Sept., 1933. In consequence of the operation he had an ankylosis of the right hip. From Dec. 23, 1932, until Apr. 9, 1934, he was paid compensation on the basis of total incapacity. Payments

then ceased. The workman brought an application against the employers for compensation. The employers denied liability under the Workmen's Compensation Act, 1925, on the ground that the workman had not been incapacitated for work by reason of the injury, but they submitted to a declaration of liability. At the Greenwich County Court His Honour JUDGE DRUCQUER awarded compensation on the basis of total incapacity.

While disabled the workman accepted two temporary jobs, and in consequence the employers applied for a re-trial. On re-trial by the same county court judge compensation of 16s. 6d. per week was awarded on the basis of 60 per cent. incapacity arising from the injury. The employers then applied for approval of a payment of a lump sum of £225, which sum was agreed by the parties, in redemption of the weekly payments. Approval was refused by the registrar on the ground that the sum was inadequate, and on appeal the registrar's decision was upheld. Subsequently the employers applied for a review on the grounds: (i) that the applicant was better through lapse of time, and (ii) that the injury did not arise from the accident, but from the pre-accident condition.

The county court judge allowed the review, and terminated the employers' liability.

The workman appealed on the grounds: (i) that the county court judge was wrong in law in holding that the present incapacity of the applicant was not due to the accident; (ii) that there was no evidence on which the county court judge could find that the incapacity of the workman for which the employers had paid compensation had ceased; (iii) that the finding of the county court judge was against the weight of the evidence.

Sir Stafford Cripps, K.C., and G. Granville Slack for the appellant.

Edgar Dale for the respondents.

Cripps, K.C.: The matter is *res judicata*. On the admission of the employers themselves they cannot now say that the injury was due to anything but the accident. When the case was before His Honour JUDGE DRUCQUER there was an admission of liability, and it was on the basis of that admission that the learned county court judge found that the injury from which the workman was then suffering was the result of the accident. [Counsel referred to: *Linthorpe v. Hoy* (3); *Ramsay v. Gramophone Co., Ltd.* (2).]

Dale: The workman had a fall in 1919, and in 1921 he had manipulative treatment. He was advised that for his tubercular hip he should later have an operation. Such an operation was necessary in 1934 or 1935. He was given an army pension of 40 per cent. on the assumption that he had later to undergo this operation. In consequence of the fall in 1932 he had an operation for fixation of the hip, that is, the operation was brought forward by about 2 years. The workman's position

would have been the same now whether there had been an accident or not. [Counsel referred to *Old v. Furness, Withy & Co., Ltd.* (1).]

SLESSER, L.J. : In this case the workman met with an accident on Dec. 23, 1932, when, while working for the employers, he fell down a flight of steps and injured his right hip. He went off duty the following day and was under treatment by fixation of the right hip in plaster of Paris since Jan., 1933. On Aug. 4, 1933, an operation was performed upon him. This produced a comparatively sound hip, but it became fixed, so that he was not able to perform the operations of his limbs freely. He had what is called an ankylosis of the right hip. From Dec. 23, 1932, until Apr. 9, 1934, he was paid compensation on the basis of total incapacity, and at that time, the compensation having ceased, proceedings were brought by the workman against the employers for compensation. The application is dated Nov. 22, 1934 : the accident is recited, and it is said that a question has arisen as to the amount or duration of the compensation payable by the respondents to the workman under the Act in respect of the injury. It is important to notice the answer which was put in by the employers. They denied their liability to pay compensation under the Act, on the ground that since the date of the application the applicant has not been incapacitated for work by reason of the said injury, but they submitted to a declaration of liability. A declaration of liability, as it is now almost universally given, is to the effect that the claimant has received an injury by accident arising out of and in the course of the employment, but that the evidence at the moment does not establish that there is incapacity, although it establishes that there is reasonable probability that incapacity may ensue. On that, the learned judge in the Greenwich County Court, JUDGE DRUCQUER, gave judgment in favour of the applicant, and has given us the grounds of his judgment, which begin thus :

It was admitted that the applicant, who was employed by the respondents as a telephone operator, was injured by an accident arising out of and in the course of his employment on Dec. 23, 1932, and as a result of the accident was entitled to and was paid full compensation on the basis of total incapacity as from that date to Apr. 9, 1934, when it was contended that the applicant was fit to resume his former work and has been so fit as from that date. The payment of compensation has stopped as from that date, and by their answer respondents were willing to submit to a declaration of liability.

The learned judge, having recited the facts of the case, comes to the conclusion that, in his opinion :

the workman was not fit to work as a telephone operator and, having regard to his description of the pain he had while working, I did not consider it right to compel him to continue to work under such conditions.

He suggested that the respondents should give the applicant an oppor-

tunity of testing his capacity to work. They had, after his attempting to work for a short time, given him notice of dismissal. That view, the respondents were unable to accept and, in the result, he was given compensation on the basis of total incapacity. Having regard to the declaration agreed, having regard to the admission that was made and the finding of the learned judge, it is clear, to my mind, that there was not, between the parties at that time, any issue on the question whether the accident was the cause of the injuries. The only question which was being contested before the learned judge was whether the workman at that time was or was not still totally incapacitated. Nor was any question raised at that time, as I understand, that the incapacity which the workman had suffered as the result of the accident was temporary in nature and would pass away, in the sense that the operation which had resulted in the fixation of the hip would have taken place in any event and after a certain period would have been the sole cause of the continuing incapacity. No such view was canvassed or decided upon at that time, but it was decided, and it is implicit in the judgment, that the incapacity of the man was due, and solely due, as was admitted, to the accident of Dec. 23, 1932.

The next matter to which I have to refer is an attempt to liquidate the liability of the employers by the familiar method of paying a lump sum. An application was made to the county court to approve a lump sum to be paid in redemption of the weekly payment. That was dealt with by the registrar, who, on Nov. 3, 1935, declined to allow the sum which was then offered, on the ground that it was inadequate. There was an appeal to the learned judge and he upheld the registrar. So that notwithstanding the agreement of the parties on that point, the sum was not permitted by the court. I may add, though I do not think it affects the case in any way, that between the original judgment and the time of this application, owing to some fresh evidence as to this man having taken temporarily certain work being brought before the court, the weekly sum to be paid was reduced from total compensation to compensation on the basis of partial incapacity; but on that second trial there is no reason to suppose, and, indeed, no suggestion to the effect, that the assumption which had been made on the first trial, that whatever the incapacity was it was the result of the accident, was ever disputed, and, therefore, it really is not relevant to what we have here to consider. The refusal of the learned judge, following upon the refusal of the registrar to certify the £225 as a fit sum as agreed between the parties for the final settlement of the whole matter, was on Nov. 29, 1935; that is to say, at that date it is yet not disputed between the parties, but that the partial incapacity from which the man then suffered was the result of this accident and that the employers were wholly responsible upon that footing. Within a few weeks of that date, how-

ever, the employers applied for a review. The application of the employers for a review is based on more than one ground, but we have only one ground here to consider because the other ground which was stated in the application really has not been considered in this case. That application for review was contested on behalf of the workman, but in the result the learned judge allowed the application for review. After having first intimated that he would grant a declaration of liability, on further argument by Mr. Dale, he changed his mind and finally the liability was entirely terminated, and it is from that final determination that the appeal is brought in this case.

The learned judge, in his finding, has proceeded upon the assumption that, as I read his judgment, no longer is the workman able to say that this incapacity is due to the accident. He says this :

The accident was of a comparatively trivial character, and at the time of the accident the man was in a serious condition owing to other circumstances unconnected with this particular accident. Such disability as he has now, a stiff hip, as the result of an operation, is due to circumstances other than the accident, a condition which would have arisen by this time apart altogether from the accident.

Now, it is said by Sir Stafford Cripps, on behalf of the workman, that such a finding was not open to the learned county court judge ; that there has been no change of circumstances since the decision made in the first place when the partial incapacity was awarded and that, on the admission of the employers themselves that a stiff hip was the result of the accident, it is not open to them now to say that it is due to circumstances other than the accident. Mr. Dale says, and says quite rightly, that there may be cases, such as the one contemplated in *Old v. Furness, Withy & Co., Ltd.* (1), where, on sufficient evidence, a judge may come to the conclusion that where the accident has accelerated the disease, a time may come when the effects of that acceleration will have passed away and that the disease after that time will be entirely due to its normal course without acceleration, and therefore after that date, when the effects of the accident have passed away, it may be proper for the employers to say that no longer can it be shown that the incapacity is due to the accident. That is the effect of the decision in *Old v. Furness, Withy & Co., Ltd.* (1), and it is entirely a matter of evidence and judgment in any particular case whether that has or has not been established. In my view, the present case does not fall within the class of case dealt with in the decision of *Old v. Furness, Withy & Co., Ltd.* (1), and for the following reason. In my judgment, the employers on the first hearing gave, without any qualification, an admission and submitted to a declaration that this man's incapacity was due to the stiff hip, which was the result of the accident and nothing else. No suggestion was then made to or considered by the learned judge that this stiff hip would have resulted from an operation which would, in any event, have had to be

performed, and I think the award which was given at that time, and the submission of the employers to a declaration of liability, was made without any such qualification. If the employers at that time had it in mind that this operation would have to take place in any event, a view which they have tried to prove upon the second hearing, it would have been open to them to have qualified in some way or other their admission or submission to a declaration. They did nothing of the kind. They admitted, without qualification, that this stiff hip was due to this accident, and on that basis no evidence was called to contradict that view and the whole case proceeded upon that assumption and that assumption only. That being the case, when the application for review came before the court, while one point, it is true, was open to the employers, namely, that the incapacity which had been caused by the stiff hip and was due to the accident had diminished or terminated, a matter which could properly have been reviewed, that matter really, as I read the case, was not pursued or pressed by the employers at all. The ground of appeal which was here argued and which was here considered was the other ground of appeal, that at the time of the review it could no longer be shown that the incapacity was due to the accident. It is the second point which the learned judge describes thus, in his judgment :

Whether or not there remains now a physical incapacity, total or partial, as a result of the accident which happened to this most unfortunate man some time ago.

Now I concede to Mr. Dale that on that second hearing an amount of evidence was given by various doctors of eminence, to the effect that this man would have had an operation in any case, even if there had been no accident ; for example, Dr. Trevor, who says : " If no accident, operation would have been advised ; I think he would have had an operation in any event " ; and Dr. Griffiths, who says : " I should have thought an operation in any event necessary." That evidence was given, but it was given about a matter, which, in my view, had already been decided in the first case, because I think the first decision went further than merely to state that at that time there was an incapacity due to the accident. In my view, there was an unqualified admission, by the employers at the time of the first hearing, that the whole of this incapacity to the hip was due to the accident, the sole question outstanding being whether the incapacity from that disability still lasted or did not last. That case, therefore, as it seems to me, is entirely different from such cases as *Ramsay v. Gramophone Co., Ltd.* (2), where new experience, or facts, or events, emerged which enabled the learned county court judge to apply opinions to those new facts. This is no more, in my opinion, than an attempt to give fresh evidence on a matter

which has already been decided, where there has been no change of circumstances.

It is elementary that in the case of new trials it is not a ground for a new trial that you are in a position later to produce evidence which might, with reasonable diligence, have been produced at the hearing. Were such a view to prevail, there would be no end to litigation. This evidence could have been given at the first hearing. It could have resulted in the employers not consenting to a declaration of liability and in not admitting, as I think they did admit, without qualification, that the original incapacity and the subsequent incapacity, whatever the amount of it might be, was due to the stiffened hip, which was the result of this accident and nothing else, although other matters may have operated, such as the then condition of the man who had been previously injured, as we are told.

Finally, therefore, one has to ask, what has the learned judge decided? Speaking for myself, I have the greatest difficulty in understanding the learned judge's decision. Mr. Dale asks us to say that he has decided that, on this evidence, the doctors are right when they say that this operation would have been performed in any event and that the consequences of the operation in any event, so to speak, would have overtaken the consequences of the operation following upon the accident, and that the case falls within the authority to which I have referred, of *Old v. Furness, Withy & Co., Ltd.* (1). But my difficulties are accentuated by the fact that not only has the judge himself said no such thing, but simply said that the disability that he now has is the result of an operation due to circumstances other than the accident, contradicting what had already been decided in the Greenwich County Court, but also by this fact, that the learned judge thought fit, before Mr. Dale corrected him, to grant a declaration. I do not agree with Mr. Dale that, in the interpretation of the judge's judgment, one may not have regard to what he did or what he attempted to do. I think the fact that he was willing even to grant a declaration indicates that at that time he had it in mind that the question really was the question not discussed, namely, whether the incapacity had ceased, the actual incapacity, and not the question whether any more the incapacity was the result of the accident. If the incapacity was the result of the operation and not of the accident, the learned judge clearly had no jurisdiction to grant a declaration, which could only be made on the ground that there still was an actionable incapacity, the *quantum* of which at that moment was not proved. It is true that Mr. Dale afterwards persuaded him that that was inconsistent with the argument which Mr. Dale had addressed to him, and I am sure Mr. Dale should be complimented on his skill in endeavouring to cause the judge to grant him a new trial. The realities are that the learned judge seemed, both by his language and by his granting a declara-

tion, as far as I can understand it, to have really been influenced by this new evidence, and I think he has done that which it has frequently been said it is not open to the learned judge to do, that is, without change of circumstances, to re-try a case, already decided, on new evidence put before him that was not present on the first occasion. This review must fail and the workman must continue, in the absence of any further order, to receive the compensation that he received in the past.

The other matter, which also is indicated in the review, that there had been an improved condition, does not seem to have been pressed in the county court. There is no evidence to support the view that the man is not still totally incapacitated, and we see no reason, therefore, to send the case back for consideration of that matter. The employer must take such steps as may seem to him advisable if he wishes to raise that matter.

SCOTT, L.J. : I agree.

EVE, J. : I agree.

Appeal allowed. Leave to appeal refused.

Solicitors : *A. Wood & Co.* (for the appellant) ; *James Turner & Son* (for the respondents).

[*Reported by FRANK ROWE, Esq., Barrister-at-Law.*]

BLOOR v. LIVERPOOL DERRICKING AND CARRYING CO., LTD.

[COURT OF APPEAL. (Greer, Slessor, and Scott, L.JJ.), **October 26, 27, 1936.**]

Negligence—Common employment—Director acting as foreman—Workman temporarily relieving fellow-worker—Volenti non fit injuria—Heart disease—Novus actus interveniens—Stay of execution—Irrecoverable payment to plaintiff.

The plaintiff was the widow of a man employed by the defendant company as a derrickman. The deceased had left the barge on which he was employed and volunteered to act temporarily as tipper on a second barge in order to relieve a fellow-workman. The fellow-workman was in fact a director of the company, but at the time he was acting merely as a foreman over the job, and was not there as representing the board of directors. While engaged as a tipper in these circumstances he stumbled and fell into the hold, sustaining minor injuries. He was removed to hospital and given an anæsthetic under which he collapsed and died. The post mortem examination showed that he had a diseased heart, but neither the history of the man's activities nor the use of a stethoscope did or would have disclosed the man's condition. At the trial it was held that the death was due to the negligence of the defendants, who were ordered to pay to the plaintiff £785, of which sum £300 was not to be recoverable in any event. On appeal :—

HELD : (i) on the facts there was no negligence on the part of the defendants.

(ii) the fact that the fellow-worker was a member of the board of directors did not in a case where he was in fact acting as a foreman bar the defence of common employment.

(iii) on the work upon which the deceased was engaged at the time he was merely a volunteer and the defence of *volenti non fit injuria* applied.

(iv) the administration of the anæsthetic was not a wrongful act intervening between the accident and the death, and could not be relied on as a case of *novus actus interveniens*.

(v) where there is an appealable matter, the court should not, as a condition of granting a stay of execution, order to be paid to the plaintiff and to be irrecoverable in any event any sum to which it is possible that it may ultimately be decided that the plaintiff has no title.

[EDITORIAL NOTE.] The main interest in this case lies in the consideration by all the members of the court of a subject that was only touched on in *Doyle v. White City Stadium, Ltd.* (1), that is, the jurisdiction of the court to order an irrecoverable payment as a condition of a stay of execution. This jurisdiction is now definitely limited to sums which must be recoverable whatever decision the higher courts may come to. The points on the administration of an anæsthetic as a case of *novus actus interveniens*, common employment where a director of a company is concerned, and a workman "doing a spell" for a fellow-worker are of great interest but are only the application of settled law to a new state of facts now of common occurrence.

AS TO *NOVUS ACTUS INTERVENIENS*, see HALSBURY, 1st Edn., Vol. 21, Negligence, pp. 380-382, para. 649; and FOR CASES, see DIGEST, Vol. 36, pp. 30-34, Nos. 165-205.

AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 219-220, Nos. 1819-1822. AS TO *VOLENTI NON FIT INJURIA* see HALSBURY, 1st Edn., Vol. 21, Negligence, pp. 476-478, paras. 798-800; and FOR CASES, see DIGEST, Vol. 36, pp. 92-97, Nos. 608-649. AS TO CONDITIONS OF STAY OF EXECUTION, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 1277, 1278.]

Cases referred to :

- (1) *Doyle v. White City Stadium, Ltd.*, [1935] 1 K.B. 110; Digest Supp.
- (2) *Shirt v. Calico Printers' Asscn.*, [1909] 2 K.B. 51; 34 Digest 348, 2806.
- (3) *Jones v. Great Central Ry. Co.* (1901), 18 T.L.R. 66; 34 Digest 440, 3595.
- (4) *Lancaster v. Blackwell Colliery Co., Ltd.* (1919), 89 L.J. K.B. 609; 34 Digest 324, 2647.
- (5) *Chapman v. Ellesmere*, [1932] 2 K.B. 431; Digest Supp.
- (6) *Fanton v. Denville*, [1932] 2 K.B. 309; Digest Supp.
- (7) *Smith v. Baker & Sons*, [1891] A.C. 325; 34 Digest 202, 1657.

APPEAL by the defendants from a decision of SWIFT, J., given on Feb. 18, 1936.

The plaintiff brought an action under Lord Campbell's Act against the defendants and claimed damages for the death of her husband, owing to the negligence of the defendants. The deceased was employed by the defendants as a derrickman on the barge "Mary." It was proved in evidence that the deceased had left the "Mary" and gone on to another barge, the "Anderita," also the property of the defendants. Here he offered to take the place of Knowles, a director of the defendant company, who was working on the "Anderita" as a tipper, unloading

pig-iron from tubs into the hold of the "Anderita." Whilst so doing, Bloor fell into the hold and dislocated an ankle. He was taken to hospital and given an anæsthetic preparatory to an operation. He collapsed and died. The post mortem examination disclosed that he had a diseased heart. The plaintiff alleged that the defendants were using an out of date type of tub, both clappers of which were movable. It was further alleged that the defendants had failed to provide a platform above the hatch covers for the tipper to stand on. It was held that the death had been caused by the negligence of the defendants and was directly attributable to the accident and the plaintiff was awarded £785 damages. As a condition for obtaining a stay of execution, it was further ordered that of that sum £300 was to be irrecoverable in any event. The defendants appealed to the Court of Appeal.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the appellants.

Maxwell Fyfe, K.C., and *H. I. Nelson* for the respondents.

Wilfrid Clothier: The death must have been caused by the negligence of the respondents in order that the appellant may succeed. Here death was caused by the administration of chloroform and the chain of causation was broken: *Shirt v. Calico Printers' Asscn.* (2). The death may have resulted from the accident, but it was not caused by it. This man should never have been given chloroform and the appellants were not responsible for a wrong anæsthetic being given. If the plaintiff had proceeded under the Workmen's Compensation Act she could have recovered £300. The court can order an amount to be deducted from that in respect of the costs thrown away by proceeding at common law: *Doyle v. White City Stadium, Ltd.* (1).

Maxwell Fyfe, K.C.: The defective tub and absence of any platform together caused the deceased to stumble and fall. This tub had two movable clappers; there is an inherent danger in this type of tub that when the clapper is knocked down and the tub hangs loosely, there will be uncontrolled swinging and a situation is likely to arise where the tipper will have to push it to steady it. The evidence is that this type of tub is dangerous, and also that standing on the hatch covers is dangerous. The question is, if user of that type of tub and the absence of a platform is negligent, did that negligence cause the death: *Jones v. Great Central Ry. Co.* (3), *Lancaster v. Blackwell Colliery Co., Ltd.* (4). This man was not a volunteer, because it was the practice of the company for their men to relieve each other. I submit he was acting in the course of his employment. He was doing an act reasonably incident thereto. [Counsel referred to *Chapman v. Ellesmere* (5), *Fanton v. Denville* (6), and *Smith v. Baker & Sons* (7).]

GREER, L.J.: This is an appeal of the defendants in an action brought under Lord Campbell's Act by a widow against the defendants,

who were the employers of her late husband, Mr. Bloor. I confess that it is very difficult for learned counsel, and very difficult for any court, to leave out of consideration in their minds, being human beings, the desire to find in favour of a widow who has lost her breadwinner; but we have got to do it, and in this case I am inclined to think that the learned judge did not succeed in divorcing that feeling of humanity from his judgment in the case.

One point which was argued here at one time can, I think, be very quickly disposed of. It is said that the accident which happened to the deceased man was not the cause of his death, because it was the fact that he was chloroformed when, if the condition of his heart had been known, he would not have been subjected to the anæsthetic or chloroform. Personally, from knowledge which I have obtained from other sources (but which, possibly, I am not entitled to use) I doubt whether it is right to say that at the present time doctors use chloroform at all in cases where there is some suspicion of the patient's heart; but in this case I am satisfied by the evidence that there was, on the part of the doctors, no real ground to suspect that this poor man was suffering from any form of heart disease. He was a man of 49; he had been working at a very difficult and onerous job for many years until he reached the age of 49, and as far as we know nobody who knew him knew that he had ever suffered any disability by reason of the condition of his heart. The doctors said that by the use of a stethoscope it was impossible to discover that he had heart disease, and in those circumstances I do not think we would be entitled to come to the conclusion that there was, in the sense used by the law, a case of *novus actus interveniens*, that is to say, some other wrongful act intervening between the accident and the death, so as to break the chain of causation between the accident and the death. That is sufficient to deal with that point, a point which was not urged by Mr. Clothier, I think, with any expectation that it would be accepted by the court.

Then it may be suggested that it was negligent on the part of Edward Knowles to allow this deceased man to work in the way he did. If that is the allegation, I think it is completely answered by the doctrine of common employment. Although this man Knowles was a director of the company, he was acting merely at the time as a foreman over the job, exercising the rights of a foreman, and was not there as representing the board of directors. That seems to me to be an answer both with regard to the allegation as to defective plant or a negligent system; in either case the negligence would be the negligence of Edward Knowles, for whose negligence—under, what I think, is an unfortunate rule of law, but which is still part of the law—the defendants would not be liable.

Then there is a third difficulty which has been emphasised in the

course of the argument by SLESSER, L.J. : that is a difficulty which, I think, notwithstanding his very able attempts to do his best for the plaintiff, Mr. Maxwell Fyfe has been unable to overcome. In this case the deceased man was not employed by the company to act otherwise than as a derrickman, that is to say, where the vessel was ; he was not employed to act or to do the work of a tipper, which work he was doing when the accident happened. In order to oblige Edward Knowles, who had been in the habit of doing this class of work as a tipper, he said he would do one or two for him while he went down and refreshed himself with a cup of tea. That seems to me to indicate that he voluntarily undertook this work ; he was a mere volunteer with regard to the work, but, even assuming that it was part of his work, I should myself adopt the view that he knew just as much about the risk of the work as Knowles did, that he knew just as much about the work and the risk, if there was any risk, as anybody, and that, with that knowledge, he voluntarily incurred it. On those grounds the defence of *volenti non fit injuria* would apply on any view of this case.

I have one more observation to make, and that is this : In the case of *Doyle v. White City Stadium, Ltd.* (1) a doubt was thrown by LORD HANWORTH, M.R., and ROMER, L.J., on the power of the learned judge to make an order directing that a sum of money, part of the damages, should be paid to the plaintiff and should not be recoverable in any event ; that is to say, not recoverable in the event of an appeal being successful. It was decided by the other branch of this court that that was an order which ought not to be made, except in special cases where it was quite plain that something would necessarily be recovered either in those proceedings or in other proceedings. I have sent for the book containing a copy of the order made in that case, and I find that the court did in fact decide and make it part of the order that the amount which had been overpaid should be returned, and I feel myself bound by the decision of the other branch of this court. The result of that is that in my judgment the learned judge obviously took the view that this lady was entirely dependent upon the earnings of her husband, and took that view notwithstanding the fact that she was being paid by her children for the board and lodgings which she was giving them. In that view he felt that £300 would be the sum which she would be likely to recover under the Workmen's Compensation Act, but he did not take into account that if the Court of Appeal differed from him on the common law liability and awarded workmen's compensation the defendants would then be entitled to deduct from the £300, to which she would otherwise be entitled, something which would represent the costs of the proceedings. We have considered that order, and we have thought it right to say that under the powers of the court by which the court deals with workmen's compensation when a common law action

fails, the widow should have £250 out of the £300 which was paid over to her, and she must return the £50.

SLESSER, L.J. : I agree that this appeal succeeds. In my view the respondent here, the plaintiff (a dependent of the deceased workman) in the court below, fails on the very threshold of her case ; that is to say, that she fails to show that her husband ever was employed upon any work where the employers owed him a duty which they have failed to discharge. The employment of the deceased man was on a boat, a derrick barge, called the "Mary," where he was a derrickman. I think his employment was limited to that barge and that it was only in relation to that barge and the work carried out thereon that the employers had any duty at all imposed upon them by the law. It is true that this man was apparently in the habit of getting his dinner in another boat called the "Meg," and there he went on the day in question to get his dinner. While he was on the "Meg," after he had had his dinner he suggested that he should become the tipper on the "Anderita," in this sense, that he came up out of the cabin and said to a Mr. Knowles who was working as a tipper on the "Anderita" : "I will knock a couple out for you while you go and have a cup of tea." The connection which exists between this unfortunate man and the employers was that he volunteered to do a fellow-workman's work while that fellow-workman was having his tea, except for two circumstances which have to be considered. The fellow-workman was in fact a director of the defendant company ; he was asked in examination what was his duty and what was his position on the board of that company ; he was asked :

(Q.) You work yourself, do you ? (A.) Yes. (Q.) With your hands ? (A.) Yes. (Q.) Do you actually take part in the operation of the barges which the defendant company owns ? (A.) Yes. (Q.) What sort of work do you do ? (A.) Anything in particular, I either go tipping or I guy or I winch to anything connected with the work of the derrick. (Q.) You work as one of the men ? (A.) Quite correct. (Q.) Have you anything to do with what I might call the book-keeping side of the firm ? (A.) None at all. (Q.) Nothing to do with the administration ? (A.) None at all.

To my mind it is clear that it was quite impossible for the plaintiff here to invoke the connection which might exist between Mr. Knowles and the company as a director, to show that this work which was done by the deceased man was either done expressly or intermedially with the approval of the company as such ; he was, as Mr. Knowles himself said to the learned judge, a volunteer, and as such the employers owed him no duty at all. It is elementary that in order to sustain an action for negligence there must be shown first of all some duty which is not performed, or the omission of something which ought to be performed. Here, I think, there was no duty at all incumbent upon the employer

with regard to this man in relation to the work which he volunteered to do in order that another man might have a cup of tea.

Then one more ground of reliance, which Mr. Maxwell Fyfe urges, should be stated. He called our attention to the fact that the evidence of Knowles is that he and the deceased man used to spell (as it is called) one another; that is to say, give one another a hand with their jobs, and, argued Mr. Maxwell Fyfe, that was done with the connivance of the company. He bases that upon a question which is put to Mr. Knowles, thus:

(Q.) The practice of your company is that anyone who is there and happens to be off duty might come and take the place of someone else? (A.) Yes, to give a spell. I often spell them and others.

I do not read that as being an answer which means that there was any recognised practice of the company that different men should do each other's work. Put in the limited form in which the question is put, it is obviously absurd to imagine that all the different employees of the company could carry on each other's employment. But the learned judge, as I read his judgment, does not base his judgment upon any such finding, and I find it difficult to come to a conclusion that the learned judge has really considered this matter in connection with the difficulty which I ventured to raise on the appeal. The learned judge says:

He [the deceased man] was employed by the company of which Mr. Knowles was the managing director—

that, for reasons which I have already pointed out, is a complete misunderstanding of the position of Mr. Knowles. So far from being a managing director—we do not know from the evidence what he directed, but he clearly in no sense managed the company, he did his work like any other workman—

at any rate of that department which had to do with the movement of pig-iron, and he was in fact in charge of the derrick barge in which he was working. It was no part of his duty, I think, to have said he would take charge in helping to tip, but although it was no part of his duty it was a very natural and a very proper thing for him to do.

That is a finding that it was no part of the deceased man's duty to tip. He says:

It was a natural thing to do,

and the learned judge goes on to explain why; he says:

Men who are working together either in barges or ships or other places very often oblige and assist each other in the way in which Mr. Bloor obliged Mr. Knowles that afternoon. He might say: "Maybe it is not strictly my business to be looking after the business, but I do not mind doing it for you for a quarter of an hour or half an hour while you go and have your tea."

That seems to me entirely inconsistent with the finding which Mr. Maxwell Fyfe wishes us to conclude here, that this man was doing something for the company in the ordinary course of an implied arrangement with the company. It is put by the learned judge himself as merely a matter of the men very often obliging and assisting each other; if they do so oblige and assist each other, it is quite impossible in my view to make a third party responsible for that assistance.

Finally, it is interesting to observe that in the statement of claim the learned pleader, no doubt feeling how necessary it was to show some duty on the employers, pleads that :

The work was being done under the direct orders and supervision of Edward Knowles, a director of the defendant company.

It is quite clear—and I need not reiterate the reasons—from the evidence and the judgment that no such direct orders and supervision were proved at all. There was a voluntary act on the part of the deceased man to enable another man to have his tea, in doing work for which he was not employed, on a barge on which he was not employed, and, while I associate myself with my Lord in regretting that this widow cannot retain the whole of the moneys which the learned judge has given her, it seems to me it would be to work an injustice against the employers to formulate a duty against them which on the evidence it is impossible to sustain.

I would only add that in my view the learned judge has not given effect to the principle (I think the right principle) laid down in the case of *Doyle v. White City Stadium, Ltd.* (1); that it is improper that a learned judge should compel persons to pay money in any event which moneys, it may subsequently be held by a higher court, they were under no legal duty to pay at all. Where the circumstances are that in any event they will have to pay something to the other side, I think it is right and proper, in appropriate cases, that that amount should be paid over; but where there is an appealable matter and the sum to be paid, either in whole or in part, still remains a matter of dispute, then I think it is contrary to all principle that persons should in any event receive money which the law may ultimately decide they have no title to, leaving the person who has to pay, as a condition of getting his stay, without redress. However, as my Lord has said, that is not a matter we need here lay down; it has already been decided in the case of *Doyle v. White City Stadium, Ltd.* (1), and, so far as regards that part of the £300 which, under the Workmen's Compensation Act, s. 29, may be attributable to costs thrown away by not proceeding under that Act, it is clear that the learned judge was wrong in ordering the £300 to be so treated; the sum which should have been so treated was the amount payable as compensation, which has now been decided by the court to be £250.

SCOTT, L.J. : I agree with the judgments which have been delivered, and only wish to add a word or two. With regard to *Doyle's* case (1), I should like to keep open the question—if it arises at any time—as to whether the rule applied by this court in regard to the judicial discretion on an application for a stay is applicable to cases where leave to appeal is asked. In certain cases where leave to appeal is asked we have imposed the condition of the appellant to the House of Lords agreeing that the amount should be irrecoverable in any event ; and I want to keep open the question of the effect of the decision of this court in *Doyle's* case (1) upon applications for leave to appeal.

On the merits of the appeal here, I agree with the reasoning of the two judgments which have been delivered and I only want to add that in my view I find it very difficult to see in the case any evidence of negligence, and further I am satisfied there was no evidence that, if there was negligence, that negligence was the cause of the accident. I therefore agree that the appeal should be allowed, with the results mentioned by my Lord.

Solicitors : *Weightman, Pedder & Co.*, Liverpool (for the appellants) : *G. J. Lynskey & Sons*, Liverpool (for the respondents).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

INTERNATIONAL TRUSTEE FOR THE PROTECTION OF BONDHOLDERS AKTIENGESELLSCHAFT v. R.

[COURT OF APPEAL (Lord Wright, M.R., Slessor and Romer, L.JJ.),
July 1, 2, 3, 6, 7, November 2, 1936.]

Money—Currency—Bond—Gold clause—American legislation—Effect of option to pay in England.

The suppliant was the holder of a 20-year 5½ per cent. coupon gold bond whereby the British Government promised to pay the bearer or registered holder \$1,000 on Feb. 1, 1937, and interest at 5½ per cent. in the meantime, such principal and interest to be payable at the option of the holder in New York or London, and if in New York, in gold coin of the U.S.A. of the standard weight and fineness existing on Feb. 1, 1917, and if in London, in sterling money at the fixed rate of \$4.86½ to the pound. It was contended that by a joint resolution of Congress passed in July, 1933, it had become unlawful to pay these bonds in New York otherwise than in paper dollars, and the British Government took the view that they were relieved of their liability to pay at the standard gold rate above referred to and they ultimately refused to pay interest at that rate:—

HELD : (i) the bond being given by the British Government was governed by English law.

(ii) the gold clause was indistinguishable from that in the *Feist* case (1) and its effect was not that the sums payable under the bonds were payable in gold coin alone, but that they were also payable in the currency in use at the date of payment of an equivalent value to the sum named in the bond at the gold value therein mentioned.

(iii) the effect of the American legislation was to make it unlawful for the creditor to sue for the gold value of the bond, but it did not prevent the debtor paying that value, though it made the excess over the value in the new American currency a mere gift.

(iv) the holders of the bonds were entitled to be paid (a) if the New York option is exercised, such an amount in dollars as is equivalent to the value in currency at the time of payment of the 1,000 gold dollars specified in the bond, (b) if the London option is exercised, the equivalent of 1,000 dollars at the fixed rate of \$4.86½ to the pound in sterling money of England. The words as to gold coin of the United States of America were inapplicable to the London option and the gold clause was not imported into the London option.

EDITORIAL NOTE. This case is now brought very closely into line with the *Feist* case (1). The effect of the decision is that the gold clause means what it says despite the 1933 legislation in the United States. The effect of that legislation is held to be to prevent the lender suing for the higher amount, but it does not prevent the borrower paying at that higher rate if he so desires. The point to be noted, however, is that the gold clause is not imported into the provision or option for payment in London, which is merely a clause for payment at a fixed rate of exchange between dollars and sterling.

AS TO CURRENCY PAYMENTS, see HALSBURY, Supp. Contract, para. 277 ; and FOR CASES, see DIGEST Supp., Money and Moneylending, 15a-61a.]

Cases referred to :

- (1) *Feist v. Société Intercommunale Belge D'Électricité*, [1934] A.C. 161 ; Digest Supp.
- (2) *Smith v. Weguelin* (1869), L.R. 8 Eq. 198 ; 43 Digest 628, 632.
- (3) *Goodwin v. Roberts* (1876), 1 App. Cas. 476 ; 6 Digest 451, 2884.
- (4) *N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co., Ltd.*, [1927] A.C. 604 ; Digest, Practice, 344, 609.
- (5) *Norman v. Baltimore & Ohio Railroad Co.* (1935), 294 U.S.R. 240.
- (6) *Perry v. United States* (1935), 294 U.S.R. 330.
- (7) *Ralli Brothers v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 ; 11 Digest 397, 699.
- (8) *Twycross v. Dreyfus* (1877), 5 Ch. D. 605 ; 6 Digest 447, 2871.
- (9) *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589 ; 11 Digest 396, 688.
- (10) *Bronson v. Rodes* (1868), 7 Wallace, 229.
- (11) *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1929] 1 K.B. 470 ; Digest Supp.
- (12) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79 ; 1 Digest 296, 246.
- (13) *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1934] A.C. 122 ; Digest Supp.
- (14) *Re Chesterman's Trusts*, *Mott v. Browning*, [1923] 2 Ch. 466 ; 35 Digest 169, 12.
- (15) *Di Sora v. Philipps* (1863), 10 H.L. Cas. 624 ; 11 Digest 394, 676.
- (16) *Case of Mixed Money* (1605), 2 State Tr. 113 ; 1 Dav. Ir. 18 ; 11 Digest 557, 570.
- (17) *Indian & General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K.B. 539 ; 11 Digest 387, 640.
- (18) *The Case of the Serbian Loans* (1929) Permanent Court of International Justice, Series A, No. 14, p. 5.
- (19) *The Case of the Brazilian Loans* (1929) Permanent Court of International Justice, Series A., No. 15, p. 93.

APPEAL from a judgment of BRANSON, J., delivered on Nov. 8, 1935, dismissing a petition of right presented by the appellant company.

In Jan., 1917, the British Government, in order to raise money for the conduct of the war, raised in the U.S.A. a loan of \$250,000,000 by the issue of short-term gold notes convertible at the option of the holder into 20-year $5\frac{1}{2}$ per cent. gold bonds of the United Kingdom payable on Feb. 1, 1937, and not subject to prior redemption. These bonds were issued in dollar denominations. Many of the holders exercised their option, and the nominal value of the bonds outstanding at the time of the action was in the neighbourhood of \$160,000,000.

The petition of right concerned a "twenty-year $5\frac{1}{2}$ per cent. coupon gold bond," dated Feb. 1, 1917. The bond expressed on its face that the Government of the United Kingdom promised to pay to the bearer or registered holder the sum of one thousand dollars on Feb. 1, 1937, and interest at $5\frac{1}{2}$ per cent. per annum every half-year. It contained the clause :

Such principal sum and the interest thereon will be paid at the option of the holder, either in the City of New York, State of New York, United States of America, at the office or agency which will be maintained in the said city by the obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard weight and fineness existing on Feb. 1, 1917; or in the City of London, England, in sterling money at the fixed rate of \$4.86 $\frac{1}{2}$ to the pound.

Payment was to be made without deduction for British taxes. The bond might be registered in the name of the holder by presenting it to the bond registrar of the obligor in the City of New York for notation. Interest coupons were attached and read as follows :

On the first day of Feb., 1937.

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN
AND IRELAND
\$13.75

Promises to pay to bearer at the office or agency which for such purpose will be maintained by the Government in the City of New York, United States of America, thirteen and $\frac{75}{100}$ dollars gold coin of the United States of America, or at the option of the holder, in London, England, in sterling money at the fixed rate of \$4.86 $\frac{1}{2}$ to the pound payment at either place being made without deduction for British taxes, present or future, being six months' interest on the twenty-year $5\frac{1}{2}$ per cent. bond of the Government.

These coupons bore the printed signature of the secretary to the Treasury.

On Apr. 5, 1933, the President of the United States prescribed in an executive order a number of regulations forbidding the hoarding of gold coin, gold bullion and gold certificates and withdrawing these currencies from circulation. On June 5, 1933, Congress passed a joint resolution in the following terms :

JOINT RESOLUTION.—To assure uniform value to the coins and currencies of the United States.—Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction ; and Whereas

the existing emergency has disclosed that provisions or obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorising obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law. (b) As used in this resolution, the term "obligation" means any obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SECT. 2. The last sentence of sect. 43 (1) (b) of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows: "All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

In July, 1933, a British Government White Paper entitled "War Loan Acts (Twenty-year $5\frac{1}{2}$ per cent. Gold Bonds). Proposals of His Majesty's Government" was presented to Parliament. After referring to the contract contained in the bond and to the joint resolution of Congress, it stated:

It follows from the terms of the aforesaid legislation that payment of interest and repayment of principal under the existing bonds, if made in New York, can only be made in coin or currency which is at the rate of payment legal tender in the United States for the discharge of debts, that is, in paper dollars and not in gold dollars . . .

The Chancellor of the Exchequer, speaking in the House of Commons on July 21, 1933 (Commons' Debates, 5th Series, Vol. 280, col. 2180) said:

The obligation which the British Government undertook in 1917 had been

abrogated by an alteration in the law of the land under whose jurisdiction the bond was issued. . . . I think that everybody will agree that, in view of the passing of that legislation, there is no legal obligation upon us to resume a liability of which we have been lawfully relieved by the Government of the United States . . .

By way of compensation, the British Government offered the bond-holders the right to exchange their bonds for sterling bonds payable in 1937 bearing interest at $2\frac{1}{2}$ per cent., at the rate of £260 to \$1,000. The suppliant company represented a number of bond-holders who had not exercised this right. Bond-holders who exercised it received interest in paper currency, dollar for dollar, according to the nominal amount specified in the interest coupons.

On Oct. 5, 1934, the suppliants' solicitors wrote to the Treasury Solicitor asking whether the Government was prepared to pay interest in London in sterling equal, at the fixed rate of $4.86\frac{1}{2}$ dollars to the pound provided in the bond, to such a sum in United States dollars as would represent on the date of payment the gold value of the nominal amount specified on the coupon, or, in other words, £1 *ls. 3d.* per \$100 for the half-yearly interest due on Aug. 1, 1934. On Oct. 26 the Treasury Solicitor replied that the Government were not prepared to admit this claim. Accordingly on Dec. 7, 1934, the suppliants presented a petition of right to the Crown claiming the right to payment of the interest on a gold basis. The petition set out, in addition to the facts, the contention that it was not contemplated or intended by the obligor on the issue of the bond that gold coins of the U.S.A. would be utilised in payment, for neither on Feb. 1, 1917, nor since had there been a smaller gold coin in the U.S.A. than one dollar, nor had gold coins of one- or three-dollar denomination been minted in the U.S.A. since 1890. They further contended that upon the true construction of the bond the obligor contracted to pay to the bearer every half-year such a sum of money of account of the U.S.A. as represented the gold value of \$27.50 according to the standard of weight and fineness on Feb. 1, 1917; and that accordingly every "dollar" comprised in the nominal amount of each payment ought to be treated as representing the price in New York in the money of account of the U.S.A. of gr. 25.8 of gold and that any fraction of a "dollar" ought to be treated as representing the price of a corresponding fraction of that weight of gold. They also contended that if payment of interest was required in the City of London, it should be paid in sterling at the rate of £1 for every $4.86\frac{1}{2}$ dollars ascertained as aforesaid; and that by the White Paper and the speech of the Chancellor of the Exchequer the obligor repudiated liability to pay at the aforesaid rate. They prayed that their rights under other similar bonds for 1,000, 500 and 100 dollars, held by them, might be ascertained and declared, and that they might be compensated for the damages they had sustained.

The Attorney-General pleaded in answer that the amount payable

under the bond if payment had been required in the City of New York was to be determined by the law of the U.S.A. ; he relied on the provision of the resolution of Congress and contended that by reason thereof the obligor was only entitled lawfully to pay, or alternatively was under no obligation except to pay, interest at the rate of a currency dollar for each nominal dollar of obligation ; further, that since this resolution it was unlawful or not obligatory to pay for each nominal dollar of obligation the amount of gold contained in that amount of gold coin of the U.S.A., or the current price of that amount of gold. To holders requiring payment of interest in England the obligor was only obliged to pay the sterling equivalent of the nominal amount of the interest coupon at £1 for each 4.86½ dollars ; that neither the White Paper nor the Chancellor's speech constituted a repudiation of any legal liability of the obligor.

On Nov. 8, 1935, BRANSON, J., heard and dismissed the petition of right. He said that the first question to be decided was whether the proper law of the contract was the law of the United Kingdom or of the U.S.A., and decided that, the contract being between a sovereign and subjects, the proper law of the contract was the law of England, on the authority of *Smith v. Wequelin* (2) and *Goodwin v. Roberts* (3). The presumption that a sovereign will not submit to any court but that of his own country is, said the learned judge, so strong that only an express stipulation to the contrary will displace it, and no such stipulation was made here. In dealing with the question whether the contract to pay in gold coin fixed the mode of payment or was a measure of the obligation, he concluded, after a survey of recent American decisions and of *Feist v. Société Belge* (1), which he distinguished, that the obligation of the bond was to pay in the United States in gold coin of that country equal in weight and fineness to that which was legal tender in Feb., 1917, and, where the sum was too small to be so paid, then in silver or nickel coins of legal tender there. He was satisfied on the evidence that the gold clause was inserted not with any special reference to any possibility of the U.S.A. going off the gold standard, but as a customary clause which had been in use in similar contracts in the U.S.A. for some 47 years and the practical operation of which was fully understood. Payment in London was to be made in sterling at the fixed rate of 4.86½ dollars to the pound without any reference to gold coin at all. Concerning remedies, he considered that the rate of payment in London which the Treasury Solicitor had told the suppliants would be made was the true amount due. He pointed out that no coupons had yet been tendered in the U.S.A. and the principal was not payable until Feb. 1, 1937, so that no actual breach of obligation had arisen. The suppliants had alleged an anticipatory breach by the White Paper and the Chancellor's speech, but he did not agree with this contention. As the Attorney-General

had invited him to give his views as to the rights of bond-holders on presentation of coupons or bonds, he said that, in view of the resolution of Congress, payment could not be made according to the tenour of the bond, as the requisite gold coins were not in existence. It would, moreover, be illegal by the law of the U.S.A. for the Government to pay in gold in the U.S.A. There would be nothing unlawful in paying in currency an amount calculated to represent the gold contained in the specified gold coin, but the obligation of the bond was not to be construed in this way. So much of the bond, therefore, as related to payment in gold coin in New York had become void, leaving in force the obligation to pay in London at the fixed rate of exchange calculated on the nominal amount of the bond.

The suppliants appealed.

Sir William Jowitt, K.C., Cyril Radcliffe, K.C., and G. C. Dunbar for the petitioner company.

The Attorney-General (Sir Donald Somervell, K.C.). Gavin Simonds, K.C., A. Andrewes-Uthwatt and Valentine Holmes for the Crown.

Sir W. Jowitt, K.C. : This is an English contract, to be construed according to English law. When the government of a state contracts a loan in another country, the contract is governed by the law of the state, and not by the law of the country where the contract is made : *Smith v. Weguelin* (2), approved by the House of Lords in *Goodwin v. Roberts* (3). As this is a Government bond, its performance rests entirely on the good faith of the Government : *Twycross v. Dreyfus* (8). The principle is well stated in DICEY ON THE CONFLICT OF LAWS (5th edn.), pp. 663, 678 :

Rule 161. The interpretation of a contract and the effect, i.e., the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper law of the contract.

Rule 162. The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract. (1) a discharge in accordance with the proper law of the contract is valid. (2) a discharge not in accordance with the proper law of the contract is not valid.

An illustration may be found in *Jacobs v. Crédit Lyonnais* ^v(9). If the performance of an English contract abroad becomes illegal through an alteration in the foreign law, the English courts will not enforce the contract. The English law will incorporate into itself any technical rules imposed by the foreign law on the performance of the contract. If, however, the foreign law allows one of the parties to fulfil his side of the bargain in some different way from that which is provided, the English law will not consider that different way a valid discharge. In *Ralli Bros. v. Compania Naviera Sota y Aznar* (7) the court would not enforce an English contract, the performance of which involved a breach

of Spanish law. Here no breach of foreign law is involved, for this is not a contract to pay in gold coin, but a measuring contract.

The recent case of *Feist v. Société Intercommunale Belge D'Électricité* (1) is distinguishable on several points. This is a gold bond, whereas the bond in *Feist's* case (1) was a sterling bond. This bond is payable in gold coin of the United States, the *Feist* (1) bond "in sterling, in gold coin of the United Kingdom." Here there are no sinking fund provisions; and this bond is payable in New York or London, whereas the *Feist* (1) bond was payable in London. The bondholder is entitled to payment in London at \$4.86½ to the pound. Therefore, even if the clause is a gold coin clause and not a measuring clause, the bondholder may call for payment in London in the equivalent of the gold coins which he is not allowed to receive in the United States because of the intervention of the American legislature.

The phrase beginning "such principal sum" is an adjectival phrase, defining the kind of dollars which are to be paid at the option of the holder as gold coin dollars of the specified standard. If the dollar had been depreciated but payment in gold had not been prohibited, payment would have had to be made in such coins. This prohibition, however, makes the contract impossible and meaningless as a gold coin contract. The UNITED STATES CODE (1890, Title 31: Money and Finance; s. 314—Standard Unit of Value, p. 995) exactly defines the American dollar as a gold coin consisting of 25 8·10 gr. of gold 9·10 fine. This is an abstract dollar, a mere unit of value. A "deviation," "remedy" or "tolerance" is laid down to provide for minor variation from the standard, and sect. 457 lays down that gold coins of the United States shall be a legal tender for all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece; and that when they are reduced in weight below that standard they shall be a legal tender at valuation in proportion to their actual weight.

The learned judge thought, rightly, that he was entitled to have regard to the surrounding circumstances, and held that the circumstances were different in this case from those in *Feist's* case (1). The United States entered the war in April, 1917, the earliest time of maturity of the bonds being in Feb., 1918. The learned judge assumed that gold was still in circulation at the time the bonds were issued, but on the evidence gold was not then passing from hand to hand in the United States markets. This clause was inserted in the bond to guard against the contingency that the gold coin would be debased. It would be a strange thing if, now that the contingency has arisen, the court should say that the contracting parties meant the payment to be in gold coins which *ex hypothesi* would not be available for payment.

In the case of *Norman v. Baltimore & Ohio Railroad Company* (5) the debtor prayed in aid this resolution of Congress and claimed that

he was entitled to discharge his debt dollar for dollar. The court held that Congress had been acting within its powers and that an obligation to pay in gold coin of the United States is a measuring contract only. In *Norman v. Baltimore* (5) and in *Perry v. United States* (6) the 9 judges were agreed that a clause similar to the present one was a measuring clause and not a gold coin clause. This was the only basis on which the court could have held, as it did, that the plaintiff Perry had suffered no damage by the resolution of Congress.

The early American case of *Bronson v. Rodes* (10) treated this type of contract as a contract to pay in gold coin. At that time, however, not only was such payment legally permissible, but gold coin and the paper currency were of the same value. Since the war, however, now that the value of the paper dollar has depreciated, the Supreme Court of the United States has taken the view that *Bronson v. Rodes* (10) was wrongly decided, and that the obligation to pay in gold coin of the United States is a measuring or commodity contract. The clause in the present bond is an obligation to pay in currency an amount equivalent in value to the gold. Regarding the English option, the figure of \$4.86½ to the pound is not merely a translation. The true construction is that this figure is a translation, not of \$1,000, but of the obligation under the American option.

There is nothing unlawful about such a condition. If this is an English contract and the clause is a measuring clause, there is no illegality in paying a larger number of dollars than the number specified on the bond. In fact, many borrowers in the United States have so interpreted their obligation. The reference to public policy in the resolution of Congress made it neither illegal nor improper for a debtor to treat the clause as a measuring clause and pay his creditor in the equivalent of gold coin. In *Ralli Bros. v. Compania Naviera Sota y Aznar* (7) it would have been illegal to carry out the English contract, but an English contract is not avoided by anything short of illegality in the country where it is to be performed.

Radcliffe, K.C., following for the appellants: The English courts will not enforce a contract, the performance of which involves breaking the law of a foreign State, but this rule is subject to qualification. In *Foster v. Driscoll* (11) the courts would not uphold a contract to supply whisky to persons in the United States in defiance of the prohibition laws. No courts in any country are, however, concerned to enforce the trade and revenue laws of another country, and a defence based upon an infraction of such laws will not succeed in this country. Similarly, it is no defence to say that the performance of a contract would infringe the public policy of a foreign country. It was given in evidence that Congress often declared its enactments to be in accordance with public policy, so that the Supreme Court, which is the judge of their validity,

might be the more disposed to regard them as constitutional. It was also said that such a declaration had no legislative effect. The enactments in the resolution have legislative effect, and have to be construed by the courts with reference to their constitutionality and to public policy. The declaration itself does not prevent a waiver of the conditions of the contract, though the provisions of the enactments cannot be waived.

The Attorney-General: The Crown must succeed if the discharge of the contract is governed by United States law; or if, though governed by English law, its performance was contrary to the law of the United States or infringed the comity of nations.

The learned judge, on the authority of a *dictum* in *Smith v. Weguelin* (2), held that every contract to which a sovereign government is a party must, as a matter of law, in the absence of express provisions to the contrary, be construed according to the law of the sovereign. That *dictum* was either wrong or has been wrongly applied. In that case LORD ROMILLY, M.R., said at p. 212:

It is, in my opinion, a complete misapprehension to suppose, that, because a foreign government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made.

That *dictum* is not applicable to the present case, and its correctness does not depend on one of the parties being a sovereign government.

There is nothing to prevent a sovereign from suing the other party to the contract in that party's court, which might indeed be the only place where he could be sued. The bonds were issued in America and referred to American coinage; they were published only in America and the principal and interest were payable in America. Payment in England was determined by the amount in American currency, and the bonds were registrable in New York. They were secured by securities approved by one American firm and held by another. These features were held out as an inducement to Americans in America to subscribe to the issue. It would be a remarkable result if, by the taking of these special steps by the Crown to raise money in America, the subscribers found that their rights were to be construed according to a foreign law or modified by an alteration in English law.

In deciding which is the proper law of a contract the court looks at the *lex loci contractus*, the circumstances, and the place where the offer was made. Where the place of the contract and its performance are the same, the inference is irresistible that the law of that place is the law of the contract. The nature of a dollar and the obligation to pay in dollars are only ascertainable by reference to United States law. The proper law of the contract must be governed by the intentions of the parties: *Jacobs v. Crédit Lyonnais* (9); *Châtenay v. Brazilian*

Submarine Telegraph Company (12). Where a contract contains a provision for payment in a foreign country in the coin of that country, that obligation is effectually discharged by payment of that which is legal tender in the place of payment: *Adelaide Electricity Supply Co. v. Prudential Assurance Co.* (13) : *Re Chesterman's Trusts* (14). This case is governed by the same principle as *Chesterman's* case (14). Even if this contract were an English contract, the dollar obligation must be ascertained by the United States law, which, for the purposes of the Crown, is the same as though the law of the contract were American.

There is nothing illegal in a contracting party paying an extra sum to his creditor as a gift. The recognition of an obligation to make such a payment is, however, illegal. In *Foster v. Driscoll* (11) the object to be attained was a breach of international comity and therefore void as contrary to public policy.

LORD WRIGHT, M.R. : The agreement in that case was contrary to the public policy of this country and not of the United States.

The Attorney-General : Feist's case (1) is to be distinguished : at the time *Feist's* contract was entered into, this country was on the gold standard and the notes were inconvertible, and gold coin was substantially no longer in circulation. The gold clause in the present contract has been in use for many years during which gold coin was in circulation with paper certificates alongside it for convenience. Even if, owing to a state of war in other countries, gold was less in circulation early in 1917 in the United States than it had been before the war, yet this clause dates back to the Civil War, to a period in which a meaning could easily be and was given to it, a meaning which everybody considered it to have, even in America, until *Norman's* case (5). In *Feist's* case (1), moreover, the contract was to pay sterling. The number of dollars which had to be converted into sterling in order to find the amount was the nominal number of dollars in the bond. If the *Feist* (1) construction was put on the dollar obligation of this bond, it would produce the curious result that, whereas a bondholder in America would be entitled to \$169 for every \$100 coupon he presented, yet if he presented his coupon in London he would only receive the sterling equivalent of \$100.

It was laid down in *Di Sora v. Phillipps* (15) that when a contract is made in a foreign country and in a foreign language, the English court construing it must first obtain a translation of the instrument, secondly, an explanation of the terms of art, if any ; thirdly, evidence of the foreign law applicable to the contract ; and fourthly, evidence of any peculiar rules of construction which may exist in the law, and must then itself interpret the instrument on ordinary principles of construction.

Gavin Simonds, K.C., following for the Crown : This bond prescribed the payment of \$1,000 in a particular way, not the payment of an unknown, uncertain and fluctuating number of dollars—i.e., it is a gold

coin provision and not a gold value provision, whatever may be the proper law of the contract. Moreover, even if this is a gold value clause, the law applicable to it is the law of the United States, under which the obligation can be discharged by a dollar for dollar payment. Even if English law is generally the proper law of the contract, yet American law determines the valid discharge of the obligation in America. Even if it is a gold value clause governed by English law, yet this court will not enforce or declare enforceable a contract which, though not illegal, is in clear terms against the public policy of the United States, particularly upon a matter which vitally affects the economic order of that country and the preservation of a single monetary system. If the contention of the appellants is right, then, in the event of dollars appreciating in terms of gold, the debtor may discharge his obligation by a smaller number of dollars than the face value of the bond. It is impossible for the laws of a civilised country to exclude that which is legal tender from being valid payment of a debt.

The learned judge would have found that the contract was governed by American law but for the *dicta* of LORD ROMILLY in *Smith v. Weguelin* (2). Those words are not authority for the proposition that a sovereign can carry his law about with him abroad and import it into a contract for the performance of an obligation in a foreign country. The proper law of a contract is an entirely different matter from the submission of a party to the jurisdiction of a foreign court. It cannot be presumed that any American bondholder intended to submit to the law of England. Here the municipal law must *prima facie* govern the discharge, for the question is one of the currency of a contract.

This court will not make an order compelling the parties to do an act contrary to the declared policy of a friendly power: to enter into a bond to recognise a currency different from that established by law. As a matter of comity, it is not proper for the court to enforce a bargain which is declared by Congress to be inconsistent with its policy in a vital matter.

It was held in the *Mixed Money* case (16), where the English Government sought to introduce a debased pound into Ireland for the discharge of a debt, that a fixed standard of money is necessary in every commonwealth, and that therefore it had always been part of the sovereign's prerogative to decide what that standard should be. If the power is infringed, the infringement brings back all those difficulties to avert which money was invented. For purposes of comity there is no real distinction between what is illegal and what is against public policy; the two are equally harmful to a friendly state: *Foster v. Driscoll* (11).

Sir William Jowitt, K.C., in reply: The resolution of Congress prohibits the insertion into agreements of any stipulation infringing the right to pay dollar for dollar, but that only refers to agreements made

after it came into force. A contract made beforehand may legally be honoured according to its obligations. The declaration of public policy was only put in to mitigate the severity of Supreme Court rulings. The obligations of a sovereign power depend on good faith and cannot be altered at the whim or will of another sovereign power.

Although English courts may look at the foreign law to see how a contract is to be carried out, and import certain of that law into English law for the purpose, yet they will not look at the foreign law for the purpose of altering the contract. In *Indian & General Investment Trust v. Borax* (17) it was held that a railway company could not claim to deduct American income tax from its half-yearly payments of interest on its bonds, for there existed no English statute which regarded payment of income tax in a foreign country as a valid discharge of an English contract, and the common law governing a contract made in this country was not governed by the law of another country. Moreover, it is nothing to the point to say that, according to the law of the country where a contract has to be performed, a certain act constitutes a good discharge; it must be a good discharge by English law.

LORD WRIGHT, M.R.: The judgment which I am about to read is the judgment of the court which consisted of SLESSER and ROMER, L.JJ., and myself.

The appeal in this case is against a judgment of BRANSON, J., who has decided against the suppliants, who are the holders of a bond for 1,000 dollars issued by His Majesty's Government, dated Feb. 1, 1917, and styled "A twenty-year 5½ per cent. Coupon Gold Bond payable Feb. 1, 1937." The learned judge has held that the contract contained in the bond was to be deemed to be an English contract, though actually made in America; he has decided against the suppliants' petition on the ground that the contract was one to be performed in the United States by the payment of the principal and interest in gold coin. By the law of the United States as from the year 1933 such a payment was unlawful, and he has accordingly dismissed the petition on the ground that an English court will not enforce the performance of acts in a foreign country in which those acts are contrary to the law of that country. The appellants, while accepting the position that the contract is to be deemed to be an English contract, have contended that the obligations under the contract are not to pay in specie in gold, but that the reference to payment in gold coin is inserted as a measuring rod or measure of liability, and that there is nothing in the recent law of the United States which makes it unlawful to pay the full amount provided for by the terms of the bond, according to the construction for which they contend. It was agreed during the course of the proceedings before BRANSON, J., that the court should not occupy itself with the question

of the technical form of the proceedings. Both parties asked the court to make a declaration which would determine the rights of the parties. We therefore do not think it necessary to examine the original form of the petition or its subsequent amendment. The question before us is : What is the true meaning of the contract ? The Attorney-General in the trial before BRANSON, J., said he was not before the court on any technicality and invited the judge to give his view as to the rights of a bondholder on presentation of the coupons, or the bonds, in New York, while the United States of America legislation remains as it is at present. We follow the course which he proposed. The bonds were issued in three denominations, 1,000 dollars, 500 dollars and 100 dollars. So far as the principal sums are concerned, the provisions are identical, except as to amount, and the same is true in regard to the coupons. There is, however, a special point on the form of the coupon depending on the precise amounts of dollars and fractions of dollars which are payable. The bond is an engraved document which has at the top a symbolic figure and on each side of the symbolic figure is the sum of 1,000 dollars (to take that amount) engraved in a decorative form. Then it is headed :

The Government of the United Kingdom of Great Britain and Ireland twenty-year $5\frac{1}{2}$ per cent. Coupon Gold Bond payable Feb. 1, 1937,

and the operative part proceeds as follows :

The Government of the United Kingdom of Great Britain and Ireland (hereinafter termed "obligor") for value received promises to pay to bearer, or, if this bond be registered, then to the registered holder thereof, the sum of One Thousand dollars on Feb. 1, 1937, and to pay interest on such principal sum at the rate of five and one-half per cent. ($5\frac{1}{2}\%$) per annum, semi-annually, on Aug. 1 and Feb. 1 in each year, until such principal sum shall be paid, but only upon presentation, and surrender of the coupons or such interest hereto attached as severally they mature. Such principal sum and the interest thereon will be paid at the option of the holder, either in the City of New York, State of New York, United States of America, at the office or agency which will be maintained in the said City by the obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard weight and fineness existing Feb., 1917, or in the City of London, England, in sterling money at the fixed rate of $\$4.86\frac{1}{2}$ to the pound. Payment at either place aforesaid will be made without deduction from either such principal or interest for any British taxes, present or future. This bond will not be redeemed prior to the due date thereof above specified.

Then there is a provision for the registration of the bond, as to the principal sum, and there are consequential provisions if the holder is registered. The back of the bond is headed with the name of the Government of the United Kingdom of Great Britain and Ireland, and then appears the figure of 1,000 dollars in a decorative setting. Then there follow the words :

Twenty-year $5\frac{1}{2}$ per cent. Coupon Gold Bond payable Feb. 1, 1937, interest payable Feb. 1 and Aug. 1. Principal and interest payable at the option of the holder in New York or London.

There were attached to the bond a series of coupons each for the appropriate amount of half-yearly interest at $5\frac{1}{2}$ per cent. per annum ; for instance in the case of a bond for 1,000 dollars the coupon is for 27.50 dollars, which involves a fraction of a dollar. The coupon

promises to pay to bearer, at the office or agency which for such purpose will be maintained by the Government in the City of New York, United States of America, twenty-seven and 50/100 dollars gold coin of the United States of America, or, at the option of the holder, in London, England, in sterling money at the fixed rate of $\$4.86\frac{1}{2}$ to the pound, payment at either place being made without deduction for British taxes present or future, being six months' interest on the twenty-year $5\frac{1}{2}$ per cent. bond of the Government.

There was evidence that \$1 gold pieces were only coined in small numbers for a short period many years ago, and there was no gold coinage of any amount at any time of less than 1 dollar.

The loan was duly subscribed, and by Feb. 7, 1919, there remained outstanding twenty-year bonds in the form which I have stated—of which the suppliants held one—amounting in all to 143,587 million dollars in the three denominations respectively which I have stated. It is not necessary to refer to the actual circumstances under which the loan was first advertised and then accepted. The loan was originally in one year and two year convertible gold notes. An advertisement had been issued and had declared that principal and interest were to be payable at the office of J. P. Morgan & Co., and that on notice the one or two year notes were to be convertible into bonds such as those which I have described. The advertisement was signed by a number of banks and issuing houses in the United States, and the subscription books were to be opened at the office of J. P. Morgan & Co., and the amounts due on allotment were to be payable at the office of J. P. Morgan & Co. in New York funds. In or about July of 1933 the larger proportion of the outstanding bonds were discharged under an arrangement proposed by the British Government and accepted by the bulk of the bondholders. At the time of the arrangement the Court of Appeal in England had held in the case of *Feist v. Société Intercommunale Belge D'Électricité* (1) a judgment to which we refer later, that a contract providing that a debt should be discharged by a payment in gold coins could be discharged by payment in bank notes for the nominal amount. It was not then admitted that that decision governed the construction of the words in question, but all the bondholders except those representing 15 million dollars accepted an arrangement under which they were to receive until the date of maturity interest at $2\frac{1}{2}$ per cent. instead of $5\frac{1}{2}$ per cent. per annum, and that instead of each bond of 1,000 dollars then worth at par £206, they should receive a bond to the value of £260. The suppliant is a bondholder who did not fall in with this arrangement, and the petition of right was eventually presented to determine what was the true construction of the bond.

The first question which has to be decided is what is the proper law of the bond. The loan was contracted in the United States; it was issued at the office of the New York bankers, Messrs. J. P. Morgan & Co. The money lent was lent in dollars, and if the bonds were registered at all, they were to be registered in New York and to be transferable by registration there. According to what may be described as the principal option, namely, that principal and interest should be discharged in New York, its performance was to be in the United States of America. Under these circumstances on the principles generally applied in the law of contracts it would naturally be held to be an obligation, the intention of which was that it should be governed by the law of the United States or the law of New York. The learned judge, however, has rejected that conclusion, and we are in agreement with his decision that the proper law of this contract is the law of England. We base our conclusion—as did the learned judge—on the decision of LORD ROMILLY, M.R., in *Smith v. Weguelin* (2), in which he laid down the principle that where a government enters into a contract of loan in a country foreign to itself, it must be held exceptionally to the general rule that the contract is to be governed by the law of the country of the government and not the law of the place where the contract was made or by the law which would generally be applied in a transaction between private persons. LORD ROMILLY, M.R., at pp. 212 and 213, said this :

It is, in my opinion, a complete misapprehension to suppose, that, because a foreign government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever may be the bondholders. Suppose a French or Belgian company residing in *Paris* or in *Brussels* instruct their agent in *London* to subscribe for some of these bonds, is the contract between the Peruvian Government and a French company or between the Peruvian Government and a Belgian company to be regulated by the English law, because the contract is made by their agents in *London*, or are the contracts to vary according to the domicile of the subscriber to the loan? If the French Government should negotiate a loan on certain specified terms, whether negotiated in *Brussels*, in *London*, or in *Paris*, the same law must regulate the whole, and that law is the law of *France*, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So, if the English Government were to negotiate a loan in *Paris* or in *New York*, the English law must be applied to construe and regulate the contract.

That statement of principle was approved by LORD SELBORNE in *Goodwin v. Roberts* (3), at p. 494. It is true that the principle so laid down was not in either case essential to the decision of the matter, either before the Chancery Court or the House of Lords. It was also pointed out that *Smith v. Weguelin* (2) is not cited as an authority for the particular proposition in the English works of authority on the Conflict of

Laws, such as those by the late Professor Dicey or by the late Professor Westlake. It is, however, cited by Professor Beale in his work on the Conflict of Laws. At p. 1102 of the edition of 1935, volume 2, that learned author states as part of the law of England on this point that :

when a foreign government is a party to a contract, the law of such government is applied,

and he quotes *Smith v. Weyuelin* (2). We agree with the learned judge that we ought to follow this authority and apply it in the present case. There are special features which exist in the case of a contract by a government which may well make it the proper inference that contracts into which they enter are to be governed by the law of that government. Any such contract can only be put in suit against the government, if at all, in the courts of their own country, and though it is true that the government may submit to the jurisdiction of a foreign court either by itself bringing an action or by accepting service of proceedings in that foreign court and waiving its immunity, still any such course is entirely at the discretion and the volition of the government, and that being so, the court is entitled to infer that the intention of the contract is that it should be governed by the law of the government in question. As an analogy may be cited cases where the parties to a contract have agreed to submit possible disputes under it to a forum in a particular country. In such cases the inference of intention is that the law of that country shall govern the contract : see *N.V. Kwik Hoo Tong v. Finlay* (4), especially the observations of VISCOUNT DUNEDIN, at p. 608. Applying these principles to the present case, we agree with BRANSON, J., that the law of the bonds in question is the English law.

It is on the question of what is the true construction of the contract on the basis of English law that we find ourselves in disagreement with the learned judge. The question of the construction of what is called the gold clause in a contract involving payment of money, in particular under bonds and obligations such as those in question, has been the subject recently of a number of decisions. In regard to an English contract the governing decision must be that of the House of Lords in *Feist v. Société Intercommunale Belge D'Électricité* (1). The same principles of construction have been applied by the Supreme Court of the United States in the case of *Norman v. Baltimore & Ohio Railroad Company* (5), and, as we think, in other cases before that court. It has also been applied in decisions of the Permanent Court of International Justice sitting at The Hague, which are reported in the publications of that court, Serie A ; in particular we may refer to judgment No. 14, concerning the payment of the Serbian Loans, reported in that volume at p. 5. The uniform effect of these judgments as we read and understand them is that the gold clause has not the effect of constituting the

contract a bullion contract or even a money contract requiring payment in specie or in the specific gold coin mentioned. The reference to the gold dollar or the gold franc, or whatever the unit of account may be, is not intended to define a mode of payment, but to fix a measure of value. To quote the language of the Supreme Court of the United States in *Norman's case* (5), at p. 302 :

the gold clauses now before us were not contracts for the payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars. We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed,

or, as the Supreme Court said in *Perry v. United States* (6) at p. 348 :

We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment.

But for an English court considering an English contract, the governing authority is the decision of the House of Lords in *Feist's case* (1). The judgment of the House was given by LORD RUSSELL OF KILLOWEN, with whom the other members concurred. In that case the terms which provided for the payment of the amount of the bond, £100, were contained in clause 1, at p. 166 of the report :

£100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on Sept. 1, 1928.

There was a similar provision as to the payment of the interest, and in clause 4 it was provided that the bond was to be

one of an authorised issue of bonds of the company of an aggregate principal amount not exceeding £500,000 in sterling in gold coin of the United Kingdom at any one time outstanding.

The coupons which related to the interest at $5\frac{1}{2}$ per cent. payable half-yearly, contained a provision that the sum of £2 15s. was to be paid in sterling in gold coin of the United Kingdom, of or equal to the standard of weight and fineness existing on Sept. 1, 1928.

The bond in that case contained in each of the two top corners a symbol and the figure of £100 in an ornamental border. LORD RUSSELL OF KILLOWEN, in his judgment, came to the conclusion that it was apparent from the contents of the document that the parties did not use the words of the gold clause in accordance with the literal meaning which they would bear if considered apart from the rest of the document and the circumstances which surrounded its execution, in particular because the interest could not be paid in gold coin of the United Kingdom. He also arrived at the same conclusion by pointing out that according

to its strict reading the coins tendered would all have to be coins of the exact standard of weight and the exact standard of fineness specified in the Coinage Act, 1870, without any remedy, allowance or variation from the standard. He goes on to say, at pp. 172 and 173 :

I therefore ask myself this question. If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it. In my opinion, the purpose can be discerned from clause 4, in which the reference to gold coin of the United Kingdom is clearly not a reference to the mode of payment but to the measure of the company's obligation. So too, condition 6, which again is a clause not directed to mode of payment, but to describing and measuring liability, shows that the words are used as such a measure. In just the same way I think that in clauses 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness not as being the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained. I would construe clause 1 not as meaning that £100 is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of £100 if paid in a particular way, in other words, I would construe the clause as though it ran thus (omitting immaterial words): "pay . . . in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on Sept. 1, 1928." I would similarly construe clause 2. I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some of its provisions. Thus, for instance, the half-yearly payments in accordance with the coupons (which are described in clause 2 as equal) may in fact not be equal. But I prefer this to the only other alternatives—namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear.

His Lordship also quotes a passage from the decision of the Hague Court, which has been already mentioned, and the way in which he introduces the quotation is very significant. He says :

I do not, I need hardly say, treat these as in any way binding upon us. Indeed the relevant facts and words under consideration were very different from those which have been under consideration here. I would like, however, to cite one passage as stating happily and succinctly the considerations and principles which have influenced me in arriving at the conclusion which I have reached. It occurs in the judgment dealing with certain Serbian loans (18) stated to be payable both as to principal and interest in gold. It runs thus: "As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word 'gold' cannot be ignored, the question is: What must be deemed to be the significance of that expression? It is conceded that it was the intention of the parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the parties were not

content to use simply the word 'franc,' or to contract for payment in French francs, but stipulated for 'gold francs.' It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it."

We particularly refer to this part of his Lordship's judgment because it illustrates a matter of very considerable importance. The gold clauses in bonds and obligations are very common in international contracts and in every part of the world. It would be a very serious matter if contracts of that character were treated by particular courts as having a different meaning, in the absence of language and surrounding circumstances of a decisive character compelling that conclusion. The construction of such commercial clauses ought to be as far as possible uniform, unless there are the strongest considerations involving a different construction.

The learned judge has found in the present case that there were features which entitled him, or required him, to distinguish the bond in question from that before the House of Lords in the case I have just cited. In particular he relies on a difference in the circumstances surrounding the issue of the bond in *Feist's* case (1) and those surrounding the issue of the bond now in question. He says :

I am satisfied upon the evidence that the gold clause was inserted in that limb of the provision as to payment which relates to payment in New York, not with any special reference to any possibility of the United States of America going off the gold standard, but as a customary clause in use in similar contracts in the United States of America for some 47 years, the practical operation of which was fully understood. There is no need to strain any of the language of the document, unless it be straining it first to imply a term that any small sum for the payment of which no gold coin was available should be discharged in silver or nickel coins of legal tender and to construe the expression "gold coin of the standard of weight and fineness existing in February, 1917," as intending gold coin which would pass as legal tender under the statutes enacting that standard. I conclude, therefore, that the obligation of this bond is to pay in the United States in gold coin of that country equal in weight and fineness to that which was legal tender in Feb., 1917, and where the sum is too small to be so paid, then in silver or nickel coins of legal tender there.

We are unable to concur in that view of the position. We cannot find any substantial distinction between the language of the bond in question and that which was being considered in *Feist's* case (1). It is true that at the date of the loan, 1917, the United States were on the gold standard and that the paper dollar was convertible into gold. The evidence of the American lawyers before the court was that for practicable purposes at that time no one drew any distinction between the paper dollar and the gold dollar, and the evidence was that in practice even in contracts containing gold clauses, which were very common in long term obliga-

tions, gold would not be tendered in payment. After the Civil War there had been in America very serious depreciation of the currency, and there seems to be no doubt that the whole object of inserting the gold clauses originally had been to provide against the risk of any possible future depreciation in the currency. It was for that reason that such clauses were common in the United States. Such depreciation in the currency could well be provided for by a clause the effect of which was that if the currency were depreciated below the value of the standard weight and fineness of the gold dollar as at the date at which the debt was contracted, the obligation should be construed as an obligation to pay, when the time for payment came, such a number of the dollars then current as would be equivalent in gold value to the dollars stipulated in the gold clause. In that way the possible depreciation of the dollar would be provided for, and the lender would not be prejudiced by the devaluation in the currency ; in other words, to apply that to the existing facts of this case, the facts are that at the present time the equivalent of 1,000 gold dollars—taking their value as it was in 1917 while the dollar was convertible into gold and before it was devalued as it was in 1933—is 1,690 dollars, and it is that amount to which the suppliants contend they are entitled, as matters now stand, in discharge of the obligation to pay 1,000 dollars in gold coin of the United States of the standard of weight and fineness existing in Feb., 1917. The obligation thus becomes an obligation of an amount which can only be fixed from time to time by ascertaining the gold value of the existing paper currency. That, however, is an ordinary operation in finance and presents no difficulty. The effect of this construction is to secure the lender against the risk of the dollar depreciating. We have already quoted the view of the Supreme Court of the United States to the effect that such was the purpose of these clauses. The position is stated very succinctly by STONE, J., concurring with the majority, in *Perry's case* (6) at p. 538 in the following terms :

I do not doubt that the gold clause in the Government bonds, like that in the private contracts just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause ; *Feist v. Société Intercommunale Belge D'Électricité* (1) ; *The Case of the Serbian Loans* (18) and *The Case of the Brazilian Loans* (19),

and he gives the references. Then he proceeds :

In the absence of any further exertion of governmental power, that obligation plainly could not be satisfied by payment of the same number of dollars, either specie or paper, measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our internal economy at the due date.

In the gold clause cases the dissenting minority shortly expressed the same opinion at p. 366, in an opinion which was common both to *Norman's case* (5) and *Perry's case* (6) :

That the holder of one of these certificates was owner of an express promise

by the United States to deliver gold coin of the weight and fineness established by statute when the certificate issued, or if such demand was not honoured to pay the holder the value in the currency then in use, seems clear enough. This was the obvious design of the contract.

We find it impossible to accept the construction adopted by the learned judge, that the bonds in question were bonds for payment in gold coin and in gold coin alone. In our opinion, the view most favourable to the suppliants that could be accepted is that expressed in the opinion last quoted, which would give the holder the right to claim either the gold coin itself, or, failing that, the value in the currency then in use; if that view were accepted, the contract would be performable in either mode. We prefer to accept the construction we have stated, on the authority of *Feist's* case (1), but even on the view just stated, the difficulty which led the learned judge to come to the decision which he did would not arise. His conclusion was that as the contract was performable by the delivery of gold coin alone, except as regards the small amounts payable under the coupons, it could not be performed in the United States without breaking the law as established by the Acts of Congress in 1933.

It has been accepted by both sides that in and from 1933, when the United States went off the gold standard, it has been unlawful in the United States to make or receive payment of a debt in gold, and the learned judge has accordingly held, applying his view of the bond, that its obligation could only be discharged by a payment in gold and that such payment was unlawful now in America and could not be enforced in this country. If the premise is right, that conclusion undoubtedly follows. We need only refer to one authority for the well known proposition that an English court will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed. That authority is *Ralli Brothers v. Compania Naviera Sota y Aznar* (7). The question there was as to the amount of freight which could be claimed by a Spanish shipowner under an English charterparty which was to be construed according to English law. Part of the freight was to be paid by the charterers in Spain. When the vessel arrived and the balance of the freight was payable in Spain, a law had been passed in Spain prohibiting payment of freight above a certain amount per ton. The charterparty freight was at a much higher rate, and it was held that so much of the contract as required payment of freight in excess of the legal amount was invalid and could not be enforced against the charterers. LORD STERNDALÉ, M.R., at p. 291 quoted with approval a passage from Professor Dicey's work on the Conflict of Laws, 2nd Edn., at p. 553, where he says:

A contract . . . is, in general, invalid in so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed.

We accept that principle, just as the learned judge did. Indeed, it is too well established now to require any further discussion. It is based on the principle that it is contrary to the comity of nations that the court of one country should seek to enforce the performance of something in another country which is forbidden by the law of that country. But according to the construction of the contract which we accept, there is no obligation to pay in gold coin. The reference to the gold coin of the United States is merely in order to fix a measure of value or a scale of payment which will apply where the currency depreciates or is devalued, but the payment of that amount can lawfully and properly be made in the currency of the day in the country when the obligation falls due. If that is the true construction of the bond then we think it is clear that no question of illegality by the law of the United States can arise. It is true that in 1933 there was a resolution of Congress, the terms of which have been referred to in argument and require consideration. The resolution in question is described as a joint resolution approved by Congress on June 5, 1933, and it is described as :

To assure uniform value to the coins and currencies of the United States. [It proceeds]: Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction, and whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts, Now, therefore, be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled that (a) every provision (contained in or made with respect to any obligation) which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy ; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorising obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

The evidence of the United States lawyers is clear and unanimous that that joint resolution, which has the force of law, though it provides that :

every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts,

does not make it unlawful for a debtor to discharge his full obligation.

The distinguished lawyers who gave evidence were all agreed on that point; the resolution disentitled the creditor to claim more than the amount provided by the resolution, but if the debtor thought fit to satisfy the obligation according to its full and original tenor, there was nothing to prevent him from tendering that amount to the creditor and nothing to prevent the creditor from accepting that amount. All that it was said was that the difference between the obligatory amount and the original contract amount could not be regarded as other than a gift. However regarded, it follows clearly from that view of the resolution that there would be nothing unlawful under the law prevailing at the place of payment to render it unlawful for the British Government to pay over the full amount to its creditors under the bond. That, indeed, is the view accepted by the learned judge on that hypothesis. If the construction of the bond which we accept, but which he rejected, is the right construction, then the rule in *Ralli Brothers v. Compania Naviera Sota y Aznar* (7) does not apply. It only applies, in our opinion, if the act in question is prohibited by the foreign law.

It was contended that as the resolution in question stated a ground of public policy which would be contravened by payment in full under the gold clause in the contract, that therefore the English court should not give a judgment which would have the effect of running counter to that public policy of the United States. No authority was cited for that proposition. The statements of the law on this point have all proceeded on the basis that the term of the contract under consideration, if the English court is to refuse to enforce it, must be one which is contrary to and forbidden by the law of the country. It is clear that the law of the United States does not prohibit a creditor honouring his promise to discharge according to the full measure of the gold clause, though he cannot be compelled, since the joint resolution, to do so.

We have so far been dealing only with that part of the bond which relates to a payment in the United States of America. It is necessary to refer to the alternative option which the holder has of requiring payment in the City of London, England, in sterling money at the fixed rate of \$4.86½ to the £. In our opinion if that option is exercised the holders' rights are fixed by that part of the clause which begins "or in the City of London, England, at the fixed rate of \$4.86½ to the £."; in other words, the earlier part of the paragraph which relates to gold coin of the United States of America is inapplicable. The two methods of payment are alternative and are exclusive of each other. That, we think, appears from the form of the paragraph:

Such principal sum and the interest thereon will be paid at the option of the holder, either—

and then come the words which define the scope of the obligation if the payment is to be made in America, and then follow the words which

define the scope of the obligation if the option is exercised for payment in the City of London. To the latter option the words "in gold coin of the United States" and so forth, do not apply at all, and therefore if the London option is exercised, what the holder is entitled to is such an amount of sterling as represents the amount of the bond, say, 1,000 dollars. This construction of the London option has the effect of rendering that option irrelevant to the construction of the New York option. The two options, in our opinion, are entirely independent. Each provides for the payment of a particular sum in a particular place in a particular way. According to the New York option, the obligation is to pay the equivalent of 1,000 gold dollars in the precise form stated. In the London option the obligation is to pay 1,000 dollars according to the measure of value in sterling indicated; the gold clause is not imported in any way into the London option.

For all these reasons we think that the appeal ought to be allowed and that it should be declared that the holders are entitled to be paid at the appropriate dates both on the coupons and on the principal obligation: (a) if the New York option is exercised, such an amount in dollars as is equivalent to the value in currency at that time of 1,000 gold dollars specified in the obligation; (b) if the London option is exercised, the holders are entitled to be paid the equivalent of 1,000 dollars at the fixed rate of \$4.86½ to the £. in sterling money of England. The same principles apply *mutatis mutandis* in the case of the interest payments.

Then as to the form of the declaration learned counsel will agree on the precise form and submit it to this court. The appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors: *Allen & Overy* (for the appellants); *Treasury Solicitor* (for the Crown).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Re PARENT TRUST & FINANCE COMPANY, LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
October 27, 28, 1936.]

Estoppel—Estoppel by deed—Effect of recital.

Guarantee—Guarantee of secured loan—Whether security for loan a condition precedent—Usual clause for guarantors to be liable as principal debtors.

By a deed of guarantee for the repayment of a loan of £250,000 and interest, which recited that the lenders had at the request of the guarantors advanced to the borrowers £250,000 upon security of a charge on certain shares, the guarantors covenanted, in the event of the borrowers failing to make the repayments provided for, forthwith to repay to the lenders the said sum of £250,000 with interest at the rate of 8 per cent. per annum. The deed further provided that whatever the position between the lenders and the borrowers, the guarantors should be liable for all moneys due as principal debtors and they were not to be released from liability by reason of time being given by the lenders or by their taking no steps to protect their securities. The shares above mentioned were at no time secured and had not in fact been issued. Upon default in repayment of part of the loan the liquidator of the guarantors rejected the proof by the liquidators of the lenders, contending that the security of the charge on the shares was a condition precedent to the guarantee:—

HELD: (i) upon a proper construction of the deed of guarantee, the contention of the liquidator of the guarantors was correct, and the guarantors were not bound by the guarantee. The existence of the shares was the basis of the contract of guarantee and this was not affected by the clause making the guarantors liable as principal debtors.

(ii) the guarantors were not bound by the recital in the deed and were not estopped from setting up the facts relating to the shares.

[EDITORIAL NOTE. The decision on this appeal turns upon a rather different view of the case than that taken in the court below. There it became rather a question of construction, but the Court of Appeal have taken as the main feature of the case that the whole contract was founded on the basis that the shares given as security in fact existed, and this being proved untrue, the contract of guarantee falls to the ground as being without any foundation at all. The existence of the shares in other words was a condition precedent to the contract. It was also strenuously but unsuccessfully argued that the recital of their existence acted as an estoppel.

AS TO ESTOPPEL BY RECITAL, see HALSBURY, Hailsham Edn., Vol. 13, pp. 457-459, paras. 514-518; and FOR CASES, see DIGEST Vol. 21, pp. 252-266, Nos. 769-856.]

- (1) *Bonser v. Cox* (1841), 4 Beav. 379; 26 Digest 72, 516.
- (2) *Evans v. Bremridge* (1856), 8 De G. M. & G. 100; 26 Digest 72, 517.
- (3) *Coyte v. Elphick* (1874), 22 W.R. 541; 26 Digest 73, 525.
- (4) *Bowes v. Shand* (1877), 2 App. Cas. 455; 17 Digest 244, 582.
- (5) *Stroughill v. Buck* (1850), 14 Q.B. 781; 21 Digest 252, 771.
- (6) *Young v. Raincock* (1849), 7 C.B. 310; 21 Digest 287, 1018.
- (7) *Re Agricultural Wholesale Society*, [1929] 2 Ch. 261; Digest Supp.
- (8) *Re Strand Music Hall Co., Ltd., Ex p. European & American Finance Co., Ltd.* (1865), 3 De G.J. & Sm. 147; 17 Digest 263, 756.
- (9) *Re Fireproof Doors, Ltd., Umney v. Fireproof Doors, Ltd.*, [1916] 2 Ch. 142; 10 Digest 742, 4630.

(10) *Lainson v. Tremere* (1834), 1 Ad. & El. 792; 21 Digest 254, 790.

(11) *Bowman v. Taylor* (1834), 2 Ad. & El. 278; 21 Digest 257, 810.

(12) *Carpenter v. Buller* (1841), 8 M. & W. 209; 21 Digest 280, 959.

APPEAL AND CROSS-APPEAL from an order of BENNETT, J., made on Mar. 20, 1936 (reported [1936] 1 All E.R. 641).

The Mercantile Marine Finance Corporation, Ltd., lent to Austin Friars Trust, Ltd., a sum of £250,000 in accordance with the terms of a deed executed on Mar. 20, 1929. The deed provided that the borrowers would repay the loan on June 20, 1929, with interest at 8 per cent. per annum, or at a higher rate if the bank rate should be increased; they charged certain shares mentioned in a schedule as security for the repayment of the loan and interest or of any judgment which might be recovered under the deed, and appointed the lenders their attorney to sell these shares or any of them in the event of default of repayment of the loan on the specified day, and to receive the purchase money; and they covenanted that they would not create any prior charges, debentures or other encumbrances on their assets while the loan should be owing on the security of the deed. The schedule named the shares as follows:

Iron Industries, Ltd.: 275,000 shares of £1 each, fully paid.

Retail Trade Securities, Ltd.: 50,000 ordinary shares of 10s. each, fully paid.

Corporation and General Securities, Ltd.: 25,000 ordinary shares of £1 each, fully paid.

They held a sealed document which purported to be an allotment letter, but which was actually not a document of title relating to any shares in Iron Industries, Ltd. By another deed executed on the same day the Parent Trust & Finance Company, Ltd., made an agreement with the Mercantile Marine Finance Corporation, Ltd., to guarantee the loan. The deed recited:

Whereas the corporation have at the request of the guarantors advanced to the Austin Friars Trust, Ltd. (hereinafter called the borrowers) the sum of two hundred and fifty thousand pounds on the security of a charge dated the twentieth day of March, one thousand nine hundred and twenty-nine, on the shares particulars of which are set out in the schedule hereto—

and set out the agreement between the parties as follows:

In consideration of the corporation having at the request of the guarantors advanced to the borrowers the said sum of two hundred and fifty thousand pounds the guarantors hereby covenant with the corporation that in the event of the borrowers failing to repay the said sum of two hundred and fifty thousand pounds and interest as provided in the said charge on the twentieth day of June next forthwith to repay to the corporation the said sum of two hundred and fifty thousand pounds together with all interest due and to become due thereon or on any judgment which may be recovered thereunder at the rate of eight per cent. per annum. Provided however that the interest rate of the Bank of England at any time be

increased from the amount prevailing at the date hereof whilst the said loan or any part thereof is outstanding then the interest secured hereby is to be increased by a similar amount and that whatever may now or hereafter be the position between the borrowers and the guarantors as sureties the guarantors shall be considered and be liable as principal debtors for all moneys secured by the said charge and that the guarantors and their successors shall not be released nor shall their liability hereunder be affected by time being given to the borrowers or by the corporation omitting or neglecting to protect the security created hereby or by the said charge or by any other arrangement or dealing between the borrowers and the corporation in reference to the said security or by any other act omission matter or thing whatsoever whereby but for this provision the guarantors as sureties would have been so released.

On June 21, 1929, Austin Friars repaid Mercantile Marine £50,000, and on that date Parent Trust executed a covenant under seal continuing their guarantee for the reduced sum of £200,000 in consideration of Mercantile Marine extending, at their request, the time for repayment by Austin Friars to Aug. 20, 1929. On Aug. 21, Austin Friars repaid £50,000 more and the guarantors entered into another similar covenant extending the time to Oct. 20, 1929. On Sept. 24, 1929, Austin Friars went into compulsory liquidation and Mercantile Marine lodged a proof of debt for £150,000 and interest. Mercantile Marine and Parent Trust both went into liquidation, and the liquidators of Mercantile Marine proved for the debt, claiming £184,685 *ls. 1d.* balance and interest. The liquidator of Parent Trust rejected this claim in these terms :

To the extent of the entire claim, on the ground that the contract of guarantee of Mar. 20, 1929, by virtue of which the said claim purports to arise was made subject to the condition or was entered into upon the representation that the loan therein referred to was secured by a valid and effectual charge upon the shares mentioned in the schedule to the said contract of guarantee, whereas in fact no such charge then existed or has ever existed upon the 275,000 shares of £1 each of Iron Industries, Ltd., mentioned in the said schedule, inasmuch as the said shares were never issued or never validly issued, and that therefore the guarantee comprised in the said guarantee is not and never has been binding upon or is voidable by the company, and was in fact avoided by a letter to you from the company dated Dec. 16, 1929. Further, the fact that no such charge as aforesaid existed upon the said shares was unknown to the company at the date of the covenants which the company entered into on June 21, 1929, and Aug. 21, 1929, respectively and which are referred to in your claim, and such covenants accordingly are not and never have been binding upon the company.

The liquidators of Mercantile Marine then took out a summons against Parent Trust applying to the court for an order that the rejection of their proof be reversed or varied. BENNETT, J., heard the application on Mar. 19, 1936, and reversed the decision of the liquidator of Parent Trust.

The respondent to the summons, the liquidator of Parent Trust, appealed against the first part of the judgment, which held the guarantor liable under the contract. The applicants, the liquidators of Mercantile Marine, cross-appealed against the second part of the judgment, which

confirmed the rejection of proof in respect of the interest. The two appeals were heard together, but the cross-appeal did not fall to be decided.

Gavin Simonds, K.C., and *C. R. R. Romer* for the liquidator of Parent Trust & Finance Co., Ltd.

Sir William Jowitt, K.C., *D. N. Pritt, K.C.*, and *Wilfrid Hunt* for the liquidators of Mercantile Marine Trust, Ltd.

Simonds, K.C. : This is an instance of a party to a contract being called upon to fulfil a contract different from that into which he entered. The difference is between an obligation to implement a guarantee of a well secured loan, and of a loan which is not secured. The guarantors requested Mercantile Marine to make an advance upon the security of a certain charge, and Mercantile Marine did not do so. The guarantors are obliged to repay the "moneys secured by the said charge," but there is no such charge. Admittedly, the contract contains a clause usually found in a deed of suretyship, providing against the surety being released if there is an alteration behind his back of the contract between the principal debtor and the creditor ; but there is all the difference, in law and in business, between the case in which there is a security and the creditor may deal as he thinks fit with the subject matter of the charge, and such a case as the present, in which there never was any security. The guarantor of a secured loan who pays it off is subrogated to the rights of the creditor. The present guarantor is called upon to implement a guarantee of a loan for which there is not the security that was contemplated and in respect of which therefore he cannot be subrogated to the rights of the creditor. In *Bonser v. Cox* (1) A. agreed to become surety for B. in a joint and several bond to C., and B. agreed to give a counter-bond of indemnity to A. The bond to C. was executed by A. only, and B. executed the counter-bond to A. ; and it was held that A. was released from his suretyship, because he had bargained for a joint and several bond and was in fact left alone, so that he was called upon to do something different from that which he had undertaken. The difference in the present case is even greater.

In *Evans v. Bremridge* (2) a surety joined in a covenant on the understanding that an intended co-surety, who was purported to be made a co-covenanter, would execute the deed contained in the covenant. He failed to do so and the covenantees nevertheless advanced the money purported to be secured by the deed ; held, that the surety who executed the deed was entitled to an injunction against proceedings at law based on it. In those cases equity relieved the surety from his obligation at law ; here the guarantor is not even bound in law. In *Bowes v. Shand* (4) LORD BLACKBURN said, at p. 480 :

it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind.

In *Coyte v. Elphick* (3) several persons were parties to one deed and the creditors and sureties were misled by an absent principal; although the deed contained a clause by which the surety undertook the liability of a principal, he was held to be released. The learned judge ignores altogether the difference between the case of a surety who guarantees a secured loan, notwithstanding that it may be part of the bargain between the parties that the contract between creditor and debtor may be altered without the surety being released, and the case where the surety never has any security at all.

There is no estoppel here. If a deed recites that the vendor is owner in fee simple of Blackacre, free from incumbrances, the purchaser is not estopped from proving incumbrances.

Jowitt, K.C.: The recital to the deed set out perfectly correctly that the Mercantile Marine have advanced a sum on the security of a charge. There was a charge, and that charge was on the security of the shares set out in the schedule. The word "charge" is used again in the operative part of the deed. The charge is a definite document and is to be distinguished sharply from the question of whether the securities which that document purports to charge are in fact validly charged by it. If one of the securities charged had been a bearer bond but the bond had been forged, the contract would not have been vitiated. There is a difference between that on which the charge is made, and the charge itself. If by a document of charge a person charges shares and hands them over without complying with some formality, the charge operates not as a charge but by way of agreement, and the person creating the charge must make good his obligation. Mercantile Marine recited that the loan was secured by a charge; they referred to the document of charge, but the reference had the same effect as if they had recited it in full. They gave no undertaking concerning the value of the charge. The operative part of the document contains a simple covenant by the Parent Trust to repay, not, as in *Coyte v. Elphick* (3), the deficiency over and above what was realised by the shares that were charged, but a specified sum—"the said sum"—in the event of its not having been paid by someone else, as principal debtors "for all moneys secured by the said charge." The only way in which Parent Trust can escape this plain obligation is by showing that it is necessary to look at the recital to see what "the said sum" is. The recital identifies the sum as one that has been advanced on the security of a charge—i.e., a piece of paper. This question is wholly different from the question of whether the shares were properly handed over. A person can execute a charge without handing over anything at all. The shares were not properly charged because Mercantile Marine did not get the shares set out in the schedule. Moreover, there is no condition to be implied here. Mercantile Marine asked Parent Trust to guarantee a given sum, being the subject matter

of a piece of paper which had passed between them and Austin Friars. It cannot be said, merely because the paper was worthless, that the sum cannot be identified. In *Re Strand Music Hall Co., Ltd.* (8), bonds which were not effective securities, were held to operate contractually and impose an obligation upon the company to give adequate security as though they had been good. In *Re Fireproof Doors, Ltd.* (9), it was held that the registration of a series of debentures protects, not only debentures of that series properly issued, but also documents purporting to be debentures of that series which, owing to some technical defect, can only be upheld as agreement for those debentures, and that it is not necessary to register these agreements separately. There is no express term in the contract, and there is no ground for implying one, that the guarantors' obligation does not relate to the money lent by Mercantile Marine to Austin Friars.

The Parent Trust are estopped, by the recital in the deed to which they were a party, from denying that the loan was secured in the way set out in that recital. Where parties have contracted upon the basis of a certain state of facts, it would be unfair and inequitable to let one of them alter those facts and thereby avoid the contract. HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 13, p. 455 *et seq.*, supports the proposition that : when a recital is intended to be a statement which all the parties to a deed have mutually agreed to admit as true, it is an estoppel of them all ; but when it is intended to be a statement of one party only the estoppel is confined to that party ; the intention is a question of construction in each case : *Young v. Raincock* (6). Estoppel by deed and estoppel *in pais* are both examples of estoppel by representation : SPENCER BOWER ON ESTOPPEL BY REPRESENTATION, p. 159 : *Lainson v. Tremere* (10), *Bowman v. Taylor* (11), *Carpenter v. Buller* (12), shows that the doctrine is confined to direct proceedings between the parties on the deed and does not extend to wholly collateral matters.

Stroughill v. Buck (5) shows that where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties, but it is a question of construction whether the recital is so intended. In that case the plaintiff could not possibly tell whether the defendant had or had not advanced money, which advance was still outstanding, yet the defendants' right and title to the various documents specified entirely depended on there being an outstanding advance ; therefore the plaintiff not only took pains to recite the fact, but also took a covenant. He alleged that there was no outstanding advance and that the defendant was never interested in the documents, and brought an action for breach of covenant. The court held that in those circumstances the recital was intended to bind one party, because the fact was material for the validity to the plaintiff of the securities upon which he advanced his money. The facts must have been entirely within the knowledge of the defendant

and not within that of the plaintiff ; also the plaintiff took a covenant from the defendant. A deed, therefore, may contain a statement which, as a matter of construction, binds one party and not both. This doctrine is equally applicable to equity.

In the present case the only facts within the knowledge of the parties were the following : the Mercantile Marine knew what the piece of paper was, but did not know that in fact it would not be completely effective ; and as a matter of construction this document records the fact that the Mercantile Marine are advancing the money at the request of the guarantor, and that which differentiates the contract of guarantee from a contract of insurance is that normally in a contract of guarantee the borrower and the guarantor make their own arrangements and then ask a third party to advance money. There is no ground for saying that the recital here comes within the doctrine in *Stroughill v. Buck* (5). This recital is not precisely within the knowledge of one party as distinct from the other, nor has one party taken a covenant from the other. These parties have agreed by the recital to a conventional state of affairs and on the strength of that state of affairs have made their arrangements. It would be infringing the principle of estoppel to allow the guarantor to deny the statement of the Mercantile Marine that they had a charge on the shares which were set out in the schedule. If one party with a knowledge of the facts refrains from communicating them to the other, the courts will not enforce the doctrine of estoppel, but where each party is dealing fairly with the other and neither knows that a fact which they are reciting is untrue, the court will not investigate the truth of the facts recited, but will hold that in the circumstances, as the recital has been put into the document in good faith and records a fact that is not in the exclusive knowledge of either party, the doctrine applies and there is an estoppel. This court should not inquire whether the charge was on the shares set out in the schedule or not.

Pritt, K.C., following for the respondents : On the general construction of the agreement, it is a document not only of charge, but a charge on three lots of shares. There was no stipulation about the value of the shares, no information about it, no covenant about it. If the appellants say that the only loan guaranteed was a loan on the security of the Iron Industries shares, they must show that the contract is not good and is not binding unless the security contains the Iron Industries shares. The Mercantile Marine do not undertake that the shares shall have any value, but as a matter of description this is a contract in which they do not undertake to do anything unless all these specific shares come validly within the transaction. This is a secured loan, for the appellants have not merely a document of charge, but one which was effective on 75,000 shares, and nobody owed a duty to provide any particular value for the shares. The appellant must show that such a fundamental difference

has taken place in the basis of the contract that he now has no concern with the contract at all, and this he has failed to do. Guarantors always run a serious risk, and the presence of these particular shares is not an essential part of the contract.

Simonds, K.C., in reply : As a matter of construction, the bargain into which the Parent Trust, as guarantors, entered was a bargain under which they guaranteed a loan secured by a charge. In truth and in fact they are asked to implement a bargain which they did not make : to pay in respect of a loan which was not guaranteed by a charge.

This recital sets out something which the Mercantile Marine have done : that they have advanced to Austin Friars £250,000 on the security of a charge on the shares the particulars of which are set out in the schedule. That is a clear statement by one of the parties to the deed of something that this party has done at the request of the guarantors. That is not a recital which binds the guarantors so that they are precluded either from showing that the money has not been advanced, or that it has not been advanced on the postulated security, for it is a statement of what others, not they, have done. The law is correctly stated in *Young v. Raincock* (6), confirmed by *Stroughill v. Buck* (5). In *Coyte v. Elphick* (3), at p. 543, BLACKBURN, J., made the interlocutory observation :

Where can you find an authority that an assertion by one party in a deed estops another ?

In a sense every statement in a deed is a statement of all the parties, but a statement of one of the parties is a statement of something which that party has done. In *Stroughill's* case (5), ERLE, J., at p. 785, said :

Is there any case in which a recital by one party of a fact within his own knowledge, on the faith of which the other party contracted, has been held to estop the latter in favour of the former ?

The guarantors entered into this bargain upon the footing of the statement that the lenders have advanced the money and have advanced it upon the security described. That very fact is stated to be the consideration for the covenant they have agreed to perform. The true principle upon which both *Coyte's* case (3), and *Stroughill's* case (5) were decided is that a recital in which the parties have agreed to a certain admitted state of facts as the basis on which they contract estops them from denying those facts, but a recital of something that one of the parties has done or is, estops only that party. The guarantor is not precluded by the recital from showing to the court by evidence that the contract he has entered into is not the contract which he is being asked to perform.

LORD WRIGHT, M.R. : I regret in this appeal to have been compelled to come to a conclusion which differs from that of the learned judge who decided the matter in the court below.

The claim is in respect of a proof in bankruptcy against the Parent Trust & Finance Company, Ltd., the appellants in this proceeding, and the proof is brought by the liquidator of the Mercantile Marine Finance Corporation. The moneys claimed are the sum of £184,685 *ls. 1d.* as the balance of moneys advanced by the respondents to a concern called Austin Friars Trust, Ltd., and interest thereon, the repayment of which was guaranteed by the above-named company. There is a subsidiary question as to the rate of interest payable, if the money is due, and as to the period in respect of which interest is claimable, for there is some dispute in respect of the latter portion of the period. These subsidiary questions, however, only arise to be determined if it is first held, as the learned judge held, that the proof ought to be admitted. The proof was based upon a contract of guarantee dated Mar. 20, 1929, in which the appellants were guarantors, and the respondents were the principal creditors, and the debt was in respect of money advanced to the Austin Friars Trust, Ltd., by the respondents. The document of guarantee is comparatively short. I shall refer to the few material passages. The first matter to be mentioned is the recital, which is in these terms :

Whereas the corporation [the respondents] have at the request of the guarantors advanced to the Austin Friars Trust, Ltd. (hereinafter called "the borrowers") the sum of £250,000 on the security of a charge, dated Mar. 20, 1929, on the shares, particulars of which are set out in the schedule hereto.

The schedule there referred to sets out the shares : Iron Industries, Ltd., 275,000 shares at £1 each fully paid ; Retail Trade Securities, Ltd., 50,000 Ordinary Shares at 10*s.* each fully paid ; and Corporation and General Securities, Ltd., 25,000 Ordinary Shares at £1 each fully paid. That being the recital, I may now state in the words of the learned judge that :

It is common ground between the parties that the loan made by the Mercantile Marine Corporation to Austin Friars Trust, the borrowers, was not secured by a charge on the 275,000 shares. Although the piece of paper with a seal upon it was handed over to the Mercantile Marine Corporation, a document which purports to be an allotment letter, in point of fact, it was not a document of title relating to any shares in Iron Industries at all.

That is common ground between the parties. The agreement proceeds :

It is hereby agreed as follows : 1. In consideration of the corporation having at the request of the guarantors advanced to the borrowers the said sum of £250,000 the guarantors hereby covenant with the corporation that in the event of the borrowers failing to repay the said sum of £250,000 and interest as provided in the said charge on June 20 next forthwith to repay—

then follow provisions as to interest, and the document goes on to provide that :

whatever may now or hereafter be the position between the borrowers and the

guarantors as sureties the guarantors shall be considered and be liable as principal debtors for all moneys secured by the said charge and that the guarantors and their successors shall not be released nor shall their liability hereunder be effected by time being given to the borrowers or by the corporation omitting or neglecting to protect the security created . . . by the said charge or by any other arrangement or dealing between the borrowers and the corporation in reference to the said security or by any other act, omission matter or thing whatsoever whereby but for this provision the guarantors as sureties only would have been so released.

The document of charge bearing the same date as the agreement of guarantee, is between the Austin Friars Trust, Ltd., and the Mercantile Marine Finance Corporation. It recites as between these parties :

The borrowers are possessed of the securities more particularly mentioned in the schedule hereto . . . and whereas the corporation have agreed to lend to the borrowers the sum of £250,000 on the conditions hereinafter mentioned.

The schedule is the same as in the agreement of guarantee. The document of charge goes on to set out :

1. In consideration of the sum of £250,000 now advanced by the corporation to the borrowers (the receipt whereof the borrowers hereby acknowledge) the borrowers hereby agree to repay the said loan of £250,000 on June 20 next, together with the interest thereon from the date hereof or on so much thereof as shall for the time being be outstanding at the rate of 8 per cent. per annum provided however that should the interest rate of the Bank of England at any time be increased from the amount prevailing at the date hereof whilst the said loan or any part thereof is outstanding then the borrowers shall pay to the corporation an equivalent increased rate of interest. 2. The borrowers hereby charge the said securities mentioned in the schedule hereto as security for the repayment of the said advance and the interest thereon or on any judgment which may be recovered hereunder and hereby irrevocably appoint the corporation and also every director for the time being of the corporation and each of them separately the attorneys and attorney of the borrowers in the name and on behalf of the borrowers to sell the said securities or any of them in the event of default being made in repaying the said loan on June 20 next or any other moneys which may become due hereunder and to receive the purchase money in respect of the sale of the said securities and the receipt of the corporation shall be sufficient discharge therefor. 3. The borrowers hereby covenant that they will not create any prior charges debentures or other incumbrances on their assets whilst the said loan of £250,000 or any part thereof shall be owing on the security hereof.

It gives powers enabling the lenders to sell the securities or any of them, in the event of default being made in repaying the loan. On two subsequent dates the loan was varied. On June 21, 1929, £50,000 was paid off, leaving £200,000 outstanding, and on Aug. 21, 1929, a further £50,000 was paid off, leaving the loan outstanding at the sum of £150,000, which it was at the date of the liquidation. I will read a few words out of the second document. The two were in the same form. It states that in consideration of the time for repayment being extended, the Parent Trust and Finance Company covenant :

that our guarantee to you dated Mar. 12 last shall remain in full force and effect in every respect for the reduced sum of £150,000.

I read that as meaning that the original contract is to remain unaffected, except in the two respects in which the amount has changed, and that the time for repayment was extended. The guarantors, the appellants, have accepted that position. I attach no other importance to these two documents, both addressed to the Mercantile Marine Finance Corporation, the lenders, by the guarantors. The question is : What is the position in view of the admitted fact that the 275,000 fully paid shares at £1 each of Iron Industries, Ltd., were never available as security, in other words, that the money which was lent and the money which was guaranteed, although it was said to be lent and guaranteed on security of that charge, had not in fact that security at all, because of the facts which I have just stated ? It was said on the one hand that all the agreement of guarantee requires and contemplates is, that there should be a document—a piece of paper—as referred to in the agreement between the borrowers and the lenders, and that that constitutes a charge, although there is nothing capable of being charged, and in fact there is no such security as regards these Iron Industries Shares as the document purports to charge. I cannot accept that view. I think that the only reasonable and fair construction of the agreement of guarantee is, that what the guarantors were guaranteeing was a secured debt, a debt secured by a charge, an existing charge on existing and available shares. As there was no such charge in fact, I think the guarantors are entitled to say that they are not bound at all by the paper which they have signed. There is abundant authority for that, in my opinion, but I do not think it needs any authority at all. A guarantor must inevitably regard as one of the most material facts affecting his position the existence or the non-existence of security if he has stipulated that the debt is to be the subject of the security. If he pays the debt on the default of the borrower, he is entitled to the benefit of all the securities which are available, and are contemplated as being available for him, when he enters into the contract of guarantee. To guarantee an unsecured debt is a different proposition from guaranteeing a secured debt, and I think it is enough for this case to say that all this guarantor is here required to perform is something which he never agreed to perform. It is completely different in substance from that which he promised to do. If authority were needed for that simple proposition, there are cases which have been referred to very closely parallel to the present case. There is *Bonser v. Cox* (1), where a man agreed to become a surety for another man in a joint and several bond to a third party, there being another guarantor and in fact the other guarantor did not execute the bond of guarantee. It was held in that case that he was not bound by the contract. LORD LANGDALE, M.R., said at p. 382 :

I think that it cannot, upon any principles on which this court acts, be doubted, that the surety has an interest, and a most material interest, in the rights and

remedies which the creditor has against the principal debtor; he is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different from that which was contemplated by himself and all other parties.

In that case it was not a question of a security of land or, as is here the case, of shares. It was a question of the joint liability of some other guarantor. But the principle is exactly the same. The question is: What are the remedies which the creditor has against the principal debtor? Whether they were remedies against another guarantor, or remedies by the realisation of securities, they are matters material to the guarantee, matters which go in the relief of his liability if the debtor makes default. Very much the same principles were laid down in *Evans v. Bremridge* (2), and TURNER, L.J., sums up the position at p. 109:

as the plaintiff entered into the obligation upon the understanding and faith that another person would also enter into it, he has a right in equity to be relieved, on the ground that the instrument has not been executed by the intended co-surety.

In my opinion, his right is not merely a right in equity, but a right to defend the action on grounds of law. In the decision which I have just quoted, the court of equity was naturally only concerned with the matter as a matter of equity. In the somewhat later case of *Coyte v. Elphick* (3) the contract was that the loan should be secured, among other things, by a mortgage. It was not so secured, and the guarantor was held not to be liable. BLACKBURN, J., said, at p. 543:

When we look at the contract for the loan of this money we see that it is to be secured partly by mortgage, partly by the undertaking of certain sureties.

And the mortgage in question was on the policy. BLACKBURN, J., goes on a little lower down:

The policy has never existed, so that it never could have been sold. The defendant is not liable, therefore, to pay, because the event upon which he was to pay has never happened. His liability was to make good deficiencies in property said to be pledged. But before he could be liable the property said to have been pledged must have been pledged, and the plea avers that it was not. The plea is therefore a good one.

The case did not therefore turn on the fact that the guarantee was to make good a deficiency after the policy had been realised. The answer to the claim does not depend upon the implication of any condition, as the learned judge thought. It is a matter which ought and can be decided simply on the ground that the guarantor is required to perform a promise which he never made. No doubt in many cases, and quite conveniently, it is said that a condition of his liability is the existence of the promised security. But that is only one, and I think a less accurate way of putting the true position. Reference was made to *Bowes v.*

Shand (4), the well known case in quite a different action, where there was a contract for the sale of a cargo to be shipped in March or April, and it was not in fact shipped in those months. It was held that under those circumstances a buyer could not be required to fulfil his contract. I do not intend to refer to the long discussion ; it is not very relevant to this case. I shall only refer to a few words of LORD HATHERLEY, at p. 476, where he says that the defendant was at law entitled to avail himself of the answer to the case made against him, namely :

That he has not entered into the engagement you allege, and if you seek to fasten upon him the engagement, you must first bring him within the four corners of the contract.

The learned judge, I think, was led to come to the conclusion at which he arrived that treating the matter as one depending upon the implication of a condition, it was impossible here to apply the condition as the appellants alleged. He considered that he could not hold that the guarantors were attaching real importance to the existence in the hands of the creditors of these shares as a security ; and I think his reason is, because he found by the terms of the contract that the guarantors had left the creditors free to realise the shares or make arrangements with the debtors with respect to the shares. I confess I have some difficulty in finding any such term in this particular contract. I have read the words which are inserted to relieve the lenders from that very strict liability which attaches under a contract of guarantee, because it has always been held that in a contract of guarantee on which the debt depends, any substantial variation of the principal contract under which the debt is payable will release the surety. The term here is quite stringent. It provides that :

the guarantors shall be considered and be liable as principal debtors for all moneys secured by the said charge and that the guarantors and their successors shall not be released nor shall their liability hereunder be affected by time being given to the borrowers or by the corporation omitting or neglecting to protect the security created hereby or by the said charge or by any other arrangement or dealing between the borrowers and the corporation in reference to the said security or by any other act, omission, matter or thing whatsoever whereby but for this provision the guarantors as sureties only would have been so released.

I do not read that clause, wide as it is, as giving power to the lenders to release or destroy the security. I think it has a much more limited scope. Perhaps I should say that I am not prepared so to construe it without further argument and further consideration than have been presented or given here. But even if that were so, it would not touch the essential point in this case, namely, that the security which is spoken of in all these documents did not, in the material portion, exist at all. I think that that circumstance has the effect of never enabling this clause to be raised on the basis of the contract which is set out in the

document as a whole, and that they never come into operation at all in the circumstances which I have already stated.

There is one more point which has to be dealt with, and that is whether the words of the recital in the guarantee which I have already read, constitute an estoppel binding between the parties to the deed. We have been referred to a number of authorities on that point, and as I think the law is now perfectly clear—though its application in particular circumstances may be a matter of some difficulty—I shall not go through the authorities which have been cited, I shall content myself with one very admirable statement in the judgment of PATTESON, J., in the case of *Stroughill v. Buck* (5), at p. 787 :

When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all.

Every word there needs to be carefully considered.

But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument.

The question here is : What is the effect of applying that principle to the present case ? Now it is to be noted here that the recital states something which the lenders have done. They have advanced the money on the security of the particular charge on particular shares mentioned. The lenders are invited to act upon that allegation of fact. It is a matter peculiarly in the knowledge of the principal creditors, and it is a statement made with the intention that it should be acted upon by the other side, in the way in which they did act upon it, namely, by entering into the contract of guarantee. I think, in those circumstances, the second part of the rule which I have stated applies. I think the recital should be construed as being the statement of one party only, namely, the principal creditors. It is true that in *Stroughill v. Buck* (5) there was another ground upon which the court based their conclusion, but though the contract was a bilateral contract, and the recital appeared as part of a bilateral contract, it was only binding on one party. Both grounds are set out on p. 788 of the judgment to which I have referred, where is said : “ As this fact ”—that is the security in question—“ was material for the validity to the plaintiff of the securities on which he advanced his money ”—that is the one ground—“ and as he took the covenant of the defendant to secure to him the truth of this fact ”—that was the second ground because there was an independent covenant in the body of the deed—“ we think the true construction to be that the recital in question was intended to be the statement of the covenantor only.” I think the former ground would have been sufficient to enable the court to arrive at the conclusion at which they did arrive, and that

view is confirmed by the interlocutory observations which are made from time to time during the course of the argument in the case. Thus ERLE, J., said, at p. 785 :

Is there any case in which a recital by one party of a fact within his own knowledge, on the faith of which the other party contracted, has been held to estop the *latter* in favour of the *former* ?

I do not gather that there was any affirmative answer to that question. A good deal of reference was made to the case of *Young v. Raincock* (6). That case, however, turned mainly in this respect on a question of pleading, and PATTESON, J., who tried the case, in the course of the argument in one of those interlocutory observations to which I have referred, said, at p. 786 :

I thought that the recital was the defendant's language, and that, even if it had been pleaded, there was no estoppel as against the plaintiff ; but, as there was a distinct issue upon it, the question was open for the jury, even supposing that, if pleaded, it would have been an estoppel.

There, though the contract was a bilateral contract, the view of PATTESON, J., was that even there it was the statement of one party only. I think, therefore, on the point of estoppel that there is no estoppel here affecting the claim to proof.

Under all these circumstances, I think the appeal should be allowed, and the order of the learned judge set aside, and it should be ordered that the proof be not admitted.

ROMER, L.J. : I agree. During the argument of the respondents we were sometimes invited to consider this appeal as raising a question of whether the appellants had escaped from, or been released from, the solemn engagement undertaken by them by the document of Mar. 20, 1929. I do not take that view of the matter at all. What we have to discover is what was the liability which was undertaken by the appellants by that document. I confess that, for the reasons that have been given by LORD WRIGHT, M.R., and with all deference to BENNETT, J., it is plain that what the appellants guaranteed in that document was the repayment of a debt effectively secured, amongst other properties, by 275,000 shares of £1 each fully paid in the Iron Industries, Ltd., and that it is impossible for the respondents now to make the appellants liable in respect of a debt not so secured, a totally different debt. It was indeed urged by Sir William Jowitt that the charge which is referred to in the recitals to the deed in fact existed, that there was, in fact, such a charge, because he said the charge was the piece of paper which was the document dated Mar. 20, 1929. But, of course, a piece of paper cannot be a charge. It may create a charge, it may be evidence of a

charge, but it is not a charge itself, and when it is recited in the document that the £250,000 had been advanced on the security of a charge dated so and so on the shares, "particulars of which are set out in the schedule hereto," the recital cannot, in my opinion, be regarded as a mere assertion of the existence of that piece of paper; it must be regarded as an assertion of the fact that the loan was effectively secured upon, amongst other things, the shares to which I have referred.

On the question of estoppel, I have very little to add. It is, of course, true that a recital in a deed may operate so as to estop every party to the deed from subsequently asserting the contrary of what is stated in the recital. But as has been pointed out in *Stroughill v. Buck* (5) and in other authorities, the question always is whether the recital is intended to be a statement which all the parties to the deed have mutually agreed to admit is true, in which case it is an estoppel of all parties, or whether it is intended to be a statement of one party only, in which case the estoppel is confined to that party. The question is one of intention, and the intention is to be gathered from the consideration of the instrument itself. The instrument is a guarantee by the Parent Trust & Finance Company, Ltd., of a loan said to have been made by the respondents to Austin Friars Trust, Ltd., on the security of these shares. Whether that loan had been made in fact or not, whether it was secured as stated or not, was a matter presumably within the knowledge of the Mercantile Marine Finance Corporation alone, and not a matter which ordinarily would be within the knowledge of the Parent Trust & Finance Company, Ltd. I confess that it appears to me somewhat extravagant to think that by this recital the Parent Trust & Finance Company, Ltd., intended to bind themselves to the assertion that the loan had been made, and that when made it had been effectively secured upon these shares, so that if it subsequently turned out either that the loan had never been made at all, or that it had never been secured upon the shares, the Parent Trust & Finance Company, Ltd., were, nevertheless, liable under the guarantee because they would be estopped from denying either that the loan had been made, or that it had been effectively secured.

For these reasons, in addition to those which have been given by LORD WRIGHT, M.R., I think that this appeal must succeed.

GREENE, L.J.: I agree. It appears to me clear beyond possibility of doubt that the sum of £250,000 referred to in the operative part of the deed of guarantee was a sum having the quality and characteristics referred to in the recital. When the recital is looked at it appears that the sum in respect of which the guarantee is going to be given is a sum which is secured in a particular manner by a particular document. It

is said, on behalf of the respondents, first, that the sum was secured by a particular document ; but that, with great respect, appears to me to leave unsaid half of what should be said, because the document is not to be merely a piece of paper bearing a date, and identifiable by a date ; it is to be a piece of paper having a particular quality and a particular effect, namely, the effect of charging certain specified shares. In the present case the document in question had no such effect for reasons which have been explained.

Sir William Jowitt then advanced a further argument which with all respect I have some difficulty in following, but it appeared to be to this effect, that notwithstanding the circumstances, that the borrowers, Austin Friars, Ltd., had not any shares in the Iron Industries, Ltd., they, as between themselves and the lenders, were under an implied obligation to obtain such shares and give an effective security over them. Let me assume, for the sake of argument, that the true effect of the bargain as between the principal borrower and the lender was that such an obligation existed ; that would not make the statement in this recital with which we are now dealing a true statement, because there is all the difference in the world between an existing security over shares owned by the person giving it and a mere personal undertaking to obtain property, and to give a security over it when obtained. The argument appears to me to be one which cannot by any possibility be accepted.

Now, the learned judge dealt with the matter in two ways. I just want to add a word to what has been said with regard to the second point that he makes in his judgment. He deals with the argument put forward on behalf of the present appellants—that the debt in question was not of the kind which the contract contemplated—in this way. He says that when one looks at the concluding part of the operative part of this deed one finds that the guarantors take upon themselves the liability of principal debtors, and from that he concludes that it is not competent to them to dispute the advance, or to say that it is not an advance of the kind contemplated by the deed of guarantee. With the greatest respect to the learned judge, that argument really amounted to this. It is treating the guarantors as undertaking in this deed precisely the same liabilities as the principal debtors undertook under the original loan. Under the original loan the principal debtors were unquestionably liable to pay the sum advanced, whether the security that they purported to give was a real security or not. But it is to be observed that the debt in respect of which these guarantors are to be treated as principal debtors is not £250,000 *simpliciter*, but it is and is expressed to be all moneys secured by the said charge. In other words, that the only sum in respect of which they are undertaking the liability of the principal debtors is the sum which is described as having a particular characteristic, and having come into existence with the benefit of a real security. It is not

the sum which, in fact, was the only sum that ever came into existence, namely, the sum secured in a different and less effective way.

With regard to the second point, the question of estoppel, I must confess that I feel no doubt about it. There is a form of document which is sometimes seen in this country—I believe the form had its origin on the other side of the Atlantic—in which the recitals take this form: “Whereas A. represents so and so, and whereas B. represents so and so, and so and so.” In a document of that form there can be no doubt as to which party undertakes the responsibility for the accuracy of which recital. In the form to which we are accustomed here a question may arise as to whether a recital is a recital which is intended by one party or the other, or by both parties, to be of such a kind that the one, or the other, or both, are to be precluded from disputing its truth, and whether the recital has that character or not must depend on the construction of the document. When the present document is looked at it will be found that the facts with which this recital deals are facts which, in the normal course, would be within the knowledge of the lenders, and which in the normal course would not be within the knowledge of the sureties. The recital really has three elements. It recites that the corporation have advanced money; it recites that they have taken security of a particular kind for the money so advanced, and it recites that it did these things at the request of the guarantors. To my mind it is quite impossible to construe that recital in such a way as to treat the guarantors as agreeing that the facts recited should be treated as indisputably true. The guarantors would not normally be there when the payment was made, they would not be attending at the bank in order to see that the cheque was signed and was not stopped. It would be no part of their function to see that the security was an effective one, and that the property purporting to be secured really existed, and that any documents to be deposited were handed over. Those things would be things normally within the function of the lender, and there is nothing on the face of this document, it seems to me, to suggest that the guarantor is taking any responsibility for the accuracy of those statements. That a request was made is a matter, of course, within the knowledge of both of them, but the request, be it observed, if this recital be construed in the way I think it should be construed, is a request to lend, not on the security of a piece of paper dated so and so, but on the security of a piece of paper which was to have a particular quality and character, which it never had. In my judgment there is no effective estoppel here to prevent the guarantors giving evidence of the true facts of the case.

LORD WRIGHT, M.R. : The order will be that the appeal will be allowed with costs here and below. The order of BENNETT, J., will be discharged.

Instead of that, it will be ordered that the rejection of the proof will be confirmed, and the cross-appeal will also be dismissed with costs.

Leave to appeal on appeal and cross-appeal.

Solicitors : *Linklaters & Paines* (for the liquidator of the Parent Trust and Finance Co., Ltd.); *Simmons & Simmons* (for the liquidators of the Mercantile Marine Finance Corporation).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

Re ANDREW, OFFICIAL RECEIVER, *v.* STANDARD RANGE AND FOUNDRY CO., LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
July 17, 24, November 3, 1936.]

Bankruptcy—Execution—"Benefit of execution"—*Bankruptcy Act, 1914* (c. 59), s. 40.

A judgment creditor levied execution on the judgment debtor, and the sheriff withdrew on condition that the debtor paid a sum on account of the debt and undertook to pay the rest by instalments. The debtor paid three instalments. His solicitors then circularised his creditors admitting that he could not meet his liabilities. As his instalments were in arrears, the sheriff re-entered and sold sufficient goods to satisfy the balance of the debt and costs, holding the proceeds for the statutory 14 days. Within those days the debtor filed his petition and a receiving order was made; the sheriff therefore handed over the proceeds of the sale to the Official Receiver. The Official Receiver also claimed under the Bankruptcy Act, 1914, s. 40, the whole amount previously paid by the debtor to the creditor as the benefit of the execution, and alleging that the execution was not completed within the meaning of sects. 40 and 41. The creditor said that the execution had been completed and that the moneys claimed were not the benefit of the execution, also that the Official Receiver's title only extended back three months from the act of bankruptcy, i.e., only covered two of the instalments. The county court judge stated a case for the High Court, and the judge of the Chancery Division held that the moneys were not the benefit of the execution. On appeal:—

HELD : in order that there may be a benefit of the execution under sect. 40 there must be at the date of the receiving order or when the creditor has notice of a bankruptcy petition or an act of bankruptcy a subsisting execution still on foot. It is limited to the balance for which the execution is still operative. So far as the debt has been discharged by payment to avoid seizure or sale, or by a sale of goods, there is no subsisting execution and it is impossible to apply the term "benefit of the execution" to moneys so paid. Sect. 40 does not apply where there is no subsisting execution, and it is immaterial whether the execution has terminated by a return that the whole debt has been realised or of *nulla bona*, or whether the sheriff has withdrawn at the request of the creditors or for any other reason.

[EDITORIAL NOTE.] This matter has now been fully considered in the Court of Appeal and the practice that prevailed for many years in these matters has been held to be in error. The question is the meaning of the words "the benefit of the execution" in the Bankruptcy Act, 1914, and it is held that only payments made after the commencement of the bankruptcy and then only when there is a subsisting execution are "the benefit of the execution." In the judgment the usual methods by which an execution may be terminated by arrangement between the parties and the sheriff are considered and their effect dealt with.

FOR BENEFIT OF THE EXECUTION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 355, 356, paras. 479, 480; and FOR CASES, see DIGEST, Vol. 5, pp. 809-815, Nos. 6903-6933.]

Cases referred to :

- (1) *Re Godwin, Ex p. Trustee v. Morris, Re Godwin, Ex p. Trustee v. British Reinforced Concrete Engineering Co.*, [1935] Ch. 213; Digest Supp.
- (2) *Re Samuels, Ex p. Trustee v. Tee*, [1935] Ch. 341; Digest Supp.
- (3) *Re Brelsford*, [1932] 1 Ch. 24; Digest Supp.
- (4) *Re Ford, Ex p. Official Receiver*, [1900] 1 Q.B. 264; 5 Digest 812, 6918.
- (5) *Re Kern (P.E. & B.E.)*, [1932] 1 Ch. 555; Digest Supp.
- (6) *Re Fairley*, [1922] 2 Ch. 791; Digest Supp.
- (7) *Re Godding, Ex p. Trustee*, [1914] 2 K.B. 70; 5 Digest 812, 6920.
- (8) *Re Pearson, Ex p. West Cannock Colliery Co.* (1886), 3 Morr. 187; 5 Digest 816, 6941.
- (9) *Stock v. Holland* (1874), L.R. 9 Exch. 147; 5 Digest 816, 6939.
- (10) *Figg v. Moore Brothers*, [1894] 2 Q.B. 690; 5 Digest 812, 6915.
- (11) *Burns-Burns' Trustee v. Brown*, [1895] 1 Q.B. 324; 5 Digest 812, 6916.

APPEAL by way of case stated in the county court under the Bankruptcy Act, 1914, s. 100 (3), from a decision of FARWELL, J., given in the Chancery Division on May 18, 1936, in favour of a judgment creditor and against the Official Receiver as trustee.

The substance of the case stated by the learned judge was as follows :

On Jan. 17, 1935, the creditors (respondents) obtained judgment against the bankrupt for the sum of £83 0s. 4d., balance of debt, and £7 10s. 0d. costs. On the same day they caused a writ of *fieri facias* to be issued, and on Jan. 21 execution was levied by the sheriff's officer entering into possession of the debtor's goods and chattels. On Jan. 23 an agreement was made between the debtor's solicitors and the sheriff's officer that he should withdraw from possession on the terms that the debtor should pay £25 before the withdrawal and £10 per month afterwards, until the debt was discharged, and that in case of default the sheriff's officer should have the right to re-enter and retake possession. Accordingly, on Jan. 23 the debtor paid £34 19s. 6d., made up of £25 on account of the debt and £9 19s. 6d. costs and fees. He made three subsequent payments, of £10, £8 11s. 6d., and £10 respectively, on account of the judgment, respectively on Feb. 20, Mar. 25 and May 13.

On May 28 the debtor's solicitors issued a circular letter to all his creditors calling them together and admitting that the assets were few. On June 6, the debtor being in default of payment of instalments, the

sheriff re-entered and sold sufficient of the goods to satisfy the balance of debts and costs. He held the proceeds for 14 days, as required by the Bankruptcy Act, 1914. During the 14 days, on June 18 the debtor filed his petition in bankruptcy and a receiving order was made. The sheriff therefore handed over to the Official Receiver the balance realised by the sale.

The Official Receiver claimed the total sum of £53 11s. 6d. paid by the bankrupt before the re-entry. He based his claim on the Bankruptcy Act, 1914, s. 40, and contended that this sum represented the benefit of the execution and that the execution was not completed within the manner prescribed in this section as extended by sect. 41 (1). On Mar. 17, 1936, the Official Receiver launched a motion making this claim.

The respondents contended :

(a) That the execution had been completed within the meaning of sect. 40 as extended by sect. 41 ;

(b) That the moneys paid could not be said to represent the benefit of the execution within the meaning of sect. 40 and therefore the Official Receiver was not entitled to claim them ; and

(c) That in any event the title of the Official Receiver did not relate back beyond three months.

The questions which the parties desired to have determined in the High Court were :

(i) Whether the moneys paid to the respondents could be retained by them as not being " the benefit of the execution " ;

(ii) Whether the execution had been completed within the meaning of sect. 40 as extended by sect. 41 ; and

(iii) If the execution had not been so completed, whether the Official Receiver as trustee was entitled to the return of the moneys paid to the respondents, or of any part of them.

On May 18, 1936, FARWELL, J., on the authority of *Re Godwin* (1), and *Re Samuels* (2), decided that the moneys were not the benefit of the execution and could therefore be retained by the judgment creditors ; the other two questions therefore did not arise. He thus left all questions open for the consideration of the Court of Appeal.

The Official Receiver appealed.

The Solicitor-General (Sir Terence O'Connor, K.C.), and C. N. Tindale Davis, on behalf of the Official Receiver as trustee in bankruptcy.

W. N. Stable, K.C., and Anthony H. Marlowe, for the judgment creditors, respondents.

The Solicitor-General : In *Re Godwin* (1) a judgment creditor levied execution and the sheriff entered into possession, and during the next two months the debtor paid the whole amount that was owing. The creditor thereupon instructed the sheriff to withdraw, which he did

unconditionally and without reserving power to re-enter. Later the debtor filed his own petition, and the trustee in bankruptcy moved for a declaration that the payments made to the judgment creditor were void by reason of the Bankruptcy Act, 1914, ss. 40 and 41. The divisional court held that the phrase "the benefit of the execution" referred solely to the protection obtained by an execution creditor by reason of the issue of a writ of *feri facias* and its delivery to the sheriff, and did not include any payments to an execution creditor either by the sheriff or by the judgment debtor; also that the section only related to executions in fact existing at one or other of the appropriate dates mentioned in the section, and did not refer to an execution which was unconditionally withdrawn before any of those dates.

In *Re Samuels* (2) a judgment creditor issued execution and the sheriff entered, but a few days afterwards the debtor and the creditor arranged for payment by instalments, and the sheriff withdrew reserving power to re-enter. The debtor paid the costs of the execution and certain instalments, but afterwards defaulted, and the creditor sought to appropriate all the sums paid in reduction of an earlier claim which was the subject of a consent order but not of a judgment. FARWELL, J., held, applying *Re Godwin* (1), that a payment made to prevent a seizure and sale and so get rid of the execution is not "the benefit of the execution."

In the present case execution was issued under sect. 40, and that execution was not completed within the definition of "completion" in subsect. (2)—i.e., that there was no seizure and sale before the sheriff's attention was drawn to an act of bankruptcy. The execution creditor is not entitled to the benefit of the execution. Sects. 40 and 41 are inconsistent with one another: if sect. 41 contains a correct description of the meaning of the benefit of the execution, sect. 40 is redundant, for there is nothing to which it can apply. In *Re Samuels* (2) liberty was reserved to the sheriff to re-enter, whereas here the debt had been recovered in full by the sheriff before the receiving order was made. In none of the three cases have the learned judges considered the meaning of the words "completion of the execution"; they confined themselves solely to the phrase "the benefit of the execution." This they treated as a mere metaphysical conception, not related to any commuting of the creditor's charge into tangible effects.

In *Re Ford* (4) the debtor paid a sum on account and agreed to pay the debt by instalments, and the sheriff withdrew with authority to re-enter in default of payment of any instalment. A receiving order was then made. It was held that the execution had not been completed as to the sum at the date of the receiving order; that the execution creditors were therefore not entitled to retain the benefit of the execution, and that the trustee in bankruptcy was entitled to the sum as part of the debtor's estate. The operative statute was then the Bankruptcy

Act, 1883, s. 45 (1). This case was followed without question until the decision in *Re Godwin* (1), where it was cited, but not mentioned, in the judgment. It contains a contrary definition of "the benefit of the execution" by CHANNELL, J., at p. 268.

If the benefit of the execution does not include "payments to an execution creditor whether by the sheriff or by the judgment debtor" (*Re Godwin* (1), at p. 223), it is difficult to see to what benefit sect. 40 applies, or what the execution creditor is ever allowed to retain. The section clearly contemplates that, if certain conditions are not transgressed, he may retain something.

In *Figg v. Moore Brothers* (10), it was held that, to entitle an execution creditor to retain the benefit of his execution as against the trustee in bankruptcy, the execution must be completed either by sale or receipt of the amount of the levy before the sheriff has been in possession for 21 days, otherwise the title of the execution creditor may be defeated by the act of bankruptcy committed by the debtor under the Bankruptcy Act, 1890, s. 1, of which the execution creditor must be taken to have had notice. "Benefit" is the restriction operating against the goods to the detriment of the unsecured creditors. The words in *Goddling's* case (7), "the benefit of the execution," do not apply to any payments to an execution creditor. In *Burns-Burns v. Brown* (11), the Court of Appeal held that the act of bankruptcy committed by reason of the sheriff's holding for 21 days the goods seized by him under an execution operates under the Bankruptcy Act, 1883, s. 45, to make the execution itself void as against the trustee in bankruptcy of the debtor, and approved the decision in *Figg's* case (10).

In the present case the execution has not been completed; therefore the specific part of the goods of the debtor is restricted from division among the creditors because of the existence of this charge, and the meaning of the section is that that shall not continue. If the execution has been levied and all but a minute amount of the debt has been recovered under it, and the writ is still kept alive, the creditor is in a worse position than he would be in if he had received the full amount. Once execution is levied against the property of a debtor who afterwards, within the prescribed period, commits an act of bankruptcy, the receipts under the execution must be brought into the pool for the benefit of all the creditors of the estate, save only in one case: if the process of execution has been completed within the meaning of the Bankruptcy Act, 1914, s. 40 (2)—i.e., by seizure and sale. The tendency of all the acts is to limit the common law rights and leave a greater area of property and goods for the disposal of the creditors as a whole in the bankruptcy. If a creditor levies execution in circumstances which have in themselves a savour of insolvency, the Act will not protect him; but if he levies it in circumstances in which he can recover the whole

of the money and complete the execution under subsect. (2), the Act does not treat him as having done something which was in itself an indication to him of the state of insolvency. Each successive Act has brought a larger part of the estate within the trustee's control and left less available for a creditor who secures himself by a writ or is a landlord. In the Act of 1883, sect. 45 was identical with the present sect. 40 (1), (2), but its sect. 46 did not contain the important words "on the completion of the execution by the receipt or recovery of the full amount of the levy." As this alternative method of completion did not exist, the provisions of sect. 45 caused no difficulty. Those words were inserted by Parliament in the Bankruptcy Act, 1890, s. 11, as a result of the decision in *Re Pearson* (8). In passing the 1914 Act to codify the law, the legislature overlooked the presence of those words and incorporated sect. 45 of the 1883 Act and sect. 11 of the 1890 Act side by side. *Re Godding* (7), decided just before the coming into force of the 1914 Act, cannot stand with the decision of the divisional court in *Re Godwin* (1).

In *Figg's* case (10), VAUGHAN-WILLIAMS, J., at p. 693, correctly stated the law as follows :

For the purposes of the Act an execution against goods is completed by seizure and sale, or—reading in sect. 11 of the Bankruptcy Act, 1890—receipt or recovery of the full amount of the levy.

The decision of CLAUSON, J., in *Re Brelsford* (3) also cannot stand with the decision of the Divisional Court in *Re Godwin* (1).

Re Fairley (6) was decided on the principle that if the creditor has received money, no matter how long ago, in an uncompleted execution, that money can be claimed by the trustee in bankruptcy. In *Re Samuels* (2), the execution was incomplete ; that was the case where right of entry was reserved , which was left open by *Re Godwin* (1).

Tindale Davis, following for the appellant : If a transaction between a creditor and debtor occurs within the three months' period of relation back, but the creditor does not know that an available act of bankruptcy has been committed within that time, the transaction is protected by sect. 45. The effect of bankruptcy on an execution is expressly excluded from that section. The divisional court was right in holding in *Re Kern* (5) that sect. 40 was a substantive enactment and had no relation to sect. 37. An execution creditor who keeps the execution on foot does so for his own purposes and must take the risk of finding himself compelled to account for what he has received. The rights of a trustee under sect. 40 are not limited to the benefits of the execution received by a judgment creditor after the date to which the trustee's title relates back.

The reason for the general trend of the decisions is that, apart from *Re Pearson* (8), it was assumed that when an execution creditor levies

execution and suspends it with the right to re-levy, and from time to time recovers moneys, that is "the benefit of the execution." In *Re Godding* (7) the whole of the judgment debt was paid up, but the learned judge none the less held that the execution had not been completed, because the comprehensive definition of "completion" contained in the two sections had not been complied with. In *Re Pearson* (8) the money was not "the benefit of the execution" because it was paid to avert a sale, a state of things not contemplated by the law as it then stood.

Stable, K.C., for the respondents: These two sections, which codify the whole of the law on this matter, are quite clear and are well adapted to deal with the situations that arise. The only logical line to draw between the two conflicting titles—those of the execution creditor and of the trustee—is the available act of bankruptcy, and the statute has drawn that line. The sections only apply when the charge of the creditor comes before that of the trustee. The natural meaning of "the benefit of the execution" is the advantage over the other creditors that the execution creditor gets by virtue of his charge. This definition can be aptly applied to every conceivable case. When the sheriff in this case sold the goods under the charge and before the completion of the execution, the execution creditor had notice of an available act of bankruptcy, and therefore he cannot retain the benefit of the execution—i.e., his priority over the other creditors. It makes no difference that the sheriff was holding money and not goods, for he had sold the trustee's goods, which had vested in the trustee at the moment of the available act of bankruptcy. The divisional court were right, because the money is to be handed over. If there is no charge on the goods, there is no charge on the proceeds of sale. The money is paid, not under a sale, but to avoid a sale; the creditor has to pay it back, because it is the trustee's money.

The difficulties which have arisen in the reported cases over the word "completion" are due to a misconception. A complete thing is perfect in all its parts, the result of a process carried through to perfection. The process of execution can only be completed by seizure and sale, which are what the sheriff is directed to perform. An execution can be terminated in many other ways—e.g., when the sheriff reports that he has carried out the execution as to £50 and *nulla bona*. The section provides that if the trustee, when the estate vests in him, finds an execution still in existence, he may compel the creditor to remove his charge because the execution is not complete; if he finds that the execution has been completed, he must look at the moment when it was completed: if at that moment the receiving order had not been made, or the judgment creditor had not notice of the presentation of a petition or of an available act of bankruptcy, the creditor is entitled to keep

what the execution brought him. This construction will work logically and efficiently in every set of circumstances. The execution is completed when it is carried through to perfection.

ROMER, L.J. : What is the position if some of the goods are sold and, by arrangement with the debtor, the sheriff withdraws unconditionally ?

Stable, K.C. : Then the execution has been completed as to the part of the goods that has been sold. The creditor retains the money because, as a result of the pressure he has exerted, that part of the debt has been paid. Where part of the goods has been sold and part of the debt paid, the moment the money is paid over to the execution creditor it ceases to be "the benefit of the execution." His title to keep it does not arise under the writ of execution, which is then *functus*. All the old decisions, starting with *Ford's* case (4), are perfectly dealt with by the section provided that the meaning of the words "the benefit of the execution" is not strained. The point was decided in *Pearson's* case (8), and the departure from the perfectly clear construction originated with *Ford's* case (4), in which *Pearson's* case (8) was not cited. *Goddling's* case (7), in which again *Pearson's* case (8) was not cited, extended "the benefit of the execution" to a payment which the debtor made during the execution. *Kern's* case (5) decides that a creditor who receives a payment under an execution that is not completed, though he receives it many years before the bankruptcy and before the trustee's title has attached by virtue of relation back, has to bring that money into the pool. He must do this, although another creditor who had been paid at the same time without an execution may keep his money, even if it is paid in circumstances in which it would have been upset as a fraudulent preference. This position is the result of putting a strained interpretation on the words "the benefit of the execution." The only reason why the draftsman has used the words "shall not be entitled to retain the benefit" instead of "the execution shall be wholly null and void," is that if he had, then a creditor who had notice of an act of bankruptcy during the execution would have to withdraw the sheriff, even though the debtor might never ultimately be adjudicated a bankrupt. The section therefore provides that, unless the execution is completed before the creditor has notice of the act of bankruptcy, he cannot set up his title under the writ against the title conferred on the trustee by the notice.

The Solicitor-General, in reply.

LORD WRIGHT, M.R. : The judgment which I am about to read is the judgment of the court. This appeal raises a question of importance on the construction of the Bankruptcy Act, 1914, s. 40. The question is, what is the true construction of the words "the benefit of the execution

or attachment," as to which the section provides in subsect. (1) that the creditor is not to be entitled to retain it :

against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

There is also a definition in subsect. (2) in the following terms :

For the purposes of this Act, an execution against goods is completed by seizure and sale ; an attachment of a debt is completed by receipt of the debt ; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

The words now being considered have been the subject in the last few years of conflicting decisions by divisional courts. Although the section and the corresponding section in the Bankruptcy Act, 1883, have been in operation for a good many years, this is the first time that their true construction has come before the Court of Appeal. We are accordingly required to give our view as to the meaning of the section now in force without being bound by any previous authority, though deriving all possible assistance from the previous decisions. The matter comes before the court on appeal from FARWELL, J., on a case stated by a county court judge in the bankruptcy. The first question stated by the county court judge is as follows :

1. Whether on the facts stated in this case the moneys paid in the manner aforementioned can be retained as not being "the benefit of the execution."

If that question is answered in the negative, the two following questions do not arise. The learned judge, who decided that the moneys could be retained, did not deal with the two remaining questions. As we are in agreement with his conclusion, we do not feel it necessary to deal with any question other than that which has been stated.

The facts are simple. The respondents—that is, the creditors—obtained judgment against the bankrupt on Jan. 17, 1935, for the sum of £83 0s. 4d. balance of debt and £7 10s. 0d. costs. On the same day the respondents caused a writ of *fiери facias* to be issued and delivered to the High Sheriff of Hertfordshire, and execution was levied on Jan. 21, 1935. On Jan. 23, 1935, an arrangement was arrived at between the respondents, the debtor and the sheriff's officer. Under that arrangement the sheriff's officer was requested to withdraw from possession, which he had taken, on the terms that the bankrupt should pay £25 before withdrawal on account of the said judgment and the costs, and should thereafter discharge the debt by monthly instalments of £10, but the sheriff was to have the right to re-enter and take possession under the writ of *fiери facias* if there was default in performance by the debtor. The sheriff's officer withdrew on the debtor paying £25 and a certain sum towards costs. On Feb. 5 the sheriff remitted to the respondents

£27 7s. 6d., being the £25 and £2 7s. 6d. for the costs of the execution. The debtor then paid to the respondents three further payments on account of the said judgment: £10 on Feb. 20, £8 11s. 6d. on Mar. 25, and £10 on May 13. On May 28, 1935, the debtor's solicitors issued to his creditors a circular letter which constituted an act of bankruptcy. On June 6 the sheriff re-entered, in accordance with the above agreement, and seized and sold sufficient of the bankrupt debtor's goods to realise the balance of the judgment. A receiving order was made on the bankrupt's own petition on June 18, 1935, and the sheriff accordingly handed the proceeds of the sale to the Official Receiver.

No question arises as to those moneys. The Official Receiver, as trustee in the bankruptcy, claims a sum of £53 11s. 6d., the total of the sums paid to the respondents on account of the judgment debt up to May 13 under the circumstances set out above. The question is whether he is right in that claim. The answer to that question depends on whether the moneys so received constitute the benefit of the execution within sect. 40 of the Act and are claimable by the trustee against the creditor under the section. Two views have been advanced. One is that the words "benefit of the execution" mean the fruits or the proceeds received by the debtor in consequence of the execution. It is said that as they were received by virtue of the agreement stated above and in order to induce the sheriff to withdraw, they are the benefit of the execution; and it is further said that as the sheriff, when he withdrew, reserved the right of re-entering if the agreement was broken, the execution was not complete before the notice of the presentation of the bankruptcy petition against the debtor or of the commission of an available act of bankruptcy by the debtor. The contention for the respondents is that "the benefit of the execution" does not refer to moneys actually received by the creditor in whole or partial satisfaction of his debt, whether under or in consequence of an execution or not, but that the words refer to the charge which the creditor obtains by the issue of the execution, and that, to the extent that by the payment of moneys that charge has been reduced or abrogated, there is *pro tanto* no benefit of the execution to be considered. It is contended that moneys so paid in total or partial satisfaction of the charge and discharge of the debt in whole or in part, become the creditor's moneys just as if they had been paid without the intervention of an execution, and that in the facts of a case like the present what is meant by the benefit of the execution is the priority right constituted by the execution of the creditor over the debtor's goods for the debt or balance of the debt. Thus in the present case, while the respondents claim to retain the moneys collected before the sheriff withdrew from possession under the agreement, they do not deny that in respect of the balance the supervening bankruptcy has deprived them to that extent of the benefit of the execution, which to

that extent had not been completed by seizure and sale. Their contention is that sect. 40 is restrictive of the rights which an execution creditor would otherwise have at common law in virtue of the writ of execution, in the sense that if the charge has not been made effective in due time by seizure and sale he loses that security or prior charge which he would otherwise have at common law over the debtor's goods. This is the construction adopted by the divisional court in *Re Godwin* (1) and applied by FARWELL, J., in the case of *Re Samuels* (2), in circumstances analogous to the present case, but differing in certain respects from the facts in *Re Godwin* (1). FARWELL, J., in the present case followed his own judgment in *Re Samuels* (2) without giving a further reasoned judgment. The appeal is from the reasoning contained in these two judgments.

In *Re Godwin* (1) an execution had been levied and goods had been seized by the sheriff. The debt and the costs of execution were then paid direct by the debtor to the judgment creditor, and the sheriff withdrew on the instructions of the judgment creditor. He withdrew unconditionally, reserving no power of re-entering. That happened on Aug. 3, 1932. Before that date the entire indebtedness had been discharged, the last payment having been made on July 22, 1932. On Dec. 6 the debtor was adjudged bankrupt on his own petition, which he had filed on Nov. 21. The trustee in bankruptcy claimed that all the moneys which had been paid in discharge of the debt to the creditor in the circumstances above set out should be repaid to the trustee in bankruptcy, on the ground that under sect. 40 (1) these moneys were the benefit of the execution, and that the execution had not been completed by seizure or sale before the date of the supervening bankruptcy. The county court judge dismissed the application and the trustee appealed. A divisional court consisting of LUXMOORE and FARWELL, JJ., affirmed the decision of the county court judge. They pointed out the startling nature of the contentions put forward by the appellants in that case in the following words, at pp. 218 and 219 :

The argument is certainly startling, for if it is right, an execution creditor who has received the full amount of his debt direct from the judgment creditor is liable to return that sum to the trustee in a subsequent bankruptcy, although the money was received and the execution unconditionally withdrawn many years before the adjudication, the only limitation on the liability being the expiration of the period prescribed by the appropriate Statutes of Limitation. It was not rendered less startling when it was admitted by counsel supporting it that if the payments in this case had been made by the judgment creditor to the sheriff instead of to the execution creditors direct, the amounts paid could not have been recovered, and that the position would be the same if the payments had been made without any writ of *feri facias* having been issued.

They then proceeded :

The first question which arises on the construction of the section is what is the

meaning of the phrase "the benefit of the execution." In the argument put forward on behalf of the appellants "the benefit of the execution" was assumed to cover any benefit resulting to the creditor which might be attributed to the issue of the writ of *fiery facias*. It seems to us that the whole foundation of the argument fails if this assumption is incorrect. It is to be observed that the phrase is "the benefit of the execution," not "any benefit from the execution," or "any benefit arising out of the execution"; and further, that there is no suggestion anywhere in this or the succeeding section of any repayment of money to the trustee in bankruptcy by the execution creditor.

They state the common law effect of the issue and delivery to the sheriff of a writ of *fiery facias*. After observing that the provisions of the present sect. 40 were introduced for the first time in the Bankruptcy Act, 1883, s. 45 (1), they expressed their conclusion in the following words, at p. 223 :

In our judgment, having regard to the nature of the protection obtained at common law by an execution creditor, and to the manner in which, and the purpose for which, the provisions of sects. 40 and 41 have been developed, and to the further fact that there is no mention in either of the sections of any payment by the execution creditor to the trustee in bankruptcy, the phrase "the benefit of the execution" on the true construction of the section, refers solely to the protection obtained by an execution creditor by reason of the issue of the writ of *fiery facias* and its delivery to the sheriff, and does not describe, and was never intended to describe, any of the payments to an execution creditor whether by the sheriff or by the judgment debtor. The section consequently relates only to executions which are in fact in existence at one or other of the appropriate dates mentioned in the section, and has no reference to an execution which has been unconditionally withdrawn long before any of those dates.

There was, in fact, at the material time, no execution. The sheriff had withdrawn unconditionally at the request of the creditor, who had received payment of the debt in full. The learned judges reserved for further consideration a case such as that now being considered, where execution has been withdrawn conditionally and is therefore still in force at the relevant date if bankruptcy subsequently occurs.

The second judgment to which we have referred, that of FARWELL, J., in *Re Samuels* (2), deals specifically with that state of affairs. In that case the sheriff had withdrawn on the creditor's request, and by arrangement between the creditor and the debtor, but had reserved a right of re-entry to be exercised if the debtor made default in the payments which he had arranged to make in consideration of the withdrawal. The debtor paid various sums in part payment of the debt and costs, but subsequently filed his own petition, and a receiving order was made against him. At that date the debt had not been paid in full, and the sheriff still retained his power of re-entry. It was claimed that under sect. 40 the sums which the debtor had paid before the date of the receiving order were claimable by the trustee. The effect of the judgment is shortly stated in the headnote :

Held, that the sums paid by the debtor before the date of the receiving order

were not for the "benefit of execution" within the meaning of the Bankruptcy Act, 1914, s. 40, and that the judgment creditor was entitled to retain them as against the trustee in bankruptcy.

The headnote interposes the word "for" between the word "not" and the words "the benefit of the execution"; that, we think is a misprint. FARWELL, J., sums up the position in these words, at p. 346:

In my judgment a payment made to prevent a seizure and sale and to get rid of the execution in that way is not the benefit of the execution within the meaning of the words as used in sect. 40 of the Act. Whatever the effect of reserving the right of re-entry may be, in my judgment a payment made to avoid an execution is not the benefit of the execution within the meaning of the Act.

He applied the same construction of these material words as had been adopted in *Re Godwin* (1).

We agree with that conclusion, but we think it necessary to refer to the cases in which a different view has been taken. These cases have proceeded on the assumption that the benefit of the execution includes the fruits derived from the execution, or the moneys paid to the creditor in discharge or partial discharge of a judgment debt in respect of which a writ of *feri facias* has been issued. We shall refer first to a decision of CLAUSON, J., in *Re Brelsford* (3), in which case the sheriff withdrew from possession with the authority of the judgment creditors on an undertaking of the debtor to make certain payments. The debtor made default and the sheriff re-entered into possession to levy execution for the balance of the debt. While that was the position the receiving order was made. The trustee claimed from the creditors payment of the moneys which they had received. The case, therefore, was similar to *Re Samuels* (2) and the present case. It was contended by counsel for the creditors that they were not seeking to retain a benefit of an execution; that on payment the creditors' debt was discharged *pro tanto* and thus the creditors received the benefit of the debt, and that benefit of the execution is a priority right in the debtor's goods, which at common law were charged with the debt from the issue of a writ of *feri facias*. CLAUSON, J., held that the creditors were not entitled to retain the moneys mainly, if not entirely, because he was bound by a decision of a divisional court in *Re Ford* (4), to which we shall shortly refer. *Re Brelsford* (3) was followed by the case of *Re P. E. & B. E. Kern* (5). That case came before a divisional court composed of CLAUSON and LUXMOORE, JJ. The main point there decided was whether the right of the trustee to recover the moneys received by the execution creditors was limited to moneys received by them after the date to which the trustee's title to the bankrupt's property related back under the Bankruptcy Act, 1914, s. 37. It was held that the scope of sect. 40 of the Act was not so limited. The judgment, however, does proceed upon the construction of the words of sect. 40, now being considered, in a sense contrary to that accepted

in *Re Godwin* (1) and contrary to what we consider to be the true construction. The passage in which that view is stated is worthy of quotation (pp. 560 and 561):

It appears to me that the section says in terms as plain as one could desire that, if in the particular circumstances in the section mentioned, that is to say, of a receiving order having been made before completion of the execution, the execution creditor has received fruits of the execution, he shall not retain those fruits of his execution against the trustee in bankruptcy; in other words, he must hand them to the trustee if he asks for them. It appears to me that there is nothing in the section which lays down any limit of time or imports any other limitation on the trustee's rights. It is suggested that this construction has the result that, since an execution may, in accordance with the practice to which I have alluded, be prolonged for many years, the hardship is involved that after a long lapse of time the trustee in bankruptcy may be entitled to go back to the beginning of the execution, and get back from the execution creditor sums which he has received, it may be, many years before. I confess that such possible result does not strike me as a hardship. It must be borne in mind that it is the execution creditors' own act which kept this execution on foot, assuming it could legally be kept on foot; and, further, they kept it on foot for their own benefit in order, no doubt, to obtain advantage by getting payment of instalments out of the execution debtors. I cannot see how the operation of the Act results in any hardship. The execution creditors have put themselves into this position entirely for their own purposes. If they chose to keep the execution on foot for a long time for their own purposes, I do not see how they can complain. Accordingly, as there seems to me to be no real hardship, I do not see why I should put any other construction on this section than that which appears to me to follow from the plain and obvious meaning of the words.

It seems to us, with all respect, clear that the learned judge, when he talks of "fruits of the execution," is incorrectly paraphrasing the words of the section, and while we agree with his statement of the startling results which would follow from his construction we cannot agree with him that such results should not be regarded as a hardship. Execution creditors who are willing to stay their hands in enforcing an execution do so at least as much for the benefit of the debtor as for their own benefit. It is common business understanding that it is desirable, as far as possible, to help a debtor to pay by giving him all possible time. We respectfully differ from the learned judge on his view of what is the plain and obvious meaning of the words.

Before we pass to the case of *Re Ford* (4), we may refer to the decision of a divisional court in *Re Fairley* (6), in which the court held that an execution was completed within sect. 40 by a return by the sheriff of *nulla bona*. The court there treated the fact that the execution was no longer subsisting when the bankruptcy supervened as a sufficient ground for not applying the section. LAWRENCE, J., said, at p. 801:

An execution is no doubt incomplete if the sheriff has been induced, by payment on account or otherwise, to withdraw temporarily. Moreover the authorities seem to show that an execution may be incomplete, even though the sheriff withdraws permanently, e.g., where on payment of part of the debt in order to avoid a sale, the sheriff with the execution creditor's assent withdraws permanently.

The same result was applied to the case where the execution resulted in a return of *nulla bona*, but the terms of sect. 40 (2) of the Act seem to us to be quite explicit: the execution must be completed by seizure and sale. We cannot see how the words of sect. 40 can be construed by reference to the ampler definition of "completion" in sect. 41 (1), which deals with a quite different subject matter—namely the disposal of moneys or goods in the hands of the sheriff. To treat the language of sect. 41 as imported into sect. 40, as was done by HORRIDGE, J., in *Re Godding* (7), appears to us to be illegitimate. It is obvious that the court, assuming or adopting the construction which we have rejected of the words "the benefit of the execution," felt the difficulties thereby involved in the definition of "the completion of the execution" in sect. 40.

Of the various authorities which in argument have been referred to there are only two others which we think it necessary to discuss here. One is *Re Ford* (4), a decision of a divisional court. That was a case of a payment on account in consideration of withdrawal by the sheriff but subject to the sheriff being authorised to re-enter if the debtor should make default in making the payments which he had undertaken to make. The matter fell to be decided under the Bankruptcy Act, 1883, s. 45 (1), which was substantially identical with sect. 40 of the present Act. The divisional court, consisting of WRIGHT, J., and CHANNELL, J., held that there had been no completion of the execution and that the creditor, who had obtained the payment on account in partial discharge of his debt, was bound to hand it over to the trustee in the supervening bankruptcy. There was, as we read the report, no argument on the construction of the crucial words; it seems to have been assumed that "benefit of the execution" referred to money paid by the debtor to the creditor, and the discussion seems to have centred on what was meant by "the completion of the execution." There was no reference in the judgments to a previous decision of a divisional court in *Re Pearson* (8). That decision specifically related to the Bankruptcy Act, 1883, s. 46 (2), which partially corresponded to sect. 41 of the present Act. We only refer to that decision because of a dictum of CLEASBY, B., in *Stock v. Holland* (9), that money paid to prevent the execution from being completed, and as soon as it was assented to, became the money of the creditors. CAVE, J., observed that when the debtor has paid out the execution, the creditor does not want the execution at all. No doubt that was said in regard to a complete discharge of the debt, but we think it equally applies to a partial discharge under an execution. There is in such cases no question of the benefit of the execution as something subsisting. To the extent that the creditor has been paid his debt under and in virtue of an execution, the debt is *pro tanto* discharged, and to that extent there is, in our opinion, nothing on which sect. 40 can operate.

The operation of the section in such cases is limited to cases where there is at the date of the receiving order, or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy, still on foot a subsisting execution, and is limited to the balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the still incomplete execution, which may be affected by the operation of sect. 40 (1). In this connection the result is the same whether the payment has been made to avoid seizure or to avoid sale, or whether the partial discharge of the debt has been effected by a sale of goods under an execution which is kept on foot in order, if possible, to realise enough to pay the balance of the debt.

We think, however, that sect. 40 cannot apply if there is no subsisting execution, and that it is immaterial, if there is no execution on foot, whether the execution has been terminated by a return that the whole debt has been realised, or whether the execution has been withdrawn by the sheriff at the request of the creditors, or whether there has been a return of *nulla bona* or he has withdrawn for any other reason. Sect. 40, in our opinion, can only apply if or to the extent that there is a subsisting execution which is still operating to charge the debtor's goods, and it cannot operate in so far as goods have already been sold and the proceeds applied to the partial discharge of the debt, or where payments on account have been made by the debtor in partial discharge of the debt in order to avoid seizure or sale, or to induce a temporary withdrawal by the sheriff. In our opinion, to the extent that the debt has been actually discharged, it is impossible to apply to money so paid the appellation of "the benefit of the execution." The money so paid has, in our opinion, become the money of the creditor with the result of wiping out *pro tanto* the debt. The benefit of the execution can then only refer, in our opinion, to the charge still remaining under the still subsisting execution for the balance of the debt. We think the appeal must be dismissed and the first question in the special case, which alone is now material, answered in the way in which it has been answered by FARWELL, J.

Davis asked for leave to appeal to the House of Lords. He said: Although this case originated in the county court, it came before FARWELL, J., in the form of a special case and was therefore a trial by a High Court judge from which appeal lay to this court. If a matter comes to this court from the county court there is no right of appeal, even by leave, but in this case the court can give leave. In *Re Godwin* (1) the court refused leave to appeal. The court's decision of this case has altered a practice in applying sect. 40 which has existed for 45 years and which has been approved by many decisions.

LORD WRIGHT, M.R.: The effect on the existing practice of the court's decision in the present case is that in future everyone will proceed according to what this court thinks is the true view of the law.

There was no appeal from the decision in *Re Godwin* (1). You now have the views of five judges on this matter. Against that you have, no doubt, a long-standing practice, but it has been illogically applied, and in various ways people have sought to get out of their difficulties by importing into sect. 40 something which does not appear in the definition. The decisions may have acted on the practice, but that is a different matter from approving it. The whole idea is that this court should be the final judge in bankruptcy matters.

Appeal dismissed with costs ; any money in court to be paid out.

Solicitors : *Solicitor to the Board of Trade* (for the appellant) ; *Wallington, Fabian & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

ELLISON v. CALVERT & HEALD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **October 29, 30, 1936.**]

Workmen's Compensation—Accident—No evidence of cause of injury—Reasonable inference—Delay in notice of accident—Reasonable cause—Workmen's Compensation Act, 1925 (c. 84), ss. 1 (1), 14.

An electrician was employed in the foundations of a building in a cutting, the roof of which was so low that he had often to lie on his back with his head resting on the floor. Men who worked there had to discard their caps because of the heat due to central heating pipes. The place was dark, dusty, and dirty. When he returned home on Nov. 23, 1934, the electrician showed his wife (the appellant) a sore place on the back of his head, which neither regarded as serious, and he continued to work as usual. On Nov. 26 he felt so ill that his wife tried to dissuade him from going to work. He went to work but came home early and complained of pains in the chest and in the head, and in the evening his condition was serious. On the following day he remained in bed, and his doctor found that he had bronchitis in both lungs but did not connect it with the septic wound on his head. He was admitted to hospital on Dec. 7 suffering from septic meningitis and septic pneumonia, and on Dec. 10 he died from septic meningitis. The doctor who conducted the post-mortem examination attributed the septic condition to the small wound on the back of the head as the place of entry of the poison. On Dec. 7 the appellant notified the employers (the respondents) verbally that the illness was due to the workman having hurt his head in the cutting, but there was no evidence adduced as to such cause of the illness. Written notice was given to the employers on Jan. 22, 1935. An award of compensation was made to the appellant on the ground that the balance of probability was that the small wound on the head was caused at work, and that the want of notice of the accident was occasioned by mistake or other reasonable cause:—

HELD: (i) there was evidence upon which the county court judge could reasonably infer that the small wound on the back of the head was caused by an injury arising out of and in the course of the employment.

(ii) notice of the accident was given as soon as practicable, and the failure to give earlier notice was therefore due to a reasonable cause. The fact, therefore, that the employers may have been prejudiced by want of notice is immaterial.

[EDITORIAL NOTE.] The question as to whether notice is given as soon as practicable does not, in a case where the employee has a reasonable belief that no claim is likely to arise, in any way depend upon whether the employers are prejudiced by the want of notice, but purely upon the question whether the employee has that reasonable belief. In this case the arbitrator thought that the employers had probably been prejudiced, but as he was clear that the workman had not connected his illness with his employment until he was too ill to attend to the giving of notice, his failure to give notice ought properly to be excused.

AS TO TIME FOR NOTICE, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., p. 357; and HALSBURY Supp., Master and Servant, paras. 380, 381; and FOR CASES, see DIGEST, Vol. 34, pp. 369-375, Nos. 2998-3038.]

Case referred to:

- (1) *Lancaster v. Blackwell Colliery Co., Ltd.* (1919), 12 B.W.C.C. 400; 34 Digest 324, 2647.

APPEAL from an order of the Court of Appeal (GREER, SLESSER and SCOTT, L.JJ.) setting aside an award by His Honour JUDGE ROBERT PEEL, K.C., made in favour of the appellant in an arbitration under the Workmen's Compensation Act, 1925, at the County Court of Lancashire.

The facts and the arguments are set out in the judgment of LORD ATKIN.

Edgar Dale and *P. R. Barry* for the appellant.

Edward W. Cave, K.C., and *S. Scholefield Allen* for the respondents.

LORD ATKIN : My Lords, this is an appeal from an order of the Court of Appeal setting aside an award by JUDGE PEEL, the judge of the county court holden at Lancaster and Preston, who, in a workmen's compensation claim, had made an award in favour of the dependents, the widow and infant daughter, of Henry Ellison, who had been a workman in the employment of the respondents. The learned county court judge awarded the applicant £527 8s. 0d., and no question arises in respect of the amount. The question which has arisen is whether or not it has been established that the applicant's husband met his death from an accident arising out of and in the course of the employment.

The facts are that the deceased man was an electrician and was working at the infirmary at Lancaster, where the respondents were apparently laying pipes, I suppose for the purpose of electric light, and he and other men had been working in what the workmen, at any rate, called the cutting, which is a space beneath the ground floor of the infirmary ; it is a long space, 80 feet long, 4 feet wide, and varies in height from 6 feet to 1 foot 6 inches. The evidence was that the workmen whilst so working had constantly to work lying on their backs, that the ground was broken, irregular and dusty, that there were half bricks and so forth lying about, that it was very hot, and that the workmen used from time to time to work without their caps ; and there is the evidence of the deceased man's apprentice that the deceased man used to work without his cap in this way, lying down from time to time with the back of his head on the ground. On the Tuesday or the Wednesday—the widow cannot quite remember which—her husband made a statement to her, and on the Thursday he showed her his head, and she saw a patch of something which, I think from her description, looked like a scratch, and which obviously was inflamed ; and she from that time continued to bathe it. The deceased went to work on the Saturday and he went to work again on the Monday. By the Monday he was suffering a good deal from his head, and apparently his wife thought that it would be wise for him not to go to work, but he insisted on going to work, and came back from work undoubtedly very ill. He was complaining of his chest, but he also had pains in his head, and she thought that the head also was in a bad condition ; and in view of the condition of her husband

she sent for the doctor. The doctor kept him from his work. The doctor diagnosed his case as one of bronchitis, and did not attribute the bronchitis to the condition of the head. The man continued to get worse, and on Dec. 4, he was taken to the infirmary. When he was taken to the infirmary it was discovered that he was suffering from septic pneumonia due to septic meningitis, which was due to the septic condition of what had been in its original condition a slight scratch on the head; and the man eventually died on Dec. 10.

Meantime, on Dec. 7, and not until Dec. 7, the widow had given notice to the employers which I think it is admitted would be sufficient notice within the meaning of the Act; and the doctor who was called in said that from the day when he was called in, and probably from the evening before, the man was not in a condition to attend to his business; in other words, was not in a condition to decide whether he should give a notice, or to consider the matter at all.

The learned judge who had all that evidence before him had to deal with two points; he had to consider in the first place whether it was proved satisfactorily to him that the deceased man had met with an accident arising out of and in the course of his employment. In a very careful judgment, which appears to me to be satisfactory in every respect, the learned judge laid down the law to himself as to how the onus of proof should be discharged, and made a very careful and accurate review of the facts. Having so reviewed the facts, he came to the conclusion that the applicant had made out that her husband had died from an injury arising out of and in the course of the employment. I do not propose to discuss his judgment any further except by saying that the learned judge in directing himself as to the law says this:

The principles to be applied to facts of this nature have been laid down by LORD BIRKENHEAD, L.C., in *Lancaster v. Blackwell Colliery Co., Ltd.* (1), at p. 406, in these words: "If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing an inference in his favour."

The learned county court judge, having previously reviewed the evidence, had already found in his judgment that the place which I have described, in accordance with his finding:

is pre-eminently the kind of place in which a workman is exposed to the risk of sustaining a small abrasion and of such abrasion becoming infected—

and having weighed the probabilities he says:

the puncture in this case was so small that it might have been caused by the scratch of a pin or indeed of a sharp finger nail, though there is no evidence that the

deceased was actually exposed to the risk of a pin scratch or that his nails were so sharp as to be capable of inflicting this small injury.

He goes on to say :

The facts of this case do not, in my judgment, by any means give rise to conflicting inferences of equal degrees of probability. Nor can they be said to be "equally consistent" in any sense of those words. In my judgment the probabilities of the injury having been sustained while the deceased was working lying down and with his head resting—without the protection of a cap—upon the cutting enormously outweigh the probabilities, if such there be, of its having been sustained in any other way.

Accordingly he finds that the accident arose out of and in the course of the employment ; and, my Lords, it appears to me that that is a pure question of fact to be determined by the learned county court judge, assuming that there is evidence.

The learned judges of the Court of Appeal thought, I take it, that the probabilities were equal, and that you are merely guessing when you are coming to the conclusion that the accident arose as it is now said that it arose. My Lords, in my opinion that is not so. I am entirely satisfied with the learned county court judge's view of the case. In view of the facts which I have mentioned, and the nature of the wound, which was on the back of the head exactly in the place where he would be likely to meet with an abrasion if he did in fact lie down in the way in which these workmen were at times required to lie down, I think the balance of probability was largely in favour of the view taken by the learned county court judge. If there is any substantial balance of probabilities, and there is evidence, then it is a mere question whether or not the learned county court judge chooses to accept that balance as being sufficient to satisfy him, and we are no further concerned. I am quite satisfied, as I submit to your Lordships, that there is evidence in this case, and for my part I feel bound to say that I should myself unhesitatingly have come to the same conclusion as the learned county court judge.

That is not the only point in the case, because the employers raised the objection that here there was no notice given, and notice, by the statute, must be given as soon as practicable unless it is excused by the provisoes, one of which is "that such want, defect, or inaccuracy" in the notice "was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." The learned county court judge in his judgment came to the conclusion that up to Nov. 26 the workman had no reason to suppose that the injury was one from which a claim against his employer would be likely to arise, and if that is so the occasion did not arise under which he was obliged to give notice. I think the right view is that in those circumstances and until that time had expired notice need not be given because it is not right to say that the practicable

time for giving it has arisen. The learned judge, I think, preferred to assume that there was a time for giving notice, perhaps from the very beginning, but there was reasonable cause for not giving it because the workman did not realise that it was an injury which was likely to give rise to a claim for compensation. But whichever way that is put, there appears to me to be ample evidence upon which the learned judge could so find. After Nov. 27, and including Nov. 27, and I think from the doctor's evidence including part of Nov. 26, the learned judge came to the conclusion that the man was in such a state of health that he could not be expected to attend to the business of giving notice. That, again, is a pure question of fact upon which there is ample evidence to support the learned judge's finding.

The learned judges in the Court of Appeal have taken a different view from that of the county court judge upon that matter. SLESSER, L.J. (for whose judgments, especially on these matters, I entertain the most profound respect) has decided the matter on a ground which I venture to think when considered is untenable. The learned county court judge in giving his judgment considered in the first place whether the employers suffered any prejudice from the want of notice, and regarding that matter from the point of view that notice might have been given as soon as the injury happened, namely, on Nov. 21 or 22, he says he cannot come to the conclusion that they were not prejudiced because it is possible that if they had known at once they might have been able to call some evidence as to when and how this accident actually happened; but, as I have said, he proceeded to say that nevertheless as the man had not a reasonable belief that any claim would arise from it, the notice was excused. From the fact that the learned county court judge had considered the question of prejudice, SLESSER, L.J., assumed that he implied that notice ought to have been given, and SLESSER, L.J., then proceeded to assume that because the learned judge had thought that notice ought to have been given, he had come to the conclusion that the workman knew that he was suffering from an ailment from which a claim was likely to arise; otherwise notice would not have to be given; and having built up that edifice he then comes to the conclusion that the learned county court judge had really arrived at a conclusion which was inconsistent with his eventual finding that notice was excused. My Lords, I venture to think that that results from a misreading of the learned county court judge's judgment, and that his judgment on that point throughout was entirely consistent, and that the inferences which are sought to be deduced from it in that matter are really not well founded.

My Lords, that notice is in these cases necessary and desirable is certain, because notice is provided for by the terms of the Act, but nevertheless, if my recollection is accurate, the Act as it now stands is

less rigid than the original Act used to be in respect of notice. Notice can be excused in different ways; and when first of all you have a provision that notice need not be given at all until it is practicable, and then you have these provisions which excuse it when there is reasonable cause for not giving it, I venture to think that it is a mistake in any way to strain the provisions as to notice, and that the courts are put in a position to deal quite fairly with the claims of employers and other persons as regards their being put into a position as soon as is reasonably practicable to deal with a claim made against them for compensation.

My Lords, I am satisfied that on the facts of this case when they are fully investigated the question has become purely one of fact, that there was evidence before the learned county court judge to support his award, and with great respect to the members of the Court of Appeal who thought otherwise I think his judgment ought to remain and ought not to have been disturbed, and I move your Lordships accordingly that this appeal should be allowed and the award of the learned county court judge restored.

LORD THANKERTON: My Lords, I have felt considerable doubt on the first question, as to whether there was evidence in this case sufficient to justify the finding of the learned arbitrator that the accident arose out of and in the course of the employment; but unless that doubt were sufficiently clear I should not feel justified in suggesting interference with a finding of fact by an arbitrator in a workmen's compensation case.

On the second point, with regard to notice, I entirely agree with the observations which have fallen from the noble and learned Lord on the woolsack.

LORD RUSSELL OF KILLOWEN: My Lords, I agree with the noble and learned Lord on the woolsack, but I desire to add one or two remarks as regards the second point.

As I read the judgment of the learned county court judge, what he has done is to consider the effect of the proviso, and the facts of this case in relation thereto. This, however, was not a case in which notice had not been given, it was a case in which notice had been given. The only question which the judge had to consider was whether the notice so given had been given as soon as practicable, within the meaning of sect. 14. The learned judge, however, made a finding of fact in these words: "I accordingly hold that throughout the want of notice was occasioned by reasonable cause"; that is to say, notice having been given on a date in December, he comes to the conclusion that the failure to give notice before that date was due to a reasonable cause. That, in my view, amounts to a finding that the notice was in fact given as soon

as practicable. The result, therefore, is just the same for the purposes of this appeal.

LORD MACMILLAN : My Lords, I also agree that this appeal should be allowed.

LORD ROCHE : My Lords, I also agree that this appeal should be allowed for the reasons assigned by the noble and learned Lord on the woolsack.

Appeal allowed with costs. Award of county court judge restored.

Solicitors : Rowley, Ashworth & Co. (for the appellant); James Turner & Son, agents for Weightman, Pedder & Co., Liverpool (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

FELSTON TILE COMPANY, LTD. v. WINGET, LTD.

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), **October 27, 28, 1936.**]

Hire-purchase—Agreement on printed form—Conditions on printed form varied by previous correspondence—Hire-purchase as agreement for sale—Contract of Sale—Conditions and warranties implied—Sale of Goods Act, 1893 (c. 71), ss. 1, 14.

The plaintiffs negotiated by letter with the defendants for the purchase of a certain machine. A letter from the defendants, which contained an estimate, stated that the estimate was subject to conditions printed thereon. One of the conditions provided that: "In lieu of any warranty or condition implied by law, we guarantee that the materials . . . are of the best quality," and that the defendants would replace any part broken or unduly worn within 12 months. After further negotiations the defendants sent to the plaintiff a hire-purchase agreement expressed in a covering letter to be drawn up in accordance with the terms stated in the letter above mentioned. The hire-purchase agreement provided that: "This agreement embodies the entire agreement as to the hiring of the machinery." There was in the agreement no exclusion of any warranty or condition. The hire-purchase agreement was duly entered into. The machine proved unsatisfactory and the plaintiffs brought an action for breach of warranty. The judge held that the correspondence formed no part of the contract between the parties and he gave judgment for the plaintiffs:—

HELD : (i) upon the evidence the correspondence formed part of the contract between the parties.

(ii) the defendants' liability for warranty and condition was excluded by the correspondence and the plaintiffs could not succeed in their action.

(iii) since the hire-purchase agreement was an irrevocable agreement to sell on the part of the owner, it was a contract for the sale of goods within the Sale of Goods Act, 1893, s. 1, and the statutory warranties and conditions would be implied.

[EDITORIAL NOTE.] Apart from the exclusion of a clause in a printed agreement for hire-purchase, this case includes a discussion of the position of hire-purchase

agreements under the Sale of Goods Act, 1893. Many cases have discussed the distinction between a sale in which the purchase price is payable by instalments and a hiring agreement coupled with an option to purchase. The leading authority in this connection is probably *Helby v. Matthews* (4). Here the question debated is whether a hire-purchase agreement is a contract of sale within the Sale of Goods Act, 1893, for if it is (and it is held to be so) the usual statutory conditions and warranties are implied. A contract of sale in the Sale of Goods Act includes an agreement to sell and this is so whether such agreement is absolute or conditional.

AS TO "CONTRACT OF SALE," see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 117, 118, paras. 224, 225; and FOR CASES, see DIGEST, Vol. 39, pp. 358-360, Nos. 1-12.]

Cases referred to:

- (1) *Glynn v. Margetson & Co.*, [1893] A.C. 351; 17 Digest 350, 1607.
- (2) *Baldry v. Marshall*, [1925] 1 K.B. 260; 39 Digest 448, 762.
- (3) *Hyman v. Nye* (1881), 6 Q.B.D. 685; 3 Digest 87, 211.
- (4) *Helby v. Matthews*, [1895] A.C. 471; 3 Digest 93, 245.
- (5) *Geddlings v. Marsh*, [1920] 1 K.B. 668; 39 Digest 443, 723.
- (6) *Andrews Bros. (Bournemouth), Ltd. v. Singer & Co., Ltd.*, [1934] 1 K.B. 17; Digest Supp.

APPEAL from a decision of MACKINNON, J., dated Feb. 24, 1936.

The plaintiffs entered into negotiations with the defendants for the supplying of a tile-making machine. In the course of these negotiations it was stated that the machine was capable of an output of 8,000 tiles per hour, and that if the machine was unsatisfactory it would be replaced. Eventually the plaintiffs signed a hire-purchase agreement for the hire of a machine. Clause 7 of the agreement was as follows:

This agreement embodies the entire agreement as to the hiring of the machinery between the company and the hirer, it being understood that the company's agent is not authorised to enter into or bind the company by any other agreement or to vary the printed terms hereof.

The machine proved unsatisfactory and the plaintiffs sued the defendants for breach of warranty. MACKINNON, J., gave judgment in favour of the plaintiffs. The defendants appealed to the Court of Appeal.

F. van den Berg, K.C., and *Harold Eaden* for the appellants.

R. A. Willes and *L. H. Gluckstein* for the respondents.

van den Berg, K.C.: This tile machine was a purely experimental machine; in fact, an agreement was made as to what was to happen if it broke down. The plaintiffs have alleged a warranty; to get that they have to rely upon the earlier documents. But to get the terms of the agreement, they have entirely neglected them. They have approved and reprobated. The statement of claim sets out documents which exclude the possibility of a warranty. There is also a claim for damages for late delivery of the machine—the date of delivery also is only stipulated in the earlier documents. It is contrary to the whole of commercial usage only to consider the hire-purchase agreement document. The term of supplying a new machine if the other were un-

satisfactory is not in the hire-purchase form. Nor is the stipulation as to the machine producing 8,000 tiles per hour. It is submitted that you can consider the other documents without rectification of the contract: *Glynn v. Margetson & Co.* (1). The courts try to give effect to the intention of the parties where several documents constitute the contract. There is no difficulty in reconciling the documents here; there is the plainest indication of the intention. Clause 7 is a term in conflict of the previously expressed intentions and such a term should be neglected.

Eaden, following on the same side: The plaintiffs contended below that the previous letters constituted a contract. The only matter outstanding was, should they pay cash or arrange to hire-purchase. In these circumstances it is submitted that clause 7 only means the entire contract as to the method of hiring. Otherwise there is complete inconsistency.

Willes: The plaintiffs are claiming damages for the breach by the defendants of a contract of bailment. The defence is that the contract was subject to exceptions, one of which was the failure to let a suitable machine to the bailee. The court will always look with great jealousy and construe strictly against a party who seeks to rely upon an exception: *Baldry v. Marshall* (2). If a party desires to avoid a term he must express it clearly in the contract. There is no case deciding that the Sale of Goods Act, 1893, applies to hire-purchase agreements. If this were a sale and not a hire-purchase agreement then the Act would apply: *Hyman v. Nye* (3), *Helby v. Matthews* (4). At common law the obligation upon the bailor of a chattel is to deliver it as reasonably fit for the purpose for which it is required as he can make it with care and skill. There is in law no difference in the measure of obligation of a bailor and a vendor. It is not pleaded that the sale was with all faults and it is not open to the appellants to argue that. The plaintiffs argued that they are entitled to look at the earlier documents to see what was meant by "the plant" described in the hire-purchase agreement. The parties were discussing this plant. A seller may wish to escape from the provisions of the Sale of Goods Act, 1893, and contract accordingly, but a hire-purchase agreement where the bailee has power to purchase is quite different. There is an implied warranty with a contract of bailment: *Geddling v. Marsh* (5). If a contract of hire-purchase is such as to enable the bailee to purchase at any time, the the Sale of Goods Act, 1893, s. 14, would apply *before* the bailee so elects; that has never been suggested. The goods were supplied under a contract which compelled the vendor to see that they were reasonably fit for the purpose intended—unless an exception was made. It was not intended for the purchaser to take the machine subject to all risks. Clause 7 is a clear exclusion of any other terms or previous negotiations.

The position would not have arisen if the machine had not broken down.

Furthermore, the defendants failed to deliver the pallets as agreed. They only delivered 4,000 instead of 15,000 ; those they delivered late and of them only 40 were of any use. The plaintiffs tried to get the defendants' sanction to purchase others, but they refused it. They would not accept responsibility for the use of other pallets or guarantee the satisfactory performance of the machine. This was a fundamental breach of the contract. It does not matter that there was another breach, which might be excused ; the plaintiffs can hang their claim for damages on to this breach ; the contract was destroyed by this breach. Every power of the court should be used to prevent so wide an exception as this. An exception protecting from a breach of contract is no excuse for defective performance : *Andrews Bros. v. Singer & Co.* (6). The court must consider the nature of the breach and if there is an exception which excuses failure of performance, where performance is attempted the nature of the attempted performance must be considered. Here incompetent machinery was in fact delivered and so there was attempted performance. But there was no attempted delivery of pallets. There was more than one breach fundamental to the contract ; even if one is excused, the other is not.

van den Berg, K.C., in reply : If rectification is allowed, I submit there should be no penalisation as to costs, as the statement of claim itself alleged that the earlier documents were included in the contract.

GREER, L.J. : This is a case which is not free from difficulty, but we have come to the conclusion, notwithstanding the vigorous argument for the respondents, that the learned judge was wrong in giving damages to the plaintiffs.

As I follow the allegations in the statement of claim and the defence, both parties are seeking to rely not merely on the words which are contained in the hire-purchase agreement, but also upon the correspondence which took place between the parties. In my judgment the covering letter of May 8 is just as much part of the contract as is the hire-purchase agreement. The covering letter, which comes from the sellers, says this :

We have drawn up a hire-purchase agreement in accordance with the terms stated in our letter of Mar 11. We are sending this in duplicate, and we should be obliged if you would have the original signed over a 6d. stamp, witnessed and returned to us at your convenience.

I understand that to mean : " We are sending this printed document upon a definite understanding that our letter of Mar. 11 is to be deemed to be part of the contract between us." The letter of Mar. 11 contains an estimate, and following the estimate are these words : " This estimate

is subject to conditions printed on back." One of the conditions printed on the back is this :

Guarantee. In lieu of any warranty or condition implied by law, we guarantee that the materials employed in the manufacture of our machinery are of the best quality, and if through defective material or workmanship any part become broken or suffer undue wear within 12 months from delivery, we undertake to replace such part or parts free of charge to the destination named in the tender if in Great Britain and otherwise f.o.b. English port.

That is a not uncommon condition to have in the sale of machinery or goods, and it is intended, and expressly intended, to meet the cases which have decided that if you exclude warranties, those words are not sufficient to exclude conditions ; a condition is something different from a warranty. But the defendants here have been careful enough to exclude not mere warranties, but also conditions. Both parties having treated the correspondence as documents which can be looked at for the purpose of ascertaining the contract between the parties, I should treat that as an admission that we are entitled to add to the terms of the formal document the terms contained in the correspondence, and especially the terms contained in the letter of May 8, by reference to the letter of Mar. 11. That being so, it seems in my judgment unnecessary to decide whether there should or should not be rectification in this case. If rectification be the right remedy, then I should think it ought to be granted without any special provision with regard to costs, because it would be unfair to the defendants, the plaintiffs having relied on the correspondence as well as the defendants, that they should be mulcted in costs, because they now argue that you can only look at the document.

Mr. Willes, in his endeavour to support the judgment by a very vigorous argument, first of all said he could do it by contending that, after all, this is not merely an action for damages for breach of a contract of sale, but is an action for breach of the implied term in a bailment. An implied term in a bailment is that the article bailed is as fit for the purpose as reasonable skill and care can make it. If that was going to be alleged, it ought to have been expressly alleged, and there ought to be evidence that the article which was delivered, though not a very good article, was such as could have been by reasonable skill and care made fit for the purpose. There was no such evidence adduced before the learned judge, and I think the reason for that was that, though bailment is mentioned, the allegation as to the condition that was broken is in these terms :

that the plant and machinery supplied by the defendants should be reasonably fit for the purpose for which as the defendants well knew the plaintiffs required it and that it should be of merchantable quality.

That is a reference, a very definite and clear reference, to the Sale of

Goods Act, 1893, s. 14; and in order to succeed the plaintiffs would have to show that the particular purpose for which the goods were required was expressly or by implication made known by the buyer to the seller, so as to show that the buyer relied on the seller's skill or judgment, and that the goods are of the description which it is in the course of the seller's business to require. No real effort was made to bring that condition into operation, though I assume for the purposes of my decision that that condition would have applied, if it had not been for the terms which were expressly made by the correspondence. Then Mr. Willes further endeavoured to get out of the difficulties occasioned by the correspondence and the documents in the case, and said: "Oh, but I do not require to rely upon this condition; assuming it is there, still what happened was this: the contract provided not merely for the delivery of the machine, but for the delivery of a number of pallets which were necessary for the working of the machine." The answer to that is, that that is not what is complained of in the statement of claim, nor does it appear anywhere that any separate damages could be claimed for the failure to deliver the pallets, because if they had been delivered the machine would still have been unsatisfactory and not a compliance with the alleged condition.

For these reasons I have come to the conclusion that the learned judge was wrong in the view he took of the case as presented to him, and that he ought to have come to the conclusion that, by reason of the correspondence, the conditions which would otherwise have been implied under the Sale of Goods Act, 1893, s. 14, were excluded by the express agreement of the parties. If so, there is an end of this case, and the appeal must be allowed with costs here and below. I should say, if I should be wrong about that and rectification is necessary, that I should not think that it would be right or proper that the plaintiffs should be relieved of any of the costs, either of the action below or the appeal to this court, because of the fact that both parties relied upon the correspondence as well as upon the mere document of hire purchase. There can be no question that the hire-purchase agreement was, within the definition of the Sale of Goods Act, 1893, s. 1, an agreement for sale, and it is in respect of agreements for sale that sect. 14 applies. It applies to the agreement for sale after there has been delivery under the agreement for sale.

For these reasons I think the appeal must be allowed with costs and judgment entered for the appellants.

SLESSER, L.J.: I agree. The critical words in which the learned judge has found in this case in favour of the plaintiffs on the matters which have been argued in this court are these:

I am satisfied that that correspondence in March formed no part of the contract

which was made between the parties by this hire-purchase agreement in May. Quite apart from any other reason, I think Mr. Willes is justified in pointing out that any such contention must obviously fail, because there is a special provision in this hire-purchase agreement which says: "This agreement embodies the entire agreement as to the hiring of the machinery between the company and the hirer, it being understood that the company's agent is not authorised to enter into or bind the company by any other agreement or to vary the printed terms hereof."

I cannot follow the learned judge when he says that he is satisfied that the correspondence in March formed no part of the contract which was entered into between the parties in May, because, apart from any other difficulties, in my view the plaintiffs themselves in their statement of claim relied upon the covering letter of May 8, which in its turn refers to the letter of March, which the judge has excluded from his consideration. By para. 2 of the statement of claim the plaintiffs say:

By a contract between the plaintiffs and the defendants the terms whereof are contained in or to be implied from a printed hire-purchase contract (afterwards signed by both parties) and from the defendants' covering letter dated May 8, 1935, sending such printed contract to the plaintiffs, the defendants agreed—

and so on. When we look at the letter, which is thereby relied on by the plaintiffs as part of the agreement of May 8, 1935, it appears to be clear that the covering letter does contain all the terms, or involves the terms, which are here actually in dispute. There are other letters which seem to me equally necessary to be considered, being sent by one side and the other. In the letter of May 2, 1935, there is this:

We thank you for confirming that your order will be paid for as set out in our letter of Mar. 11, and if you will be good enough to agree the above figures, we will have the hire-purchase agreement drawn up accordingly and sent along for your signature.

Then on May 8:

We have drawn up a hire-purchase agreement in accordance with the terms stated in our letter of Mar. 11—

and that is signed by Winget, Ltd. It is therefore clear to my mind that the agreement here has to be gathered from a number of different documents, from the letter of Mar. 11, which, including as it did the estimate, had, as my Lord has pointed out, printed on that estimate conditions which in terms excluded any warranty or condition implied by law. That being so, we are met with this position, that the printed document, which is only a part of the agreement, does contain, in my view, in clause 7 a provision which is incompatible with the exclusion of the warranty or condition, because it is said in clause 7: "This agreement embodies the entire agreement as to the hiring of the machinery," and in that written agreement of May 8 there is, it is true, no exclusion of any warranty or condition. In these circumstances,

having regard to the fact that by the common consent of the parties, as I read the pleadings, these letters are all embodied in the agreement, I have come to the conclusion that it is permissible here to apply the principle enunciated by LORD HERSHELL, L.C., in *Glynn v. Margetson & Co.* (1), at p. 355, to the effect that :

Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent.

I think these words in clause 7, forming as they do a part of the contract, can be so limited that they must be so construed when they say, "This agreement embodies the entire agreement," that that entire agreement would include what had been already agreed in March, and imported by the letter of May as one of the terms of the contract, namely, that there should be an exclusion from liability for warranty or condition.

I would only make one other observation, as we are differing from the learned judge, and that is this : Mr. Willes has argued in the alternative that in any case the conditions, being expressed to be conditions of sale, do not apply to this agreement, which he says is a hire-purchase agreement or, as he describes it, a bailment. Strictly this agreement, so far as the lender is concerned, so far as affects the position of the seller if he is under the agreement called upon to sell, is that he has irrevocably agreed to sell the goods if the purchaser calls upon him so to do ; and it seems to me that this case, therefore, is governed generally by the conditions of the Sale of Goods Act, 1893, and more particularly by that provision in sect. 1 (2), which says that a contract of sale may be absolute or conditional. There is also this, in addition to the particular difficulty arising in this case to which my Lord has referred, that as I understand the pleadings, no claim was made on that basis, but the claim was made for breach of warranty under the Sale of Goods Act, 1893, s. 14, and in no other way. But for myself, as it seems to me, the fact that there is associated here an agreement to hire as well as an agreement to sell does not alter the position, and I think when the negotiations were taking place and the terms were being made in March at a time, as has been pointed out, when it was contemplated that there might be a hire-purchase agreement, that those terms were intended to exclude the obligation of sale which might arise under the hire-purchase agreement, just in the same way as if the whole agreement had been for sale and no other condition.

SCOTT, L.J. : I agree. If in this case it were necessary for the equitable jurisdiction of the court to be exercised, and for the contract between the parties to be rectified in order to give effect to the contract which

they intended to make, in the course of the argument I expressed the view that we should have to deal with that matter on the basis of making the appellants here pay some costs, or at any rate lose some costs, but on further reflection I think that that would be wrong, even if it were necessary for us to exercise that equitable jurisdiction. It would be wrong in my view, because I think the plaintiffs presented to the learned judge a view only consistent with their being willing to treat the contract as so rectified, and that consequently the intervention of the court was not necessary in its equitable jurisdiction, because the two parties themselves were treating it as rectified, and therefore under the Judicature Act the court was at liberty to treat it as so rectified. But in my view no rectification is necessary, and it is rendered unnecessary by the considerations which have fallen from GREER, L.J., and from SLESSER, L.J. I cannot see that it matters whether the contract is called a contract of sale, or called a hire-purchase agreement, or called a contract of bailment, because the whole contract is in writing, and the written contract contains express conditions applied by the parties to their contract, whatever its nature was, and under those conditions the right of action claimed by the plaintiffs here is quite clearly excluded. If the parties chose to agree to conditions of that kind, they were at liberty to do so, whatever may have been the nature of the fundamental bargain. As a matter of fact, here it may well be that the contract partook, as is alleged in the statement of claim, of two characters, partly contract of sale, and partly bailment, but that does not affect the question, because they have themselves appended to that contract the special conditions to which I have referred. As GREER, L.J., said in his judgment, a hire-purchase agreement is quite clearly *inter alia* an agreement for sale within the meaning of the Sale of Goods Act, 1893, s. 1 (1), and is a conditional agreement within subsect. (2) of that section. The purchaser is given by it the right to turn the contract into a contract of sale for all purposes, and to bring about an actual sale by exercising the option which the terms of the contract give him. But it seems to me that it would be wrong in a contract of that kind, because it was not a present sale, to say that the conditions and terms agreed in the written contract were not applicable to the whole contract from the start, so far as in terms they are made applicable by the agreement of the parties. Therefore, the question as to whether it was a bailment or whether it was a contract of sale, and if a contract of sale when it would operate as a contract of sale, all seems to me irrelevant. The parties here had in their contract agreed to terms which in my view afford a complete answer to the action brought.

One more word about the nature of the contract. I regard it as a contract made by correspondence, in the sense in which that phrase is habitually used in relation to the law of contract. It began with a

letter quite early on, and it did not end until the letter of the plaintiffs in answer to the letter of May 8, which enclosed the printed document called the hire-purchase agreement. In the answer they say :

We acknowledge and thank you for your letter of May 10 returning the hire-purchase agreement duly signed and witnessed.

In other words, that was the final acceptance of the final counter offer in the series of letters which constituted the correspondence between the parties. If that is right, that the contract is contained in a series of documents, then if in that series you find a printed clause inconsistent with the written terms found in the correspondence, it is a rule of interpretation that the written words should override the printed words, as was laid down in *Glynn v. Margetson & Co.* (1). The fact that the contract, which *ex hypothesi* is wholly in writing, happens to be contained in a number of separate documents as distinct from a contract contained in one document partly in writing and partly in print, in my view makes no difference whatever to the application of the rule that the written word overrides the printed word in case of an ultimate inconsistency between the two. For those reasons I think clause 7 of the printed form was no part of the contract by correspondence between the parties here, and that for that reason the learned judge was wrong in saying that that was a fundamental clause which excluded the conditions which are contained in the earlier parts of the correspondence.

Solicitors : *Watson, Sons & Room*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, Bristol (for the appellants) ; *Barilett & Gluckstein* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

CLORE v. THEATRICAL PROPERTIES, LTD., AND
WESTBY & CO., LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer, and Greene, L.JJ.),
October 26, 27, 1936.]

Landlord and Tenant—Licence—Distinguished from lease—Enforcement by assignees—Restrictive covenants affecting property other than land—Agreement of the house rights.

Doubted. BENDALL v. BENTLEY, [1952] 1 All E.R. 1000. The indenture, which is ordinarily called an agreement for the front of the house rights of a theatre, it was provided that: "the lessor doth hereby demise and grant unto the lessee the free and exclusive use of all the refreshment rooms . . . of the theatre . . . for the purpose only of the supply to and the accommodation of the visitors to the theatre and for no other purpose whatsoever." There was a condition that the lease should not be assigned nor sublet except with the lessor's consent. The definition clause stated that the terms lessor and lessee should include their executors administrators and assigns. An assignee of the lessor sought to prevent assignees of the lessee from exercising any of the rights conferred upon the lessee by the indenture:—

HELD: (i) the indenture was not a lease but a licence.

(ii) being a personal contract, it could only be enforced by persons between whom there was privity of contract, and this was so even if it was a restrictive covenant. The assignee of the lessee had therefore no rights under the document.

[EDITORIAL NOTE.] The agreement for "the front of the house rights" here was not quite in the same form as that adopted in *Daly v. Edwardes* (1), or indeed as that in *Frank Warr & Co., Ltd. v. London County Council* (2). In the present case there were both words of demise: "doth hereby demise and grant unto the lessee," and the grant was of "the free and exclusive use" of certain parts of the theatre. These words, however, were not sufficient to save the document from being construed as a licence and not as a lease. The rights under it were therefore purely contractual and would not pass to assignees. It was also attempted to support the position by treating this document as a restrictive covenant, but there was no land for whose benefit it could be said to be taken. It was therefore rejected on the footing that a purely personal covenant is not binding on a third party, although he take with notice of it.

AS TO LICENCES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 10-12, para. 6; and FOR CASES, see DIGEST, Vol. 30, pp. 500-511, Nos. 1584-1664. As to RESTRICTIVE COVENANTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 126, 127, para. 111; and FOR CASES, see DIGEST, Vol. 40, pp. 310-314, Nos. 2648-2675 and Vol. 41, p. 321, Nos 1800-1804.]

Cases referred to:

- (1) *Edwardes v. Barrington* (1901), 85 L.T. 650, H.L., affg. S.C. *Daly v. Edwardes* (1900), 83 L.T. 548, C.A.; 30 Digest 509, 1649.
- (2) *Warr (Frank) & Co., Ltd. v. London County Council*, [1904] 1 K.B. 713; 30 Digest 509, 1650.
- (3) *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108; 41 Digest 321, 1800.
- (4) *De Mattos v. Gibson* (1858), 4 De G. & J. 276; 41 Digest 321, 1798.
- (5) *London County Council v. Allen*, [1914] 3 K.B. 642; 40 Digest 302, 2602.
- (6) *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354; 39 Digest 526, 1406.

- ✓(7) *McGruther v. Pitcher*, [1904] 2 Ch. 306 ; 39 Digest 526, 1407.
 (8) *Tulk v. Moxhay* (1848), 2 Ph. 774 ; 40 Digest 313, 2667.
 (9) *Formby v. Barker*, [1903] 2 Ch. 539 ; 40 Digest 306, 2626.

APPEAL from the judgment and order of CLAUSON, J., in an action in which the plaintiff claimed and obtained :

(i) A declaration that neither of the defendants, Theatrical Properties, Ltd., nor Westby & Co., Ltd., had any right to the use and occupation of the refreshment rooms bars cloak rooms or wine cellars or any other room or office of the Prince of Wales Theatre Coventry Street London or to exercise any of the rights or privileges conferred upon Edgar Bruce by the deed of licence dated Nov. 7, 1899.

(ii) An injunction restraining the defendants Theatrical Properties, Ltd., their agents servants and employees from entering upon any of the refreshment rooms bars cloak rooms wine cellars or any other room or office of the said theatre and from exercising or attempting to exercise any of the rights or privileges conferred upon the said Edgar Bruce by the said deed of licence and from trespassing upon the said theatre or any part thereof.

The defendants moved the Court of Appeal to reverse this order and to declare, *inter alia*, that the said deed of licence, referred to as "document 13," was valid and subsisting and binding on the plaintiff. The plaintiff and defendants were respectively assignees of the parties to the deed of licence. The first defendants were the assignees of one Edgar Bruce named in the deed as "the lessee," and the plaintiff the assignee of one Leigh named in the deed as "the lessor." The appeal turned upon the point of construction of this deed of licence. The relevant parts of the deed and the facts are fully set out in the judgment of LORD WRIGHT, M.R.

F. K. Archer, K.C., and *W. F. Waite* for the appellants, Theatrical Properties, Ltd.

Roger W. Turnbull for Westby & Co., Ltd.

F. R. Evershed, K.C., and *J. F. Bowyer* for the respondent.

Archer, K.C. : The true construction of document 13 is that it is not a true licence but a grant or reservation of an interest in land : see *Edwardes v. Barrington* (1), *Frank Warr & Co., Ltd. v. London County Council* (2), *Daly v. Edwardes* (1). Alternatively the document is a mere licence in the sense that it can be revoked.

Evershed, K.C. : Document 13 is a mere licence and confers no interest in the land. The rights of Theatrical Properties, Ltd, under document 13 came to an end with the assignment by Leigh of his interest in the property itself. Whether an interest in land is created or not, all the rights under document 13 came to an end on the termination of the lease of 1899.

LORD WRIGHT, M.R. : In this case a great many topics have been discussed, but I intend to deal with the matter on a quite limited point. The question in my opinion turns entirely on the true effect of the docu-

ment called "document 13" in this case and which was a lease made between one Bruce and another Leigh and dated Nov. 7, 1899. I think that this court is bound by the decisions in previous cases to hold that this document does not convey any interest in land but is merely a personal contract embodying a licence. On that ground the learned judge decided this matter and I agree with him and in particular with his final conclusion in that the rights mentioned in the document are purely contractual. It follows from this that there is no circumstance which enables the present appellants to assert any rights against the present respondent because there is no contractual nexus between them. The action was brought by the plaintiff to obtain a declaration that the defendants had no rights against him in respect of the refreshment rooms, bars, cloak rooms and wine cellars of the Prince of Wales Theatre and judgment was given to this effect. It is necessary to examine the circumstances in detail. When the Prince of Wales Theatre was built, there was a lease made in 1883 demising the theatre to one Bruce until 1967 at a yearly rental of £1,000. In 1896 Bruce sublet the whole theatre to one Lowenfeld for 24 years at the rental of £6,000 per annum for use as a theatre. On the same day by an independent document Lowenfeld entered into an agreement with Bruce to transfer to him "the front of the house rights" in the theatre for a period which corresponds with the term of the 1896 lease at a rental of £25 per week, which sum was to be payable out of the subject matter of the letting, namely, the letting of the refreshment rooms of the theatre and other premises of a kindred character, including the privilege of using them to sell refreshments. In 1919 this agreement came to an end. In the meantime certain changes of interest and title were made which, for the purposes of this appeal, may be ignored. On Nov. 7, 1899, Bruce assigned his reversionary interest in the whole theatre to one Leigh. On the same day the agreement in dispute was made which is endorsed as being a reversionary lease of the front of the house. The first party is Leigh, who had become underlessee of the theatre for a term of 21 years, and Bruce is the second party. It is upon the true construction of this document that the decision in this case depends. In 1901 Bruce died and two executors were appointed. Some time before this one of the executors had bought from Bruce one half of Bruce's interest in document 13, namely, the agreement. He later formed the first defendant company to hold the rights under document 13, and by assignment Bruce's rights under document 13 became vested in the defendant company. This was the position from 1903 onwards. These parties remained in possession of the rights and privileges under document 13, and except that they made a further agreement with the second defendants, that is the position we have to consider at the commencement of this dispute. In May, 1908, Leigh was still sub-lessee of the lease

of 1899. He then assigned half of his rights under document 13 and in 1914 made an assignment of the remaining half to one Halsey. From that time onwards the defendant company became the assignees and were entitled to the front of the house rights without paying rent. In 1917 Leigh and his mortgagees transferred their rights in the sublease of 1899 to a Mr. Charlot, who entered possession of the theatre and continued in possession until 1931, when his rights were sold to the present plaintiff. In the instrument of sale it was stated that the property comprising the theatre excluded the rights to manage the refreshment bars and the front of the house rights. In Dec., 1931, a company called P.O.W., Ltd., was formed by the plaintiff and they attempted to make it impossible for the first defendants to exercise their rights. The result was an action which was compromised. On Feb. 21, 1935, there was an assignment of the head lease to the plaintiff. There was then a surrender of the head lease and a new lease for 99 years. Such is the chequered history of these premises and the front of the house rights which are the subject-matter of this litigation.

Now, as regards the front of the house rights the present defendants are the assignees of these rights under document 13 and the plaintiff is the assignee of Bruce, the other party to document 13. The question is whether the defendants are entitled to assert the rights granted to them under document 13 as against the plaintiff. The document in question is an indenture made Nov. 7, 1899, between John Highfield Leigh, the lessor of the one part, and Edgar Bruce, the lessee, of the other part. The recitals recite earlier transactions of a similar nature and also recite the words contained in the contemporaneous documents which dealt with the lease of the Prince of Wales Theatre. The opening words are these :

the lessor doth hereby demise and grant unto the lessee the free and exclusive use of all the refreshment rooms bars cloak rooms and wine cellars of the theatre and all other the rooms and offices thereof now in use by and in the occupation of the lessee his contractors servants or agents for the purpose only of the supply to and the accommodation of the visitors to the theatre and for no other purpose whatsoever including the sole and exclusive privilege of advertising and letting spaces for advertisements in and about the said bars and refreshment rooms and upon all the programmes sold within the theatre and also the exclusive right of selling in accordance with these presents in the theatre all such programmes of the entertainment then being given at the theatre and books of words and music as may be required for the audience of the theatre and also the exclusive right to let or sell opera glasses and to sell in or about the said cloak rooms and the theatre photographs scent and flowers and such other articles as may from time to time be usually sold at first class theatres in the West End of London To Hold the same unto the lessee for the term of 21 years from Dec. 25, 1919. Yielding and paying therefor the sum of £25 per week . . . only out of the profits to be made by the lessee.

Then there were a number of covenants. The lessee was :

to supply at his own expense all programmes and books of words and music that may be required for the audience of the theatre . . . and to keep proper books of account of the receipts and disbursements in respect of the said cloak rooms, etc. The refreshments were to be of good quality and the advertisements in and about the refreshment bars and on all programmes to be of a first-class character only and " not such as to be in anywise injurious to the repute of the theatre or detrimental to the sale of the programmes." The lessee was to :

engage and employ proper and sufficient attendants for the cloak rooms refreshment rooms sale of programmes and other articles . . .

There was also a condition that the lease should not be assigned nor sublet except with the consent in writing of the lessor. Finally there was a definition clause stating that the terms lessor and lessee should include their executors, administrators and assigns. Mr. Archer contends that this document constitutes a letting or demise of premises and is a carving out for the exclusive use and enjoyment of the lessee of a certain part of the theatre and a transfer of part of the estate to the lessee. On first sight there is a good deal to be said in favour of that contention. I need not discuss the arguments incidental to that contention, because I am going to treat this matter as decided in two decisions in the Court of Appeal and one decision in the House of Lords upon documents which deal with the same subject matter. It is quite common in theatres to have separate lettings in respect of the front of the house rights such as are dealt with in this document. The case to which reference must be made is *Daly v. Edwardes* (1). It was held in that case that a document similar in character and effect to the document in the present case was not a lease or a grant of part of an interest in land, but was merely a personal contract or as it was sometimes said a licence. In the Court of Appeal, RIGBY, L.J., seems to have held that the matter was not free from doubt. He says, at pp. 550, 551 :

Not only does the form of this agreement naturally give rise to the arguments that have been presented to us on the part of the appellant, but I must say that at the first sight of the agreement I was very much inclined to take the view for which they have contended. It is only after consideration, and careful consideration, that I have come to the conclusion that a licence instead of a lease of the hereditament was really what was intended. . . . It looks very much like a lease of land. But I do not think that any of those considerations, or all of those considerations put together, should take us away from the real substance of the matter as I deduce it from the words used ; not only, however, from those words, but first of all from those words, and afterwards from the rest of the agreement. It is the free and exclusive licence and right to use. Those are not words *prima facie* of a demise of land, although they may, under certain circumstances, have the effect of a demise of land. But what are Frank Warr & Co. to have the use of ? The refresh-

ment rooms, bars and smoke rooms. I stop there because that is enough for my purpose. They are to have the same right in the bars, for instance, that they are to have in the refreshment rooms and smoke rooms. I cannot get over the fact that they never imagined that they were to have a lease of the refreshment rooms and the smoke rooms, and if not of those then not of the bars. Let us look at the state of the admitted facts. The smoke room was to be used by those persons who paid for places in the theatre, or were admitted by the order of the lessee of the theatre. The refreshment rooms were to be used in like manner by the same class of people, and it did not follow that they were going there for refreshments. They might obviously not intend that at all; they might go to obtain a change of atmosphere and of scene, and, if they did not smoke, at any rate to get relief from the tedium of their places in the theatre. No doubt the bars were peculiarly required for the purpose of serving out refreshment. But I cannot see how in any other way they differed from the rest of the rooms, the refreshment rooms, and the smoke rooms. No doubt the persons who had got a licence to sell refreshments had a perfect right to say to others: "You must not come behind our bars, because you will interfere with us, not because you would be a trespasser." They would say, whether to the lessee of the theatre, or to anybody else "You must not come here, because we have the right by contract to do everything that is required for serving refreshments, and we cannot do that effectually and properly if you come behind the bars." That is not treating them as trespassers on land. I cannot see that that was in their minds. I asked a question which probably was a very small matter, but it seemed to me not immaterial: "Who lights the rooms?" and it appears that the lessee of the theatre does so. That lighting probably would not involve much interference. If the lights were turned on once, probably it would not be likely that they would have to be interfered with during the whole of the entertainment that was then going on. But still, without a reservation for that purpose in the lease as a mere consequence of his ownership, I apprehend that if there had been any difficulty about the electric lights during the performance, it would have been the lessee of the theatre who would have been entitled to see that the lights were put right. At any rate, if any catastrophe had happened, it would be set right by him and not by the alleged lessees of these refreshment rooms. On the whole, I think that the proper conclusion is that Frank Warr & Co. took no estate or interest in land, but that they were entitled, for all reasonable purposes, to consider themselves as having an exclusive licence to provide refreshments and all that follows from that privilege, and nothing else at all.

This case went to the House of Lords, and the EARL OF HALSBURY, L.C., gives judgment to the same effect and points out, at p. 652, that :

Those who drew up the documents have used words inappropriate to the particular thing with which they were dealing. But they are not words of art, and it is frankly and most properly conceded that we must, if we can, find out from the language of the instrument, having regard to the relations between the parties and the object which was on the face of the instrument apparent, what were the real intentions of the parties. And really but for the extremely confused and inaccurate use of technical words from time to time in the course of these instruments the object is clear enough. The lessee of a theatre is making a bargain with a refreshment contractor, and he wants proper accommodation for those whom he invites to his theatre to be provided by some person who shall preside over and have the command and the profits of the refreshment department of the theatre. The mode in which the parties have contracted is that which really makes the difficulty. But

when one looks at the whole thing there is not one word which necessarily, as a matter of art, decides the question. Then let us see what the words are that they did use. They did not say that they demise, for instance, but they say that the person with whom the contract is made is to have the use of certain parts of the premises, and—I confess that I follow the language and the reasoning of the LORD CHIEF JUSTICE very much—if you look through the whole thing you see what is the object of it. No doubt both parties intended that the one should be the exclusive refreshment contractor, and that the other person who was the lessee of the theatre should have certain control and certain powers of dealing with that part of the theatre which was reserved for refreshment—the refreshment bars, cupboards, &c. If that is the real meaning of the parties, is there anything in the language which they have used which prevents that intention from being carried out? I think not. I think the instrument most unfortunately framed—framed apparently by attempting to adapt a common form of lease of land to the contract into which the parties were entering; and from time to time language is used—I think the strongest case is where you find the covenant for quiet enjoyment, and the payment of rent and so on—which is more appropriate to the ordinary transactions by way of conveyance and lease and covenants in a lease. But still, when I look at the whole and see the relations between the parties, and that which both parties were contemplating to be done respectively by one and the other, I come to the conclusion that the decision which was arrived at by the courts below is correct, and I also come to the conclusion that there is nothing in the language of the instrument in question which prevents us from carrying out the real intention of the parties.

A similar decision was given in the case of *Frank Warr & Co., Ltd. v. London County Council* (2), where the question was, where the plaintiffs had an exclusive right for a term of years to supply refreshments in a theatre, and for that purpose should have the use of certain rooms and other rights similar to those granted under the agreement in the present case, whether the plaintiffs had an interest in land which could form the subject of compensation under the Lands Clauses Consolidation Act, 1845, s. 68. The Court of Appeal there held that having regard to the full scope of the agreement the proper construction to be placed upon it was that it was merely an agreement by way of licence and not meant to create any interest in land.

Now, it is perfectly true that the construction of one contract is not necessarily a guide to the construction of another contract, and that is true certainly when there are differences of language in the documents to be construed. But where there is no such difference in language as would justify a court of law refusing to apply to the documents the construction which the court applied to the other cases, then the court should apply that construction. The language of the instrument in the case before this court, in some respects is more favourable to being construed as a demise of an interest in land than in the other cases to which I have referred. In some respects it is the other way. Words which include in the term “lessee, his executors, administrators and assigns” are not *prima facie* applicable when what is dealt with is a personal contract or a mere licence. I cannot attach to these words

any meaning which would import the sense that what was being transferred was an interest in land. I think, on the contrary, that this is not a document which creates an estate in land, but merely one which is a personal contract between the parties named therein and is only enforceable among parties between whom there is privity of contract. For example, the assignees of Bruce, the lessee, would be entitled to enforce this contract but only against the actual contracting parties. The obligation as a whole goes beyond a mere licence. It involves an obligation to fulfil the terms of the indenture and involves a liability to damages if there is a breach. This obligation may be revoked by the covenantor, but if he does so he will break the conditions and be liable in damages. The defendants who seek to establish their rights under this document are not seeking to establish them against Mr. Leigh but against the plaintiff, the assignee of Mr. Leigh—which is not possible at common law as there is no privity of contract between the plaintiff and the defendants, and as the defendants can only enforce these rights on the contract the defence must fail. I have disregarded the question of what is called the re-entry for non-payment of rent by the plaintiff in 1935 on which he relies as against P.O.W., Ltd., which occupies the position of Leigh, the lessee. I do not treat this re-entry as affecting the rights of the plaintiff.

There was one other argument ; that was on the basis that this document did not create an estate in land but merely gave personal rights as between the parties, and as the plaintiff purchased the lease in 1931 he is not entitled to say that he is not bound by the indenture of 1899 even though he was not a party nor privy to it and even though it did not create an interest in land. In support of this contention great reliance was placed upon the decision in the case of *Lord Strathcona Steamship Co. v. Dominion Coal Co.* (3). I do not think that it is necessary to examine in detail the decisions in that case. It is a decision of the Privy Council and not binding upon us, although we will have the greatest respect for any decision of that court. The decision does not lay down any other principle than that laid down in *De Mattos v. Gibson* (4), which was a case which dealt with the purchase of a vessel under a long-term charterparty. KNIGHT BRUCE, L.J., held that in the circumstances the purchaser was bound in equity to fulfil the terms of the charterparty in this sense, that the court would restrain him from using the vessel in a way contrary to the purpose of the charterparty. How far KNIGHT BRUCE, L.J., intended to lay down any general principle is discussed by BUCKLEY, L.J., in the case of *London County Council v. Allen* (5), at pp. 658, 659, in which he said :

Notwithstanding what was said by KNIGHT BRUCE, L.J., in *De Mattos v. Gibson* (4), it is not true as a general proposition that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant. This

may be illustrated by the cases relating to the sale of chattels, such as *Taddy & Co. v. Sterious & Co.* (6), and *McGruther v. Pitcher* (7).

These are both cases in the Court of Appeal which would bind this court if there were any variance between the Privy Council and the Court of Appeal. I do not think it necessary to examine the obvious distinction between *Tulk v. Moxhay* (8) and the present case. All I need say, accepting what was said by BUCKLEY, L.J., in the *London County Council* case (5) is that I do not think that the reasoning in the *Strathcona* case (3), applying as it did to the very special case of a ship under a charterparty, can be relied on in the present case. I do not think that a personal covenant as in the present case can be binding on a third party with notice, and this appeal must fail.

ROMER, L.J.: I have regretfully arrived at the same conclusion. I say regretfully because I have considerable sympathy with the defendants. At one time I was inclined to think that notwithstanding the decision of the Court of Appeal in *Daly v. Edwardes* (1) and of the Court of Appeal in *Frank Warr & Co., Ltd. v. London County Council* (2) this document of Nov. 7, 1899, did confer upon Bruce an interest in the refreshment rooms, bars, cloak rooms, etc., of the Prince of Wales Theatre, because there are obvious differences between this case and the two cases to which I have referred. In the case of *Daly v. Edwardes* (1) the word "lease" or "let" was not used, and what was purported to be granted was the free and exclusive licence and right to the refreshment rooms, and although the word "let" was used in the case of *Frank Warr & Co., Ltd. v. London County Council* (2), it was used not in respect of any rooms but in respect of the free and exclusive right to sell refreshments coupled with the free and exclusive use of the rooms. This document of 1899 also, in addition to the grant of the exclusive use of the refreshment rooms, purposes to let the exclusive right to sell programmes, opera glasses, photographs, scent, flowers and:

such other articles as may from time to time be usually sold at first-class theatres in the West End of London.

These rights are referred to in the document as being part of the demised premises. I think the document merely amounted to a contract with Bruce that Bruce and his assignees should have the exclusive and sole right of exercising these privileges in the theatre. That being so, I confess that I can think of no principle of law or equity which will avail the defendants in this case. They have no right to the legal or equitable estate in the theatre itself. The case for the defendants is put quite plausibly in this way: Here is a covenant by Bruce who had an interest in the Prince of Wales Theatre that he and his assigns should have the

exclusive right of enjoying these privileges, but he is not to treat that right as if no one else should have the right. His right upon this basis is a restrictive covenant for his use and as such consistent with the doctrine in *Tulk v. Moxhay* (8) and any purchaser with notice would be bound by that restrictive covenant. But in the present case it is obvious that Bruce had no interest in any land for the benefit of which this restrictive covenant was entered into and so could not avail himself of the doctrine propounded in *Tulk v. Moxhay* (8). It is said that the Privy Council in the *Strathcona* case (3) expressed some disapproval of the doctrine, but I do not think that the court did intend to disapprove of the doctrine. LORD SHAW, at pp. 121-123, said :

It has been forgotten that—to put the point very simply—the person seeking to enforce such a restriction must, of course, have, and continue to have, an interest in the subject matter of the contract. For instance, in the case of land he must continue to hold the land in whose favour the restrictive covenant was meant to apply. That was clearly the state of matters in the case of *Tulk v. Moxhay* (8) applicable to the possession of real estate in Leicester Square. It was also clearly the case in *De Mattos v. Gibson* (4), in which the person seeking to enforce the injunction had an interest in the user of the ship. In short, in regard to the user of land or of any chattel, an interest must remain in the subject matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question. This proposition seems so elementary as not to require to be stated. And it is only mentioned because in numerous decisions, as is clearly brought out in the judgment of LORD WRENbury, then BUCKLEY, L.J., in *London County Council v. Allen* (5), it was necessary to shear away the misapplication or improper extension of the equitable principle. As ROMER, L.J., said in *Formby v. Barker* (9), “If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object.” Applying that to the case of land and referring to numerous cases on the subject, LORD WRENbury says in *London County Council v. Allen* (5) : “Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefit of the restrictive covenant could not enure against a derivative owner even where he took with notice.” The Board notes the observations made by SCRUTTON, J., in the case of *London County Council v. Allen* (5), in which, alluding to various decisions, the learned judge puts this point as to the possible inconvenience, not only private but public, which may result from a strict adherence to the principle that the enforcement of a restrictive covenant must be confined to those having patrimonial interests in the subject matter. His Lordship takes the not unfamiliar case of restrictive covenants imposed by an owner of a large block of land in the terms of conveyance of the various fractions in which it may be split up for private use, and he observes : “I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this court compel me so to hold.” The question here alluded to may subsequently arise, and their

Lordships are unwilling, because it is unnecessary in the present case, to make any pronouncement upon it; for the present is, as has been seen, a case as to the user of a ship, with regard to the subject matter of which, namely, the vessel, the respondent has, and will have during the continuance of the period covered by the charterparty, a plain interest so long as she is fit to go to sea.

In other words, that the covenantee had an interest in the subject matter of the covenantor's property. It is plain from the portion of LORD SHAW'S judgment which I have just read that the Board were not expressing any disapproval of the doctrine in *Tulk v. Moxhay* (8). I may also point out that if, as was held in the *Strathcona* case (3), the charterer had some equitable interest in the ship itself, then it was not necessary to rely on the doctrine laid down in *Tulk v. Moxhay* (8), because effect could be given to that interest by applying the doctrine of constructive trusts. LORD SHAW, at p. 125 of the report of the *Strathcona* case (3), said :

If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a court of equity will not permit him to violate.

I am glad to think that in this case the defendants cannot rely on the doctrine of *Tulk v. Moxhay* (8) and that I am not deciding against anything which was decided in the *Strathcona* case (3).

GREENE, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Valpy, Peckham & Chaplin* (for the appellants, Theatrical Properties, Ltd.) ; *Amery-Parkes & Co.* (for Westby & Co., Ltd.) ; *Bulcraig & Davis* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

STEPNEY CORPORATION *v.* OSOFSKY.[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and du Parcq, JJ.), **October 29, 1936.**]*Contract—Appropriation of payments—Statute-barred debt—Implied appropriation by debtor—Charges for removal of refuse.*

On Sept. 17, 1935, a certain sum was owing by the respondent, a licensed street trader, to the appellant corporation in respect of removal of refuse and other services. During the period from Sept. 18, 1935, to Mar. 17, 1936, further sums became due for similar services, and during the same period certain payments were made by the respondent to the appellants. The respondent did not specifically appropriate any of these payments to any particular charges. The appellants purported to appropriate the payments in satisfaction of the arrears of earliest date, and on Mar. 17, 1936, sought to recover the balance alleged to be due. The justices thought that the respondent believed that he was making payments towards current dues and they found that the true inference on the facts was that there had been an appropriation on the part of the respondent. They decided that the appropriation by the appellants was not and could not properly be made, and they held that the appellants could not recover a larger sum than a sum which represented the difference between the money due in respect of the period from Sept. 18, 1935, to Mar. 17, 1936, and the amount paid by the respondent during that period. The appellants appealed, contending that in the absence of specific appropriation by the respondent the appellants were entitled to appropriate the payments to satisfy any arrears even though the arrears might be irrecoverable at law :—

HELD : there were materials justifying the justices' inference that there was an effective appropriation by the respondent, and the justices' decision was correct.

[EDITORIAL NOTE.] The questions of appropriation of payments here discussed are quite well settled and there is no real question as to the right of a creditor to appropriate in respect of statute-barred debts or of the principles governing the implied appropriation by the debtor. The unusual feature of the present case was the application of these principles to the case of small payments by a street trader to a local authority. The court, it would seem, will lean in favour of finding circumstances implying an appropriation of payments to current and accruing debts rather than to the discharge of statute-barred items.

AS TO APPROPRIATION OF PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 244-247, paras. 335-339 ; and FOR CASES, see DIGEST, Vol. 12, pp. 479-483, Nos. 3911-3960.]

Cases referred to :

- (1) *Cory Brothers & Co. v. Mecca, Turkish S.S. (Owners), The Mecca* [1897] A.C. 286 ; 12 Digest 478, 3905.
- (2) *Mills v. Fowkes* (1839), 5 Bing. N.C. 455 ; 12 Digest 475, 3882.
- (3) *Walker v. Butler* (1856), 6 E. & B. 506 ; 32 Digest 394, 751.
- (4) *Nash v. Hodgson* (1855), 6 De G.M. & G. 474 ; 12 Digest 480, 3929.
- (5) *Parker v. Guinness* (1910), 27 T.L.R. 129 ; 12 Digest 482, 3946.
- (6) *Leeson v. Leeson*, [1936] 2 K.B. 156, [1936] 2 All E.R. 133 ; Digest Supp.
- (7) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572 ; 12 Digest 483, 3961.

(8) *Philpott v. Jones* (1834), 2 Ad. & El. 41 ; 12 Digest 477, 3899.

(9) *Friend v. Young*, [1897] 2 Ch. 421 ; 12 Digest 480, 3930.

APPEAL by way of case stated by justices of the peace for the county of London sitting at Stepney.

On Mar. 17, 1936, complaint was made by the Town Clerk of Stepney for the Stepney Corporation (the appellants) against Morris Osofsky (the respondent) for that he was indebted to the appellants for certain sums being arrears of weekly charges due to the appellants for the removal of refuse and for other services rendered by them in connection with his street trading licence, pursuant to the London County Council (General Powers) Act, 1927, s. 37, and the bye-laws made thereunder. A summons was issued and was heard on Mar. 27, 1936. The following facts were found : The respondent carried on business as a street trader in the borough of Stepney and held a street trader's licence. On Sept. 17, 1935, 6 months before the date of the complaint, there was owing from the respondent to the appellants in respect of charges made by them for the removal of refuse, etc., the sum of £2 11s. During the 6 months following Sept. 17, 1935, further charges amounting to £2 10s. became due from the respondent to the appellants for the same services. In each case the said amounts claimed by the borough council comprised charges made weekly. During the period from Sept. 18, 1935, to Mar. 17, 1936, the respondent paid to the appellants from time to time on account of the charges divers sums amounting in all to £2 6s. and was given bare receipts for the sums so paid. At no time in making any of the said payments did the respondent appropriate them to any particular charges. The appellants appropriated or purported to appropriate the said payments in satisfaction of the arrears of earliest date.

The justices came to the conclusion that the appellants could not recover a larger sum than a sum which represented the difference between the money due in respect of the period from Sept. 18, 1935, to Mar. 17, 1936, and the amount paid by the respondent during that period. The appellants appealed.

N. L. C. Macaskie, K.C. and *Phineas Quass*, for the appellants.

The respondent was not represented and did not appear.

Macaskie, K.C. : This was a current account, payments becoming due week by week, and on the authority of *Clayton's Case* (7) the intention of the parties is to appropriate payments to the earliest debts. Failing this, the appellants are entitled to appropriate at any time they please, if the respondent has not appropriated. There is no finding of fact that the respondent appropriated, and the appellants are entitled to appropriate. Concurrence of a debtor to appropriation is not necessary ; he should know or must be deemed to know. A creditor may even appropriate payment to a debt which is statute barred or where the

contract falls within the Statute of Frauds. *Cory Brothers & Co. v. Mecca, Turkish S.S. (Owners)* (1) is an authority that the creditor may exercise a right of appropriation where the debtor does not. If a debtor does not make his intention clear the creditor can appropriate as he thinks fit, and it is only if the debtor fails to appropriate that the right of the creditor so to do arises. It is not necessary for the creditor expressly to declare his election to appropriate payments to individual items: see LORD MACNAGHTEN in *Cory Brothers & Co. v. Mecca, Turkish S.S. (Owners)* (1). Here the respondent never appropriated to any particular charge. *Mills v. Fowkes* (2) is an authority that payment may be appropriated to a statute barred debt if the debtor fails to appropriate. Here the respondent never appropriated to any particular charge. [Counsel also referred to *Philpott v. Jones* (8), *Friend v. Young* (9), LEAKE ON CONTRACTS, 7th Edn., p. 688.]

LORD HEWART, L.C.J.: This is a case stated by the justices of the peace for the county of London, sitting in the borough of Stepney. The case arose in the following way. On Mar. 17 of this year complaint was made by the Town Clerk of Stepney against the respondent for that he was indebted to the appellants for certain sums, being arrears of weekly charges due to the appellants in respect of the removal of refuse, and for other services rendered by them in connection with his street trading licence. That complaint was made pursuant to the London County Council (General Powers) Act, 1927, s. 37, and the bye-laws made under that Act. On that complaint a summons was issued, and on that summons were indorsed particulars of the claim. The justices having heard the complaint came to the conclusion that the appellants could not recover a larger sum than a sum which represented the difference between the money due in respect of the period from Sept. 18, 1935, to Mar. 17, 1936, and the amount paid by the respondent during that period. In other words, the justices held that the appellants were out of time with regard to sums said to have accrued due at a date earlier than the 6 months from the date of the complaint. The appellants, on the other hand, claim that as and when they received money from the respondent for removing the refuse they were entitled to appropriate those sums to the earliest portion of the arrears which it was said were due from him.

The facts may be shortly stated. The respondent, who does not appear, was a street trader trading in the borough of Stepney, and he held a street trader's licence. On Sept. 17, 1935, that is to say, 6 months before the date of the complaint, there was owing from the respondent to the appellants in separate charges made by them for the removal of refuse, the sum of £2 11s. I ought to say that it does seem a little hard that a holder of a street trading licence should be allowed to run up

an account of £2 11s. in regard to the removal of refuse. During the 6 months following Sept. 17, 1935, further charges, amounting in all to 50s., became due from the respondent to the appellants for the like services, and during the period of 6 months from Sept. 18, 1935, to Mar. 17, 1936, the respondent paid to the appellants moneys amounting in all to £2 6s. Unfortunately, this respondent was not represented in the court below, and it was left to the magistrates themselves to deal as best they could with the facts and the law, and I am bound to say that it is clear that they took very great pains to sift the whole matter thoroughly. This case stated shows with what admirable care and judgment they discharged that somewhat difficult task. They say, in para. 5 :

During the course of the hearing before us we raised the question whether bearing in mind the provisions of the Summary Jurisdiction Act, 1848, s. 11, the appellants had the right to appropriate in the manner hereinafter mentioned payments made by the respondent during the period of 6 months prior to the date of the complaint in satisfaction of arrears that had accrued due previously to such period of 6 months.

On behalf of the appellants it was contended :

that arrears that had accrued due more than 6 months prior to the date of the complaint though by virtue of the Summary Jurisdiction Act, 1848, s. 11, irrecoverable summarily were none the less still due and owing. That on the footing of the decision in amongst other cases, *Cory Brothers & Co. v. Owners of the S.S. Mecca* (1), provided the respondent had not specifically appropriated payments made by him to any particular charge or charges the appellants were entitled to appropriate such payments to satisfy any arrears.

The justices have found that at no time in making any of the said payments did the respondent appropriate them to any particular time. The case up to para. 7 was settled by the appellants, and it is quite obvious, if you look at the word "appropriate" in para. 4 (4) of the case that what is meant is specifically appropriate, because when you come to the contentions of the appellants in para. 6 they rely on the case that was cited before the justices and it is argued that the appellants were entitled to appropriate the payments to satisfy arrears if the respondent had not specifically appropriated payments made by him to any particular charge or charges. I think that we must take it that the justices have found that there was no specific appropriation by the respondent. But the justices explain (as they very properly do) the difficulty in which they find themselves, and stating as they do the contentions of the appellants, and that they came to the conclusion that the question for them to decide was, what was the amount due from the respondent in respect of the period from Sept. 18, 1935, to Mar. 17, 1936 ; in other words, a period of 6 months before the making of the complaint. They add these significant words :

If the appropriation purported to have been made [that is the appropriation

by the appellants, the creditors] was properly and could properly be made the justices would have been prepared to make an order for the sum claimed less any amounts paid since the date of the summons, but in their opinion the appropriation was not and could not properly be made in the circumstances of this case.

What do those words mean? In my opinion they mean this: that in fact the appropriation by the creditor, which was purported to have been made, was not made in circumstances in which an appropriation of that kind could properly be made. The justices go on to say:

Even if it is immaterial as a matter of law when the appropriation was made it would be unfair on the defendants in these cases that appropriation should be made without the knowledge and concurrence of the defendants and subsequently to the receipt of the sums paid.

Then come the significant words:

The justices thought that the respondent believed that he was making payments towards current dues.

I take that as meaning that in their opinion the intention of the respondent was that he was making payment of those current dues and not in satisfaction of statute barred arrears. The justices go on:

With reference to para. 4 (4) hereof the respondent did not in terms appropriate the payments he made to any particular dates.

Para 4 (4) says:

At no time in making any of the said payments did the respondent appropriate them to any particular charges.

The justices say in para. 10:

So far as the justices could judge from the evidence submitted to them these appropriations were made at the offices of the appellants subsequently to payment to the council's offices. Be this as it may the justices were of opinion on the evidence submitted that when these payments were made the respondent was not informed that such an appropriation was to be made and that when asked he made such small payments as he was able from time to time without considering or appreciating the position.

The justices think it right to add that in their opinion:

It is not fair on a defendant whose circumstances are what might be expected in the case of a trader selling from a stall in the street first to allow him to get heavily into arrears for payments due from him and then to appropriate sums paid during the 6 months within which if not paid they could be recovered as a civil debt at a court of summary jurisdiction to sums due prior to the 6 months.

The first thing we have to consider is whether the justices came to a correct conclusion when they found that the appellants were entitled to recover in the proceedings before them the difference between the amounts which became due from the respondent during the period of 6 months immediately preceding the period of the complaint, and the

amounts paid by the respondent during that period ; or, in other words, whether in the circumstances of the case it was open to the appellants to contend that the payments made within 6 months by the respondent had been and had properly been appropriated by the respondent to the satisfaction of what is called statute barred debts. I will ignore a point which I think is sufficiently clear, that it must, of course, be considered apart from any question of hardship on the part of the respondent or a dilatoriness and unbusinesslike arrangement on the part of these appellants. The question arose nearly 100 years ago in the case of *Mills v. Fowkes* (2) whether where a debtor owed a creditor some debts for a period longer than 6 years and others from a period within the 6 years and paid a sum without appropriating it to any particular debt :

such payment is not a payment on account, to take out of the statute of limitations the debts due longer than 6 years.

In giving judgment, TINDAL, L.C.J., says, on p. 461 :

The civil law, it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other ; but I do not think that such is the rule of our law. According to the law of England, the debtor may, in the first instance, appropriate the payment ; *solvitur in modum solventis* : if he omit to do so, the creditor may make the appropriation ; *recipitur in modum recipientis* : but if neither make any appropriation, the law appropriates the payment to the earlier debt.

There arises, therefore, the question of fact : Has there been that which amounts to an appropriation on the part of the debtor himself ? Of course, if there has been a specific appropriation *cadit quaestio* : if there has not been a specific appropriation then the question is one of fact : What is the true inference from the circumstances ? So it was said by CROMPTON, J., in the case of *Walker v. Butler* (3), at p. 511 :

It will be a question for the jury whether it was not applicable to all the debts.

In other words, the question, in the absence of a specific appropriation, is a question of fact whether there was appropriation. LORD CRANWORTH, L.C., in the case of *Nash v. Hodgson* (4), says also that it is a question of fact. There is more recent authority : *Parker v. Guinness* (5). That is a case heard in the year 1910. The first paragraph of the headnote is this :

Where a debtor makes a payment to his creditor, and the inference to be drawn from the circumstances is that the payment is in fact appropriated by the debtor at the time of payment, the fact that he makes no express statement on the subject at the time is immaterial. An appropriation by the debtor may be inferred from a variety of circumstances, and each case must be considered on its own peculiar facts.

The judgment in that case was a judgment of LUSH, J., who is unhappily no longer with us. On pp. 130, 131, he said this :

The question I have stated is not free from difficulty, but after careful consideration

I am of opinion that the defendants' contention is correct. It is clear, I think, that the debtor need not state in express terms that he appropriates the payment he makes in any particular way. What is to be considered is this. Is the true inference to be drawn from all the circumstances of the case that the debtor paid the moneys generally on account, leaving the creditor to apply them as he thought fit, or is the true inference that he paid them on account of special portions of the debt for the purpose and with a view to wipe these out of the account? His undisclosed intention so to do would, of course, not benefit him. It is what he did in fact, and not what he meant to do that is to be regarded. But if the inference to be drawn from the circumstances is that the payment was in fact appropriated by the debtor at the time of payment, the fact that he made no express statement at the time is immaterial. Now an appropriation by the debtor may be inferred from a variety of circumstances. Each case must, in my opinion, be considered on its own peculiar facts.

Then quite recently, indeed so recently as April of the present year, the cases were considered in the Court of Appeal in case of *Leeson v. Leeson* (6). At pp. 162 and 163 GREENE, L.J., said this :

It is true that a debtor who owes two debts to his creditor is entitled to appropriate a payment which he makes to his creditor to one debt rather than to the other. When, however, he does not notify the creditor of his intention, and when the circumstances are such that the creditor receives the payment merely in satisfaction of the debts and the payment is not more appropriate to the payment of the one debt than to that of the other the creditor is entitled to make the appropriation. When it is said that there need not be an express appropriation of a payment, but that the appropriation can be inferred, that does not mean that appropriation of a payment can be inferred from some undisclosed intention in the mind of the debtor. It is to be inferred from the circumstances of the case as known to both parties.

GREENE, L.J., cited with approval a passage in the judgment of LUSH, J., in *Parker v. Guinness* (5), which is contained in the passage I have just read. What he did in fact and what is to be inferred is to be the test. TALBOT, J., who, on that occasion, was sitting in the Court of Appeal, added this :

I will only add that *Parker v. Guinness* (5), seems to me to afford an excellent illustration of a case where appropriation on the part of a debtor may be inferred from the circumstances of the case, although the debtor made no express statement on the subject at the time.

That, I think, is the contrast with the present case. In para. 4 (4) it is said that there was no express statement on the subject at the time. The justices found that the true inference on the facts of the case was that there was an appropriation on the part of the debtor. He was paying the sums which he paid during the critical period of 6 months towards the current dues and not earlier ones. Of course, if that is the true inference, there was no opportunity left to the creditors to say that they would make an appropriation themselves. In my opinion, upon the facts of this case ascertained by these diligent justices in circumstances

already mentioned there were materials justifying the inference that there was an effective, although not a specific appropriation by the debtor. The justices have drawn that inference and have relied upon it. I think that in so doing they were well within their rights.

I think the appeal ought to be dismissed.

SWIFT, J. : I agree.

DU PARCQ, J. : I also agree.

Appeal dismissed.

Solicitors : *T. Myrddin Baker*, Stepney (for the appellants).

[*Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.*]

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES, LTD., AND ANOTHER *v.* BRIDGEWATER. BRIDGEWATER *v.* PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES, LTD., AND ANOTHER
(Consolidated Appeals).

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Sir Lyman Poore Duff), **July 13, 14, 16, 17, 20, October 16, 1936.**]

Privy Council—New South Wales—Sale of reversion—Undervalue—Independent professional advice—Sales of Reversions Act, 1867 (c. 4), s. 1—New South Wales Conveyancing Act, 1919 (No. 6), s. 30.

The respondent was entitled to certain contingent and reversionary interests under his grandfather's and father's wills, the exact nature and extent of which interests were the subject of some doubt, and several counsel had advised upon them and their opinions differed. One Murray, a moneylender whose executors were the appellants, had advanced various sums to the respondent between the end of 1927 and Sept., 1928, amounting in all to £2,203 17s. 7d. In Sept., 1928, Murray refused to make any further advance, but offered to purchase the whole interest under the grandfather's will and the interest under the father's will to the extent of £1,450 for £125. The respondent saw an independent solicitor with whom, however, he only had one short interview, and who seemed to have acquiesced in the transaction as soon as the respondent said he was determined to sell. Murray, at the time of the earlier advances, had insisted on policies for £2,500 on the life of the respondent to be taken out and assigned to him, and they were assigned to him absolutely. It seemed probable that the respondent paid the first premium and in the surrender of one of them the respondent and Murray acted jointly and both signed all documents :—

HELD : (i) the sale had been made at a substantial undervalue, and the respondent had had no proper separate advice.

(ii) the position of the parties was such that it was incumbent on the executors of Murray to prove affirmatively that the transaction was just and equitable, and this they had failed to do.

(iii) the judge of first instance having decided that the policies had become the absolute property of Murray there was nothing in the facts which rendered this view wrong in law.

[EDITORIAL NOTE.] The onus of proving a transaction in respect of a reversionary interest is a *bona fide* one is always upon the person dealing with the reversioner or those representing him. In the present case that person appears to have acted with some caution, but it is essential that the independent advice given to the reversioner should be real advice based upon a proper inquiry into the value of the interest and some inquiry as to the price that will be offered by likely purchasers, such as insurance companies. It is common practice to protect a charge of a reversionary interest by taking out a policy of insurance upon the life of the reversioner. This case will be of interest to conveyancers dealing with reversionary interests in that it shows the necessity that such policies should be included in the mortgage or charge of the interest, since the policies taken out in the present case are held through insufficient evidence as to the exact nature of the transaction, to have been absolutely assigned to the lender. This is contrary to the usual intention in such cases and illustrates the necessity that the documents should leave no doubt of the exact position of such policies.

AS TO INADEQUACY OF CONSIDERATION ON A SALE OF A REVERSIONARY INTEREST, see HALSBURY, Hailsham Edn., Vol. 15, p. 284, para. 506, and FOR THE CASES, see DIGEST, Vol. 25, pp. 271, 272, Nos. 951-965; and AS TO INDEPENDENT ADVICE, see HALSBURY, Hailsham Edn., Vol. 15, p. 274, para. 492; and FOR CASES, see DIGEST, Vol. 12, p. 103, Nos. 629, 630.]

Cases referred to :

- (1) *Aylesford (Earl) v. Morris* (1873), 8 Ch. App. 484; 25 Digest 269, 940.
- (2) *O'Rorke v. Bolingbroke* (1877), 2 App. Cas. 814; 25 Digest 272, 961.
- (3) *Foster v. Roberts* (1861), 29 Beav. 467; 25 Digest 271, 951.
- (4) *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312; 25 Digest 272, 962.
- (5) *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127; Digest Supp.
- (6) *Rae v. Joyce* (1892), 29 L.R. Ir. 500; 25 Digest 272, 965 i.
- (7) *Sinclair v. Elderton* (1900), 21 N.S.W. L.R. (Equity) 21.
- (8) *Salt v. Northampton (Marquess)*, [1892] A.C. 1; 35 Digest 352, 954.

CONSOLIDATED APPEALS from a judgment of the Supreme Court of New South Wales in its equity jurisdiction (SIR JOHN MUSGRAVE HARVEY, C.J.), dated Jan. 31, 1935.

The facts of the case appear in the judgment of their Lordships delivered by LORD RUSSELL OF KILLOWEN.

F. R. Evershed, K.C., and *Wilfrid Barton*, for the appellant: The onus lies on the seller to show that there is some unfair dealing or advantage taken; it is only thrown on the purchaser from circumstances where there would be a presumption of fraud. The vendor, though young, was experienced and had been advised by his solicitor. Mere inadequacy of price, however grave, is not of itself a presumption of fraud. It rests on the means whereby the acceptance of this low price may be secured. There was no advantage taken. [Counsel referred to: *Foster v. Roberts* (3), *O'Rorke v. Bolingbroke* (2), *Fry v. Lane* (4), *Inche Noriah v. Shaik Allie Bin Omar* (5), *Rae v. Joyce* (6).]

H. H. Mason, K.C., and *Kenelm Preedy*, for the respondent: On the

facts disclosed the transaction was bad and unjust. The plaintiff was an expectant heir, his interest was future and contingent. He had just attained his majority and had not any protection of parents or anybody else. He was dealing with a person with whom he was indebted. Value is the most important factor of all. The property was sold at an undervalue and by a person in necessity, who had just attained his majority and had no independent advice. [Counsel referred to : *Sinclair v. Elderton* (7), *Salt v. Northampton (Marquess)* (8).]

LORD RUSSELL OF KILLOWEN : In this case their Lordships have to advise His Majesty in relation to an appeal by the executors of one Bertram Murray, deceased, and a cross-appeal by one Francis Henry Bridgewater, in an action instituted for the purpose of setting aside a sale by Bridgewater to Murray of Bridgewater's expectant interests under certain wills.

Murray was a moneylender who carried on business at Sydney. Bridgewater is a young Englishman who was born on Sept. 29, 1906, and who at the age of 17 arrived in South Australia as an assisted emigrant. For some 3 or 4 years he drifted about from one job to another in South Australia and Victoria. Eventually he arrived in Sydney at the end of the year 1927, with about £2 in his pocket. He had, however, also a letter (dated Oct. 4, 1927) which he had received from an uncle in England, in which references were made to his interests under the wills of his father and his grandfather.

Armed with this letter he went to see Murray whose advertisement he had read in the papers. Murray gave him a few shillings, and cabled to his own solicitors in London (Light and Fulton) for information. In reply he received a cable on Feb. 9, 1928, in the following terms :

Bridgewater entitled share value roughly £4,000 grandfather's estate on attaining 25, also three fifths father's estate on attaining 27 subject life rent in one quarter no information yet value.

On receipt of this cable Murray began to make advances from time to time to Bridgewater on the security of his interests under the wills, with the result that on Sept. 18, 1928, there were outstanding the following securities on those interests, viz. : A mortgage dated Feb. 15, 1928, to secure the payment of a principal sum of £675 ; a further charge dated Feb. 21, 1928, to secure the payment of a further principal sum of £175 10s., and a further charge dated Mar. 22, 1928, to secure the payment of a further principal sum of £1,309 10s. In each case the principal sum secured included interest for one year at the rate of 30 per cent. per annum on the moneys advanced, and such principal sum if not repaid at the expiration of 12 months carried interest at the rate of 20 per cent. per annum. The judge who tried the action found

that the terms of the mortgage loans were, in the circumstances of the case, reasonable, and no complaint is made in regard thereto.

At the end of Mar., 1928, Bridgewater went to England; he arrived back in Australia in Aug., 1928, with little or no money, but he was able to secure some employment.

At this point it will be convenient to indicate the nature of his interests under the wills of his grandfather, Francis Matthew Bridgewater and his father Francis Franklin Bridgewater. Under his grandfather's will one eighth of the residuary estate was held upon trust as to one half for his father for life, and after his father's death upon trust for his father's issue as his father should by will appoint, and as to the other half upon trust that the trustees should apply the income during Bridgewater's minority towards his advancement and education as they might in their uncontrolled discretion think proper, and subject thereto (the will proceeded):

my trustees shall hold the said remaining half share upon trust for my said grandson absolutely upon his attaining the age of 25 years and in the event of my said grandson dying before he shall attain the age of 25 years or after that age without leaving issue capable of taking a vested interest in such one half share then upon trust for all and every other the children of my said son Francis Franklin Bridgewater who shall be born within 21 years after my death as and when he or she shall attain the age of 25 years or if a daughter shall previously marry and if more than one in equal shares and failing such other children of the said Francis Franklin Bridgewater then upon trust for all my other children or their issue living at my death other than the said Francis Franklin Bridgewater.

By his will his father exercised his above-mentioned testamentary power of appointment in the following words:

I hereby appoint and direct that from and after my decease the one half of the eighth share of the residuary estate of the said Francis Matthew Bridgewater the income whereof is under the said will payable to me during my life shall be held upon the trust following (that is to say) such part thereof as shall be equal to the share or interest which my said son Francis Henry Bridgewater takes or shall hereafter take under the said will in the remaining half of the said eighth share shall be held in trust for my said daughter Elizabeth Dulcie Bridgewater absolutely and the residue (if any) of the said first mentioned one half of the said eighth share shall be held in trust for my said son Francis Henry Bridgewater and my said daughter Elizabeth Dulcie Bridgewater in equal shares as tenants in common.

His own estate he disposed of by giving his wife an interest therein during widowhood which, in the event (which happened) of her remarriage, was cut down to the income of one fourth during her life; and subject to those trusts he declared that three fifth parts of the residuary trust fund and the income thereof should be held in trust for Bridgewater absolutely if he should attain the age of 27 years. The will also contained a declaration that if Bridgewater should marry a first or second cousin he should forfeit all interest under the will.

It is obvious that each will gave rise to questions. Under the grandfather's will the interest was contingent on Bridgewater attaining the age of 25 years, and was expressed to be subject to a defeasance even after he had attained 25 in favour of a class (of which it might be said that it was not ascertainable within perpetuity limits), whom failing then in favour of a class ascertainable within legal limits. It is not for their Lordships to construe the will, but clearly arguments suggest themselves ranging from the contention that on Bridgewater attaining 25 his interest was indefeasible, to the view that on his death after attaining 25 without leaving issue an intestacy would supervene as to the particular share of residue. In fact, as their Lordships were informed, some 5 or 7 counsel were consulted at different times and in different hemispheres, and if it be not literally true to say *quot homines, tot sententiae*, the opinions expressed were sufficiently at variance to justify the statement that the true construction of the grandfather's testamentary disposition was not a matter entirely free from doubt.

As regards the father's will, apart from the exact effect of the appointment in favour of the daughter and the forfeiture clause, the document is reasonably plain. Bridgewater took in the events which happened three fifths of his father's residue (subject to his mother's life interest in one fourth of the entirety) contingently on his attaining the age of 27 years. The position, however, was complicated by the circumstances that his mother was in fact the sole trustee, and that there were questions whether certain assets which she claimed to be her property, formed part of the father's estate; and also whether the father's estate had remained intact in her hands. However, while in England, Bridgewater had reached a compromise with his mother under which his share in the capital of the estate had been agreed at £1,450.

Bridgewater soon after his return to Australia in Aug., 1928, being in need of money, approached Murray for a further advance. Bridgewater was then aged 21, nearly 22. Meanwhile a cable had been received from London, to the effect that counsel had advised that it was very doubtful whether under the grandfather's will the interest vested (i.e., indefeasibly) at 25. Mr. Murray then took the opinion of eminent counsel in Sydney, who advised on Sept. 8, 1928, (a) that Bridgewater's interest in the capital of the grandfather's estate would pass from him under the gift over in the event of his dying at any time without leaving issue, and (b) that he was not then entitled, but on attaining 25 would be entitled, to the accumulated and accruing income of the share.

Murray then declined to make any further advances by way of loan on the security of Bridgewater's interests under the wills, but stated that he was willing to purchase those interests out and out. Notwithstanding doubts as to the true construction of the grandfather's will, Bridgewater was undoubtedly entitled to a substantial sum in respect

of income on attaining 25 (stated at this date to be £1,000) and to further sums in respect of corpus (£1,450) and income under his father's will on attaining 27. His death under either of those ages was an event unlikely and therefore easily insurable. The total sum due on the incumbrances which Murray held was some £2,160; but by Sept. 17, 1928, further sums had been advanced by Murray to Bridgewater bringing his total indebtedness on that date to a sum of £2,203 17s. 7d.

Murray offered to purchase the whole of Bridgewater's interest in his grandfather's estate, and his interest in his father's estate (to the extent of £1,450), for the sum of £125, and this Bridgewater agreed to accept. Murray, however, told Bridgewater that a solicitor must advise him, and a Mr. Taylor acted in that behalf. No suggestion is made against Mr. Taylor's honesty, but as will appear the protective assistance which he afforded to Bridgewater was in fact *nil*.

An assignment on the contemplated lines was prepared by Clisdel, who was Murray's managing clerk. In preparing the assignment Clisdel inserted a sum of £184 as the consideration, to cover other items debited against Bridgewater in Murray's ledger which were not covered by the mortgages, and also the estimated costs due to Light and Fulton. Bridgewater was to receive £125 nett, and as Clisdel said in his evidence, "I did not really consider it was very material what the assignment was filled in for, so long as Bridgewater got his £125."

On Sept. 17, 1928, Clisdel, on behalf of Murray, wrote and sent a long letter to Mr. Taylor giving him full information, and stating that if Bridgewater still wished to complete, the assignment would be forwarded. Bridgewater saw Mr. Taylor on Sept. 18, 1928. Apparently all that passed between Taylor and Bridgewater was that Bridgewater (in reply to Taylor's statement that he considered the price insufficient) said that he was determined to sell; whereupon Taylor read to him the draft assignment and said he was rather a foolish young fellow. He then dictated a letter to a typist which Bridgewater signed, in the terms hereinafter mentioned. They then went to Murray's office, where the transaction was completed. Bridgewater executed the assignment expressed to be in consideration of a sum of £184. He actually received £118 for which he signed a receipt in the following terms: "Received from B. Murray the sum of £118 in full settlement *re* the sale of my whole share or interest in my late grandfather's estate and my share or interest in my late father's estate to the extent of £1,450—Sept. 18, 1928." The odd £7 making up the £125 he had in fact received as to £2 four days before and as to £5 on the day before.

The letter which Mr. Taylor obtained from Bridgewater on Sept. 18, 1928, was addressed to his firm, and ran thus:

After fully discussing the question with you of selling to Mr. Bertram Murray the share in the estate of my late grandfather Francis Matthew Bridgewater and

also the share in the estate of my late father Francis Franklyn Bridgewater amounting to £1,450, I have decided to complete such sale in view of the fact that I am so heavily indebted to Mr. Murray, and would be unable to raise by way of mortgage sufficient money to discharge the amount owing to him, and furthermore I am influenced in my decision by the opinion of counsel regarding my share in my grandfather's estate, both of counsel in England and in Sydney.

I fully appreciate the disparity between the consideration money, and the probable value of my shares in the estates mentioned as pointed out by you, but in view of the doubtful legal position regarding my share in my grandfather's estate, I think this counter-balances the difference in price between what I am receiving from Mr. Murray, and what I may receive under these estates subject to the contingencies mentioned in the will of my grandfather.

There was a conflict of evidence as to whether Bridgewater saw Mr. Taylor more than once, viz., on Sept. 18. Clisdell suggested more than one interview. Bridgewater denied this. Unfortunately Murray and Mr. Taylor were both dead at the date of the trial. The defendants, however, put in evidence Mr. Taylor's diary entry, from which it would appear that only one interview took place between them. It is in the following words :

18th inst. On receipt of letter from Bertram Murray with copy will of Francis Matthew Bridgewater, copy will of Francis Franklyn Bridgewater, opinion of Mr. Maugham, K.C., cables and letters perusing. Attending you on your calling conferring at length and advising you that we thought the purchase money offered for your shares in the estate of your grandfather and father was not adequate, but you informed us that you were determined to sell in view of your indebtedness to Mr. Murray, and furthermore the legal doubt that existed as to what share you actually took in your grandfather's estate. Perusing. Assignment from yourself to Mr. Murray which you handed us also declaration. Reading this over and explaining same to you and you were quite satisfied therewith. Attending Mr. Murray's office with you when you executed assignment and declaration and received purchase money.

From these facts it appears to their Lordships that Mr. Taylor made no attempt to advise his youthful client, or to assist him in resisting the temptation to exchange his future prospects for immediate cash, or to counteract the pressure which must almost necessarily exist where a debtor is negotiating with one who is his creditor concerning the sale of property which already stands as security for a large indebtedness between them. He never even suggested making inquiries from insurance companies to see whether better terms were not obtainable. He simply accepted as irrevocable the young man's expressed determination to sell at the price which he had already agreed with his creditor, and contented himself with explaining the contents of the draft document which the creditor had prepared for that purpose.

The Chief Judge in Equity, exercising the equitable jurisdiction of the Supreme Court of New South Wales, has set the sale aside as an unfair dealing with an expectant heir. He has held that the sale was

at an undervalue, that Mr. Taylor did not do his duty to Bridgewater, who being in need of money overbore Mr. Taylor, and that in the circumstances the transaction was not a fair deal between Murray and Bridgewater.

It is necessary at this stage to refer to the Conveyancing Act, New South Wales, 1919, s. 30. That section is couched in terms so similar to those of Sales of Reversions Act, 1867, s. 1, that the two sections may be treated as identical in considering the judicial comments which have been made in this country on the subject of the latter enactment. The New South Wales Act (sect. 30) enacts the following provision :

No purchase of any reversionary interest in any property made in good faith and without fraud or unfair dealing shall hereafter be opened or set aside merely on the ground of undervalue.

The remarks which LORD SELBORNE, L.C., made (see *Aylesford v. Morris* (1), at p. 490) in reference to the English Act and its effect are clearly applicable to the New South Wales enactment. He stated the position in these words :

The Act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases "made *bona fide* and without fraud or unfair dealing," and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of LORD HARDWICKE, raise "from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness"—a presumption of fraud. Fraud does not here mean deceit or circumvention ; it means an unconscientious use of the power arising out of these circumstances and conditions ; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.

Further, the language used by LORD HATHERLEY may properly be quoted, notwithstanding that it is contained in a judgment in which, on the facts, he disagreed with the views of his colleagues. In the case of *O'Rorke v. Bolingbroke* (2) he said, at p. 823 :

But in the case of the "expectant heir," or of persons under pressure without adequate protection, . . . the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract.

And again, at p. 829 :

The court protects "expectant heirs" . . . against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest, and justly to estimate the proposals made to them. . . .

Inadequacy of price is not alone sufficient to authorise the vacating of a contract for the sale of a reversion, but inadequacy of price coupled with the inexperience and absence of any competent advice on the part of the seller, are sufficient to set in motion the protective powers of the court of equity.

It was contended before their Lordships on behalf of Murray's executors (a) that on the evidence there was no undervalue in the price given, (b) that the onus was therefore on Bridgewater to show want of good faith, fraud or unfair dealing, (c) that this onus had not been discharged, and therefore (d) that even assuming some undervalue in the price given, sect. 30 of the New South Wales Act afforded a complete defence to the action.

Their Lordships cannot accede to any of these contentions, and in this case with all the evidence before them they find themselves able to deal with the matter irrespectively of any questions of onus.

Upon the evidence they are satisfied that the price given was a price not slightly but substantially below the true value of the interests which were sold, making all allowances for uncertainty as to the exact construction and effect of the grandfather's will in relation to corpus. They agree with the view of the Chief Judge in Equity in this regard, a view which their Lordships believe to have been reached after a consideration of the whole evidence, and not to be based upon any alleged mistake as to the result of the evidence given by Mr. Wolfenden.

Further, their Lordships are satisfied that sect. 30 of the New South Wales Act affords no defence.

The circumstances in which the transaction was carried out present many disquieting features. The vendor was a young man not yet 22 years old, urgently in need of cash, and with no relation in the country to guide him. He was selling his expectant interests to a creditor who already had a powerful grip on them as security for his debt. The price was fixed between them alone. There was no bargaining or inquiry for a better market by anyone on the young fellow's behalf. The matter cut and dried, with draft assignment already prepared, was placed before Mr. Taylor and was carried through without any real advice by him and almost without breathing space, in a few hours of a single day. A transaction carried out in these circumstances does not appear to their Lordships to be a purchase made in good faith and without unfair dealing.

The relative positions of the parties and the circumstances were such that it was incumbent on Murray's executors to establish affirmatively that the transaction was fair, just and reasonable. Not only have they failed to do this, but the evidence as a whole leads to the contrary conclusions. The transaction accordingly cannot stand, and the appeal should, in their Lordships' opinion, fail.

The cross-appeal raises two points : one a question of fact, and the other a question of the form of the decree.

The first question relates to a sum of £51 15s. received by Murray in Mar., 1932, in respect of the surrender value of one life policy and to a sum of £1,732 10s. paid or payable under another life policy. The relevant facts should be stated.

At an early stage of the financial transactions between Murray and Bridgewater, Murray stipulated that two policies of insurance on the life of Bridgewater should be taken out and assigned to him. One policy (dated Feb. 22, 1928) for £1,000, and another (dated Apr. 4, 1928) for £1,500, were effected with the City Mutual Life Assurance Society, Ltd., and were by an indenture dated June 15, 1928, assigned by Bridgewater to Murray absolutely, the consideration expressed in the deed being a sum of £58 15s. This sum is the exact amount of the aggregate of the first premiums payable on the policies. There is a conflict upon the evidence, not easy to resolve, as to whether those premiums were borne by Murray or by Bridgewater. By a letter dated June 15, 1928, addressed to the insurance company and signed by Bridgewater, notice was given of the assignment, and it was stated that Murray was the absolute owner of the policies and that all future notices as to premiums were to be sent to him. The matter had been arranged between Murray and Bridgewater, and the necessary documents had been signed by Bridgewater before his departure for England. The policies were never included in any of Murray's mortgage securities. Whatever may have been the truth in regard to the first premium on each policy, there is no doubt that all other premiums were paid by Murray, and that he never had any security for their repayment, nor was he entitled to charge any interest thereon.

In the month of Mar., 1932, Murray, having received moneys in respect of Bridgewater's interests under one or other of the wills, decided to surrender the policy for £1,000. In order to avoid paying the costs of a perusal by the insurance company's solicitors of the assignment to Murray, Bridgewater signed a written direction to the insurance company to pay the surrender value (£51 15s.) to Murray, and he joined with Murray in signing the receipt to the insurance company for that sum.

The other policy contained a provision that in the event of the assured incurring total blindness by an accident, the society would pay the whole of the policy money. This unfortunate event actually occurred in the month of Sept., 1932, with the result that a sum of £1,732 10s. became payable under the policy.

By the statement of claim Bridgewater claimed that the policy moneys all belonged to him, alleging that before the execution of the assignment of Sept. 18, 1928, an agreement was made between Murray and himself that in the event of his attaining vested interests under the wills of his grandfather and father, the policies should belong to him free from any claim by Murray. The learned judge declined to accept Bridgewater's evidence as to this, and his counsel did not press the matter further before their Lordships. It was, however, contended that the policies were part of the security given by Bridgewater to Murray, and that if the assignment of Sept. 18, 1928, were set aside and the relationship of

mortgagor and mortgagee reconstituted, Murray would be entitled to have the policy moneys brought into account.

The title to the policy moneys seems to their Lordships to depend on a question of fact, viz., what was the arrangement between the parties when the policies were taken out? The learned judge heard the evidence of Bridgewater, and considered the admitted facts and the documents. He thought that, in this regard at all events, Bridgewater was not a reliable witness, and he formed his own conclusion on the documents the admitted facts and the probabilities. That conclusion he expressed thus :

In my opinion Murray stipulated with F. H. Bridgewater that F. H. Bridgewater should take out policies on his own life and should then assign them absolutely to Murray, Murray then becoming proprietor of the policies free from any control by F. H. Bridgewater. It would be in Murray's power to continue them or to drop them as events turned out.

He poses the question which he has to decide thus :

In my opinion the only question of fact that arises in regard to this matter is whether the assignment . . . was an assignment by way of mortgage or an assignment absolutely to Murray—

and he ultimately answers it by holding that the policy moneys belonged to Murray, and making a declaration that they are not the subject of account between Murray and Bridgewater but belong to the estate of Murray absolutely.

Their Lordships find it impossible, on the materials before them, to come to any different conclusion. It was urged that the learned judge had misdirected himself on a vital point, because in the course of his judgment he said that it was quite immaterial who paid the first premiums. But their Lordships do not understand the learned judge to mean more than this : that having arrived at a clear opinion, upon all the other facts of the case, that the bargain was that the policies were to belong to Murray absolutely, and were not to form part of the mortgaged property, he did not think it necessary to decide a dispute, which however decided would not have the effect of altering his opinion. Their Lordships are of opinion that upon the first question the cross-appeal should fail.

The second question on the cross-appeal relates to the form of the decree. The trustees of the grandfather's will treating Bridgewater as indefeasibly entitled to his share thereunder on his attaining the age of 25 years (which he did on Sept. 29, 1931) paid over considerable sums to Murray as assignee of Bridgewater's interest. The learned judge, while expressing the opinion that the view of the trustees was probably correct, stated that the matter could only properly be decided in the presence of the grandfather's next of kin and perhaps also of Bridge-

water's sister. He further stated that difficult matters arose under the father's will, as to the effect of the appointment in favour of his daughter, and the provision against marriage with a first or second cousin. Accordingly he inserted in the decree a declaration that the plaintiff was at present entitled to receive from the estates of the grandfather and father only so much of the income of the said interests of the plaintiff therein as was not required to repay the sums and interest secured by Murray's three securities; and also a declaration in the following terms:

That the plaintiff will not be entitled to receive from the defendants any capital assets received by the said Bertram Murray deceased or the defendants in respect of the said interests of the plaintiff under the said wills or any of them except under the order of a competent court or with the consent of all the beneficiaries interested.

Bridgewater objects to this provision as being unfair to him, and unnecessary for the protection of the defendants. Their Lordships think that no such provision is necessary as regards the interests under the father's will; and that as regards the interests under the grandfather's will it will be sufficient if the decree is varied by striking out the third and fourth declarations therein contained, and inserting therein immediately after the words "is charged upon the interests of the plaintiff under the said wills or any of them" the following provision:

And this court doth further order that it be referred to the master in equity to inquire and ascertain what moneys and investments have been received by the said Bertram Murray and the defendants as his executors under or by virtue of the said assignment of Sept. 18, 1928, in respect of the interests of the plaintiff under the wills of his grandfather and father. And this court doth further order that the master in equity do send a registered letter addressed to the Public Trustee in England (1) enclosing a copy of the decree in its altered form, (2) notifying him as one of the trustees of Francis Matthew Bridgewater deceased that unless within four calendar months from the receipt by him of that letter proceedings are instituted to recover the moneys and investments received by the said Bertram Murray or his executors from the trustees of the will of the said Francis Matthew Bridgewater as representing or in respect of the share of the plaintiff in that testator's estate, such moneys and investments will be treated as having been properly paid to and received by the said Bertram Murray and his executors in respect of such share, and (3) requesting him (so far as his knowledge of their whereabouts enable him so to do) to communicate the contents of such letter, or a copy thereof, to the daughter of the said Francis Franklin Bridgewater, the children of the said Francis Matthew Bridgewater other than the said Francis Franklin Bridgewater, and the next of kin of the said Francis Matthew Bridgewater.

If no proceedings are instituted within the time limited, their Lordships think that the balance remaining after the Murray securities have been paid off, may then be properly paid over to Bridgewater, leaving it to any aggrieved person to pursue his or her remedy (if any) against the trustees, or to seek such relief (if any) as a tracing of the funds may enable him or her to obtain.

To the extent indicated the cross-appeal should succeed.

In the result their Lordships are of opinion that the appeal should be dismissed, that the cross-appeal should fail as regards the policy moneys, but that an order should be made therein varying the decree to the extent indicated in this judgment; and their Lordships will humbly advise His Majesty accordingly.

The appeal and cross-appeal were consolidated and were heard together upon a single case lodged on each side. The appeal has wholly failed. The hearing of the cross-appeal accounted for less than one fifth of the time occupied by the whole case. It has succeeded only on a point which related to a detail in the form of the decree, and which was disposed of in the space of a few minutes. In these circumstances their Lordships think that justice will be done by ordering the appellants to pay to the respondent three quarters of his costs of the consolidated appeals.

Appeal dismissed. Cross-appeal dismissed as regards the policy moneys, but the decree therein to be varied to the extent indicated in the judgment. Appellants to pay to respondent three quarters of his costs of the consolidated appeals.

Solicitors : *Light & Fulton* (for the appellants, the Permanent Trustee Company of New South Wales, Ltd.); *Waterhouse & Co.* (for the respondent, Bridgewater).

[*Reported by T. A. DILLON, ESQ., Barrister-at-Law.*]

CRAVEN v. BLACKPOOL GREYHOUND STADIUM & RACECOURSE, LTD.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.), **November 9, 1936.**]

Companies—Winding up—Proof by creditor—Liquidator's award—Dissatisfaction of creditor—Action for damages—Stay.

A director of a limited company, which went into voluntary liquidation, put in a proof in the liquidation in respect of arrears of salary and damages for dismissal. The liquidator allowed the proof. The director being dissatisfied with the amount awarded to him brought an action for damages against the company in the King's Bench Division. The company applied for a stay of the action on the ground that the director, if dissatisfied with the liquidator's decision, should appeal to a judge in the Chancery Division. The judge refused to stay the action. The company appealed :—

HELD : (i) a creditor who has selected one method of having his claim adjudicated upon, which gives him the right to question the decision, ought not then to be in a position to select another method of adjudication

(ii) in any event a decision in the action would have no result, as the liquidator's adjudication, until reversed by a judge in the Chancery Division, would be binding in the winding up.

(iii) the action ought to be stayed.

[EDITORIAL NOTE.] In a voluntary winding up the court has power in its discretion to stay all proceedings, but unless stayed proceedings of all kinds may

continue or, indeed, be commenced, after the commencement of the winding up. Here, however, the creditor has elected to come in and prove before the liquidator, and it is held that, if he is dissatisfied with the decision of the liquidator, his remedy is not to commence an action, but to appeal from the liquidator to the judge in the ordinary way.

AS TO STAYING PROCEEDINGS IN WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, pp. 778, 779, para. 1337; and FOR CASES, see DIGEST, Vol. 10, pp. 1011-1012, Nos. 7012-7030.]

Case referred to :

- (1) *Currie v. Consolidated Kent Collieries Corpn., Ltd.*, [1906] 1 K.B. 134; 10 Digest 1012, 7022.

APPEAL from an order of HILBERY, J., dated Oct. 13, 1936, refusing to stay the action or to transfer it to the Chancery Division.

The facts in the case are fully set out in the judgment of GREER, L.J. *Gilbert Paull*, for the appellants (defendants).

R. A. Willes, for the respondent (plaintiff).

Paull : If a plaintiff brings two sets of proceedings in two different branches of the court in relation to the same subject matter, the court will order one to be stayed. If the plaintiff here is not satisfied with the amount awarded him by the liquidator, his proper course is to appeal to a judge in the Chancery Division. The present procedure places the liquidator in great difficulty; there is an action brought against him which he must admit is properly brought in that he does owe the plaintiff something. He cannot pay money into court because he is a liquidator, and to pay the full sum would be to give undue preference to one creditor. He is therefore in danger of having to pay the full costs himself.

Willes : If a liquidation is compulsory, all actions are destroyed, but this is not the case in a voluntary liquidation: *Currie v. Consolidated Kent Collieries Corpn., Ltd.* (1). The court may allow an action to proceed. [Counsel referred to the Companies Act, 1929, ss. 172, 177, 252, 258 and 260 (2).] Where a liquidator wholly repudiates liability, then an action will not be stayed, but where it is only a question of the amount due, then it will be stayed. The court has unfettered discretion in a voluntary liquidation as to whether to allow an action to proceed. Nothing that arises in the course of a voluntary liquidation can do more to destroy a claim than the voluntary liquidation itself. It is submitted that the learned judge was right here; he could save time and money by going on with the action. It is not a case of *res judicata*. He recognised that a mistake had been made and that it would be wrong to send the case back to the Chancery Division; that would be a further waste of time and money. The question to be determined here is how much damages is the director of a company entitled to in the event of an admitted breach of his contract of service.

GREER, L.J. : This is an appeal from the decision of HILBERY, J., refusing to stay an action under somewhat special circumstances, and, though I sympathise very strongly with the reasons that operated in the mind of the learned judge, still, I think he exercised a discretion without due regard to the position that had been created by the fact of the proof having been put in by the creditor and a decision having been reached which was binding upon him, unless appealed from in the manner provided by the proper statutory provisions either of the Act or of the rules.

The broad facts of the case are these. On Oct. 12, 1932, the creditor was given the position, by agreement, of managing director of a company at a remuneration of £1,000 a year. He was entitled to be continued in that remunerative position for a period of 5 years to Oct. 12, 1937. On Jan. 3, 1936, there was a voluntary winding up of the company because it was unable, I suppose, to pay its debts in full. A gentleman of the name of Mr. Wilcock, a chartered accountant, was appointed liquidator. Now at that time the creditor would undoubtedly be entitled to say, "I want my right to claim and my quantum of claim decided by litigation in the courts, apart from the winding up court," and he could have brought an action to have determined what he was entitled to by way of payment of arrears of salary and damages for the dismissal which operated by reason of the winding up resolution. He did not take that course. He apparently thought it was as advantageous to him, or possibly more advantageous to him, to put in a proof and let the liquidator deal with his proof, in the first instance, subject, of course, to the right he had to question the liquidator's decision, either as to his having any right at all or as to the quantum of damage, by appeal to a Chancery Division judge. Instead of that, he left the matter where it was. He did not seek to withdraw his proof, but allowed the proof to remain on the file of the liquidation, and he allowed the liquidator to deal with the matter until July 8, 1936, when the liquidator allowed the proof, that is to say for money which had become due and for damages, at the sum of £1,109 8s. 3d. The creditor was dissatisfied with the amount that had been awarded to him and, after the decision of the liquidator and after he had made up his mind not to take advantage of the provisions of the statute and the rules which entitled him to question the decision of the liquidator by an appeal to a judge in the Chancery Division, he decided that he would like another form of decision, namely, an action for damages in the King's Bench Division, and he brought his action in the King's Bench Division. Thereupon, the company, by the liquidator, said to the court : "We want you to stay this common law action because the proper method of dealing with this matter, if the creditor is dissatisfied with the decision of the liquidator, is for him to appeal to a judge in the Chancery Division." It seems to me, on general principles,

that a person who selects one method of having his claim adjudicated upon, if he is dissatisfied with the way in which that adjudication has been decided, should not be allowed to select another method of having it adjudicated. It is common knowledge in these matters that the court does not allow two sets of proceedings to go on at the same time in the same matter ; it will stay either one or the other in order that there may not be a waste of costs in asking two tribunals to decide the same question.

So far as I am concerned, I do not think it is necessary to go into the various sections and rules that have been referred to. I think it sufficient to say that the respondent in this case, having selected one method of having his claim adjudicated upon, which gives him the right to question the decision of the liquidator, ought not then to be in a position to select another method which, in my judgment, would have no result because, even if HILBERY, J., gave him a larger sum than the liquidator had given him, the adjudication by the liquidator would still remain an adjudication which, until it was reversed by a judge in the Chancery Division, would have been binding in the winding up. I think, for these reasons, the learned judge exercised his discretion without due regard to the fact that there had been a claim made in the winding up adjudicated on by the liquidator, though subject to appeal, and, in those circumstances, he really had no option but to stay the proceedings at common law and leave the creditor to his rights in the winding up proceedings.

For these reasons I think this appeal should be allowed with costs.

SCOTT, L.J. : I agree. The case of *Currie v. Consolidated Kent Collieries Corpn., Ltd.* (1) upon which Mr. Willes, on behalf of the respondents, relied, has no application to this case because in that case there had been no attempt by the creditor to enforce his claim by means of proof ; no proof had been lodged. It is unnecessary, therefore, to say anything more about that case. The effect of lodging a proof may be considered from two aspects. First, I agree with GREER, L.J., that in a voluntary winding up, after the winding up has begun, a creditor of a company has really an option as to his remedy for the purpose of enforcing a claim which he has against the company. He may either issue a writ, subject to the chance of that action being stayed on good grounds, or he may prove in the winding up. If he proves in the winding up, in my view he loses his right of action. I think the fact that he has proved in the winding up would be a ground of defence in the action, probably from the moment of proving ; but, at any rate, after the liquidator in the winding up has dealt with the proof and rejected it, wholly or in part, then to the extent to which it is rejected, wholly or in part, the creditor, in my view, loses his cause of action. It disappears.

It merges in the proof, and to the extent to which the proof is not admitted it is gone. His only remedy then, in my view, is to treat the act of the liquidator in rejecting the proof, in whole or in part, as a decision—the word applied to it in the winding up rules—and then appeal to the court, which, I think, is a proceeding which would be heard in open court.

Secondly, in the present case, where the creditor had his proof partly admitted and partly rejected, he could not, in my view, issue a writ at all. As a matter of fact, my impression is that it would be good matter for the defence, as I said before, and, therefore, not a matter for a stay; but it is obviously convenient that the common law action should be stayed in order to dispose of it for good and all and so avoid further proceedings.

I therefore agree with the order of the court that the action should be stayed on the simple ground that it is a futile proceeding.

EVE, J.: In this case the creditor is in a position from which he desires to have the benefit of two endeavours to fix the amount of the indebtedness at a figure satisfactory to himself. As a creditor, his debt accruing immediately before the winding up order was made or upon the winding up order being made, he had the opportunity of determining his course of action. He might treat himself as outside the administration of the affairs of the debtor company, in which case, subject to any attempt that might be made to get an order to stop him doing so, he might have presented a writ and endeavoured to have his true position ascertained by trial before a judge or judge and jury, or he might prove in the winding up, but he cannot have both at the same time, and, so far as his proof which he has put in, and which he has insisted upon and which the liquidator has in part accepted, is concerned, that the court does not interfere with unless one of the parties dissatisfied with the result comes to the court and asks that the matter may be reviewed. In regard to the action, that, as I say, cannot subsist at the same time as the person who is claiming in it is claiming as a creditor in the winding up, and, in my opinion, the only course the court could properly take was to restrain the proceeding which was brought subsequent to admission by the liquidator of a considerable sum as being due to the particular creditor.

I agree that the appeal ought to be allowed and the order of the learned judge discharged.

Appeal allowed with costs of appeal, costs of application in court below and costs of the action up to the time it was stayed. Order of HILBERY, J., discharged. Order staying the action.

Solicitors: *Dehn & Lauderdale* (for the appellants); *Timbrell, Deighton & Nichols*, agents for *Langhorne & Perry*, Birmingham (for the respondent).

CECIL-WRIGHT v. McCULLOCH.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.), **November 9, 1936.**]*Practice—Mode and place of trial—Trial by jury—Allegation of fraud—Discretion of judge.*

In an action for breach of a separation agreement the plaintiff alleged that she had been induced by false pretences and undue influence amounting to duress to enter into agreements to reduce the amount payable under the separation agreement. The master ordered the case to be tried with a jury. The defendants appealed to a judge in chambers asking that it should be tried by a judge alone or transferred to the Chancery Division. The judge ordered that the case be transferred to the Chancery Division. The plaintiff appealed:—

HELD: when properly examined the allegations of fraud appeared really to be allegations of breaches of trust and the judge had exercised his discretion properly.

EDITORIAL NOTE. The defendants would under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6 (1), have a right to have the action tried by a jury as parties against whom an allegation of fraud was made. That right is only subject to a limited discretion in the court or of a judge. In the present case the application for the jury is made by the party charging the fraud, and the matter is therefore wholly in the discretion of the judge.

AS TO RIGHT TO A JURY, see YEARLY SUPREME COURT PRACTICE, 1936, p. 570; HALSBURY, Supp. Practice, para. 309; and FOR CASES, see DIGEST, Practice, pp. 539, 540, Nos. 2022-2036.]

Cases referred to:

- (1) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732, 812; Digest, Practice, 855, 4004.
- (2) *Keeling v. Cook* (1934), 78 L. Jo. 306; Digest Supp.

APPEAL of plaintiff from an order of GREAVES-LORD, J., dated July 24, 1936. In an action for breach of a separation agreement, the plaintiff alleged that she had been induced by false pretences and undue influence amounting to duress to enter into agreements to reduce the amounts payable under the separation agreement. On an application before Master Mosely it was ordered that the case be tried with a jury; the defendants appealed from this decision to a judge in chambers and asked that the case should either be tried by a judge alone or else should be transferred to the Chancery Division. GREAVES-LORD, J., allowed the appeal and made an order that the case be transferred to the Chancery Division. The plaintiff appealed to the Court of Appeal.

Norman Birkett, K.C., and *Stuart Horner*, for the appellant.

Sir William Jowitt, K.C., and *Gilbert Paull* for the respondents.

Birkett, K.C.: Just as the Court of Appeal is scrupulous to see that the discretion of a judge is not interfered with, so a judge should not interfere with the discretion of a master without good cause: *Keeling v. Cook* (2). This is not a case that is pre-eminently suitable for the

Chancery Division ; it was asked that it should be transferred there merely in order to get rid of a jury. It is a proper case for a jury and the master's discretion was properly exercised ; but it was argued that because financial matters and investments were involved, it was therefore suitable for the Chancery Division. It is submitted that the learned judge was wrong because he did not decide whether or not the case was suitable for a jury, but was influenced by the arguments in favour of transferring it to the Chancery Division, which obscured the issue. The term " the court or a judge " has always been held to include a master, and by long practice there is an undoubted discretion in the master. The true test is, did the judge when exercising his discretion pay due attention to the question of whether the master had exercised his ? The issue to be determined in this case is whether there was fraud ; it is alleged in the pleadings. Any party charged with fraud may have a jury as of right. Here the plaintiff is making a charge of fraud and it is the plaintiff who wants a jury. She is entitled to say that she wants one because of the issues raised in the case, although she has no legal right to one. If this court is called upon to exercise its own discretion, it should allow a jury in this case.

Jowitt, K.C., was not called upon.

GREER, L.J. : In this case we have come to the conclusion that it is open to this court to exercise the discretion, which I think we have, although it is not necessary to decide it. I think the allegations of fraud are really, when properly examined, allegations of breaches of trust. They do not really look like fraudulent misrepresentations at all, nor is there a special allegation in the pleadings that the plaintiff acted upon the truth of these statements to her detriment. We think the learned judge properly exercised his discretion and on that ground we dismiss the appeal with costs.

SCOTT, L.J. : On the facts as disclosed in the pleadings and on what Mr. Birkett has said about the issue of fraud, I am not prepared to disagree with the decision of the learned judge which was based on the exercise of his discretion. In regard to the wider question as to the effect of the decision in *Campbell v. Pollak* (1) upon the right of this court to interfere with the exercise of a judge's discretion, I say nothing. The question as to whether the result of a strict application of the view that this court cannot interfere with a judge's discretion should be to prevent the discretion being considered by this court, is a matter which does not arise.

EVE, J. : Lest it should peradventure be thought that I was guilty of advocating the merits of another branch of the court, I think it wise

to limit my observations to saying that the learned judge exercised his discretion in the same way that we should have done.

Solicitors: *Gordon Gardiner, Carpenter & Co.*, agents for *F. H. Carpenter & Veale*, Brighton (for the appellant); *Waller, Mager & Cobbett* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., *Barrister-at-Law.*]

KIRK v. EUSTACE.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 16, November 2, 1936.**]

Husband and wife—Separation deed—Payment to wife “during her life”—Death of husband—Liability of husband’s estate for payments—Law of Property Act, 1925 (c. 20), s. 80 (1).

By a separation deed, which recited that the parties had mutually agreed to live apart from each other, a husband covenanted to pay to his wife a certain weekly sum “during her life.” He also covenanted that the wife might live apart from him and that he would not molest her. The wife covenanted to indemnify the husband against all debts and liabilities and not to molest him. Payments under the deed were to cease in the event of reconciliation and resumption of cohabitation. On the death of the husband, his executors discontinued the weekly payments. The wife contended that the payments should continue during her life, and she brought an action for arrears. The county court judge was of opinion that the deed expressed no contrary intention within the Law of Property Act, 1925, s. 80 (1), and he held that the husband’s estate was therefore liable to continue the payments during the remainder of the wife’s life. On appeal:—

HELD (EVE, J., dissenting): the essence of the separation deed was that the parties should live apart, which involved the necessity that both parties should be living at any time when it might be sought to enforce the deed. There was therefore a contrary intention within the Law of Property Act, 1925, s. 80 (1), and liability for the payments ceased on the husband’s death.]

[**EDITORIAL NOTE.** The material factor in this case is that the deed was essentially a separation deed, i.e., a deed for the period of the separation. Indeed, there was a provision for cesser upon reconciliation, so that it was plainly arguable that it was contemplated by the parties that it might not endure for the whole life of the wife. It will be noted that the covenant in the deed was not so drafted that by its express terms it bound the executors of the husband.]

AS TO DURATION OF ANNUITIES UNDER SEPARATION DEEDS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 723, 724, para. 1178; and FOR CASES, see DIGEST, Vol. 27, pp. 231-233, Nos. 2028-2043.]

Cases referred to:

- (1) *Charlesworth v. Holt* (1873), L.R. 9 Exch. 38; 27 Digest 232, 2039.
- (2) *May v. May*, [1929] 2 K.B. 386; Digest Supp.
- (3) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, 3194.
- (4) *Negus v. Forster* (1882), 46 L.T. 675; 27 Digest 197, 1664.
- (5) *Atkinson v. Littlewood* (1874), L.R. 18 Eq. 595; 27 Digest 236, 2067.

- (6) *Bateman v. Ross (Countess)* (1813), 1 Dow, 235; 27 Digest 244, 2151.
- (7) *Randle v. Gould* (1857), 8 E. & B. 457; 27 Digest 245, 2164.
- (8) *Nicol v. Nicol* (1886), 31 Ch. D. 524; 27 Digest 245, 2158.
- (9) *Re Gilling, Procter v. Watkins* (1905), 74 L.J. Ch. 335; 27 Digest 232, 2037.
- (10) *Webster v. Webster* (1853), 4 De G. M. & G. 437; 27 Digest 244, 2155.

APPEAL from a decision of His Honour DEPUTY JUDGE OWEN given at Kingston-upon-Hull County Court on July 14, 1936, in which he held that, upon a proper construction of the separation deed hereinafter referred to, the estate of Thomas Levitt Kirk was liable during the remainder of the life of Annie Mary Kirk, his widow, to pay to her a clear weekly sum of £2.

By a deed dated Sept. 23, 1922, and executed by Thomas Levitt Kirk and his wife Annie Mary Kirk, the parties agreed to live separately and apart and the husband covenanted that :

The said Thomas Levitt Kirk will weekly during the life of the said Annie Mary Kirk on condition that and so long as the said Annie Mary Kirk shall continue to live a chaste life pay or cause to be paid to the said Annie Mary Kirk or to such person or persons as she shall from time to time direct or appoint in writing the clear weekly sum of £2 without any deduction whatsoever for the separate use and benefit of the said Annie Mary Kirk and for the maintenance of herself, the first payment to be made on the execution of these presents.

The husband further covenanted that the wife might live apart from him and that he would not molest her, and the wife covenanted that she would indemnify the husband against all debts and liabilities which she might incur, and that she would not molest him in any way. Payments were to cease in the event of the parties becoming reconciled and cohabitation being resumed.

The husband died on Feb. 16, 1936. Thereafter his executors ceased to make the weekly payments, which had until then been paid regularly, contending that payment came to an end on the husband's death. The wife contended that the payments should continue during the rest of her life and she brought an action against the executors for arrears. The deputy county court judge was of opinion that there was no contrary intention expressed in the deed within the meaning of the Law of Property Act, 1925, s. 80 (1), and he held that the husband's estate was liable to continue the payments during the remainder of the wife's life. The executors appealed.

J. Willoughby Jardine, K.C., and *Clive W. Salter* for the appellants.

Richard Elwes for respondent.

Willoughby Jardine, K.C. : The agreement was nothing but one of separation, i.e., that the parties should live apart during their married life. All obligations under a separation deed end equally on death or on reconciliation : see LUSH ON THE LAW OF HUSBAND AND WIFE (4th Edn.), at p. 444 :

A covenant of a mere separation deed to pay to the wife an allowance during her

life, if she continue to live separate, determines by her husband predeceasing her, and in the converse order of death obviously.

See also *Nicol v. Nicol* (8) and *Negus v. Forster* (4).

SCOTT, L.J. : In this case what is the meaning of the words " during her life ? "

Willoughby Jardine, K.C. : To insure that her rights did not survive her death. The words cannot override the whole substratum of the agreement : see *Re Gilling* (9). The whole contract was based on the assumption that the parties had agreed to live apart from each other. [Counsel referred also to *Webster v. Webster* (10).]

Elwes : There is a moral obligation, whether separated or not, upon a husband to support his wife after his death, and " during her life " means what it says : see *May v. May* (2).

SLESSER, L.J. : This appeal arises out of a claim made by Annie Mary Kirk, the widow of Thomas Levitt Kirk, deceased, against the executors of his estate for a sum of money alleged to be due under a deed of marital separation dated Sept. 23, 1922. The deed recites that :

Whereas unhappy differences have arisen between the said Thomas Levitt Kirk and Annie Mary Kirk and they have mutually agreed to live apart from each other for the future and the said Thomas Levitt Kirk has agreed to pay the said Annie Mary Kirk his wife a clear weekly sum of £2 during her life for the maintenance and support of herself—

subject, nevertheless, to certain provisions and conditions. The husband died on Feb. 16, 1936, and the contention of the defendants is that the obligation to pay the money ceased at the death of the husband and is not binding upon the estate. The widow relies upon the express words in the covenant to pay during her life and points to the fact that there is no provision in the deed for the ending of payment on the death of her husband. The deputy county court judge decided in favour of the wife's contention, and from that decision the executors appeal. Under the Law of Property Act, 1925, s. 80 (1), repeating in effect the provisions of the repealed sect. 59 of the Conveyancing Act, 1881, it is provided that a covenant or contract under seal binds the real estate as well as the personal estate of the person making the same, if and so far as a contrary intention is not expressed in the covenant or contract. In my opinion, however, in this contract a contrary intention is expressed, and this section, therefore, does not avail the plaintiff. I come to that conclusion for the following reasons : I am of opinion that the language of the indenture, when properly considered, shows an intention to base the whole contract upon the assumption that the parties, as is recited, have mutually agreed to live apart from each other. I think that such a basic condition involves the necessity, if the contract is to operate, that both parties are living at any time when it is sought to enforce the deed

and that they cannot properly be said to be living apart within the meaning of the agreement when one of them is dead. Such an assumption is expressly to be found in clause 1 (a), which provides that the plaintiff may at all times hereafter "live apart from the said Thomas Levitt Kirk," and also impliedly in the provision in clause 1 (b) that he shall not in any manner annoy, molest or disturb or otherwise interfere with her; there is a complementary clause binding her not to molest him in clause 2 (b). It is true that it has been decided by authority that the mere fact of divorce by one or other of the spouses will not operate to destroy the effect of the deed so far as it remains applicable. The leading case on this matter is that of *Charlesworth v. Holt* (1). There the provision was that the defendant should pay an annuity for his wife's support during their joint lives and so long as they should live separate and apart. The wife subsequently misconducted herself and the husband obtained a divorce, but the language of the deed, though in the words of PIGOTT, B., at p. 42, "neither party contemplated the dissolution of the marriage," was held to be too strong to end the husband's obligation. As the same learned judge points out, "he covenants to pay this annuity absolutely so long as he and Lucy Holt live apart." Moreover, as was said by KELLY, C.B., at p. 40 :

The husband might, in this case, have introduced express words limiting his liability to the period which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie.

That decision was followed in the case of *May v. May* (2) where the obligation was that the husband "shall and will during the life of the wife pay to the wife" an annual sum. The husband committed adultery and the wife obtained a decree. He then defaulted in his payments; it was held that the deed was not subject to any implied term that it should only operate so long as the marriage relation continued to exist. As SCRUTTON, L.J., pointed out at p. 394 :

Can it be said that all husbands and wives who have executed deeds of separation must have made their bargains on the footing that the relation of husband and wife should in each case continue? Separation agreements have been drafted which provide that they shall continue valid although that relation should cease to exist.

But these decisions proceed on the footing that both parties survive. They seem to me altogether distinguishable from a case, such as the present, where in my view the whole substratum of the contract, that the spouses are living apart (whether as husband and wife or otherwise), has gone. In the language of EARL LOREBURN in *Tamplin's* case (3), at p. 403 :

The parties must have made their bargain on the footing that a particular thing or state of things would continue to exist.

If this deed were one which was made to depend on matters other than separation, as was the case in *Negus v. Forster* (4), where the deed did not depend upon the continuance of separation, other considerations apply and there the death of the husband would not necessarily destroy the substratum of the contract. If the trusts of the deed are in effect a permanent settlement, the annuity continues payable by the executors after death : *Atkinson v. Littlewood* (5). But the present case is clearly a separation deed, having, in the language of LORD COLERIDGE, L.C.J., in *Negus v. Forster* (4), at p. 676, "its one and only object separation" and no more, seeing that, among other matters, there is provision in clause 3 that :

in case the said Thomas Levitt Kirk and Annie Mary Kirk shall at any time hereafter with their mutual consent cohabit as man and wife then and in such case the said weekly sum of £2 shall be no longer payable and all the covenants hereinbefore contained shall be void.

See also *Bateman v. Ross* (6), *Randle v. Gould* (7), a case of absolute provision held to be a post-nuptial settlement, and *Nicol v. Nicol* (8). In the first edition of LUSH ON THE LAW OF HUSBAND AND WIFE, published after the Conveyancing Act and notwithstanding the judgment in *Charlesworth v. Holt* (1) in 1884, the eminent author is unambiguously of opinion as expressed at p. 379 that :

if the marriage relation was at an end through the death of one of the parties the trusts of a mere separation deed would be necessarily extinguished—

and the only authority which seems to be directly in point, *Re Gilling* (9), is to the like effect. In that case the provision was that the husband should pay the wife a certain sum for her sole and separate use during her life if she should so long continue to live separate and apart. The husband died and a summons was issued by one of the executors of the husband's will to determine whether the obligation to pay the wife had ceased on the death of the husband or whether the executors were bound to provide for the annuity out of his estate. KEKEWICH, J., speaks of the apparent novelty of the question raised, but he points out, at p. 336, that a lady cannot fulfil the character of remaining separate and apart from her husband when he is dead. In my view the decision of KEKEWICH, J., was right, and the death of the husband has put an end to this covenant just as much as if the covenant had been expressed to be for the joint lives of the contracting parties. It follows that this appeal should be allowed.

SCOTT, L.J. : I agree with the judgment of SLESSER, L.J. This appeal depends upon the true interpretation of one particular deed of separation. In my opinion its language, construed in accordance with ordinary principles of legal interpretation, is quite clear and unambiguous. I think the learned deputy judge was wrong and that the appeal ought

to be allowed. The only hesitation I have felt is due to the fact that EVE, J., dissents from the interpretation which SLESSER, L.J., and I put upon the deed.

The essentials of the agreement contained in the deed are, first, that the two parties will separate forthwith ; secondly, that thereafter they will keep separate by " living apart ; " and, lastly, that their relations whilst so living apart shall be regulated by a series of mutual promises. The initial agreement to " live apart " necessarily imports an undertaking by each to take action for the purpose. The relationship described by that phrase, once established, has to be maintained permanently ; that mutual undertaking equally imports action by each ; it means that each must continue throughout the duration of the agreement to implement by appropriate conduct his or her promise to live separately. The performance by each of his or her promise for which the agreement calls is thus at every moment voluntary and therefore involves conscious and deliberate action by each party. The instrument relates only to a state of things which is voluntary—voluntary in initiation, voluntary in maintenance ; no involuntary separation can properly be said to come within the words " living apart." Conscious and deliberate action by each so as to ensure that they do " live apart " is of the essence ; it is both the original and the continuing basis of the agreement. That basis is thus of necessity a fundamental condition, the failure of which brings the agreement to an end, simply because it has no application to such a state of affairs. It comes to an end because that agreement predicates continuing action by both parties ; and when one dies, it cannot go on. In truth the present case is a perfect illustration of the doctrine of frustration in the law of contract. When the hand of death eliminates one party, the voluntary action of both, which is the essential characteristic of " living apart," ceases to be possible. Voluntary separation ceases. Mutuality has gone. Two people cannot " live apart " when one is dead. It follows, therefore, that separation by death being a different kind of separation from that with which the deed is concerned, dissolves the contract. No doubt a clause could be drafted by which an obligation binding on the husband's estate after his death might have been imposed. But that is only to say that this deed instead of being drawn as a mere separation deed might have included the terms of a post-nuptial settlement. I can see no words which justify such an implication in this deed. The provision of the Law of Property Act, 1925, s. 80 (1), does not apply to a deed which " expresses a contrary intention." If this deed is one which on its proper interpretation is terminated by death, it must be read as expressing an intention that none of its covenants shall be enforceable thereafter by the survivor, and that is a " contrary intention " within the section ;

The only other aspect of the case upon which it is necessary to say

anything is the suggestion, which was, I think, more or less put forward, that a decision reversing the judgment of the learned deputy judge would be contrary to the view generally entertaining as to the meaning of deeds of separation in this form, and that it would upset existing practice. I do not doubt that where a particular construction has for many years been put upon ambiguous language in a common form document, particularly in commercial matters, a court may properly have regard to such practice, if there is any real ambiguity in the document. In the present case, however, not only is there no material before us from which to conclude that there is any general practice based on the interpretation adopted by the learned deputy judge in the case of deeds of separation in the same form and wording as the one we are construing, but in my view there is in this deed no real ambiguity at all. Speaking for myself, therefore, I feel bound to give it the interpretation which seems to me to be clearly indicated by the language used. I may also add that if there be any practice of the kind suggested, it must have arisen since the time when the passages which SLESSER, L.J., has quoted from the first edition of LUSH ON HUSBAND AND WIFE were current. To such a recent practice no regard can be paid.

In my view it is not necessary in this appeal to consider the decisions in the cases of *Charlesworth v. Holt* (1) and *May v. May* (2), nor is it necessary to draw in advance any boundary line between pure separation agreements on the one hand, and deeds which in addition contain provisions which make them post-nuptial settlements, on the other.

EVE, J. : The problem we are called upon to solve in this case is the true construction of a deed of separation entered into between the late Thomas Levitt Kirk of the one part and his wife Annie Mary Kirk of the other. The deed is dated Sept. 23, 1922, and after recitals that unhappy differences had arisen between the parties and that they had mutually agreed to live apart from each other for the future and that the husband had agreed to pay his wife a clear weekly sum of £2 during her life for the maintenance and support of herself subject nevertheless to the provisoes and conditions therein contained, it was thereby witnessed that in pursuance of the said agreement and in consideration of the premises the husband thereby covenanted with the wife (a) that she might at all times thereafter live apart from him and either in or out of business and in such a manner as she should think fit, (b) that he would not in any manner annoy, molest, disturb or otherwise interfere with her person or business or in her manner of living nor at any time thereafter require or by any means either by taking out citation or process or by instituting any action in England or elsewhere or otherwise endeavour to compel her to cohabit with him or to enforce any restitution of conjugal rights or for that purpose or otherwise use any force, violence

or restraint to her person or sue or cause to be sued any person or persons for receiving, lodging or entertaining her, but that she might in all things live as if she were unmarried without the restraint or correction of the covenantor or of any other person or persons by his consent ; and (c) that he would weekly during the life of the said Annie Mary Kirk on condition that and so long as she should continue to lead a chaste life pay or cause to be paid to her or to such person or persons as she should from time to time direct or appoint in writing the clear weekly sum of £2 without any deduction whatsoever for the separate use and benefit of the said Annie Mary Kirk and for the maintenance of herself, the first payment to be made on the execution of the now stating indenture.

And in consideration of the premises the said Annie Mary Kirk thereby covenanted with the said Thomas Levitt Kirk : (a) That she would at all times thereafter keep the said Thomas Levitt Kirk indemnified against all debts and liabilities which the said Annie Mary Kirk might thereafter contract and from all actions, claims and demands on account thereof and against all such costs, charges, losses, damages and expenses as might be incurred by the said Thomas Levitt Kirk on account thereof. (b) That neither the said Annie Mary Kirk nor any person on her behalf should at any time thereafter molest, annoy, disturb or otherwise interfere with the said Thomas Levitt Kirk or by any means either by taking out citation or process or by instituting any action in England or elsewhere or in any other manner compel the said Thomas Levitt Kirk to cohabit with the said Annie Mary Kirk or endeavour to enforce any restitution of conjugal rights or to compel the said Thomas Levitt Kirk to allow her any alimony or maintenance further than the said weekly sum of £2. (c) That in case the said Thomas Levitt Kirk should at any time thereafter be called upon to pay and should actually pay any debt or debts which the said Annie Mary Kirk should at any time thereafter contract, then and in every such case it should be lawful for the said Thomas Levitt Kirk to retain out of the said weekly sum of £2 the amount of such debt or debts together with all costs, charges and damages which he might incur on account thereof. And it was thereby agreed that in case the said Thomas Levitt Kirk and Annie Mary Kirk should at any time thereafter with their mutual consent cohabit as man and wife, then and in such case the said weekly sum of £2 should be no longer payable and all the covenants thereinbefore contained should become void.

The parties never resumed cohabitation, and on Feb. 16 last the husband died, having by his will appointed the appellants to be his executors. This action was instituted by the widow for the purpose of recovering payment of the weekly sums accruing after her husband's death or having it determined that she is entitled, notwithstanding her husband's death, to be paid the £2 a week during the remainder of her life. In other words, she contends that according to the true construction of the deed

and the language used, the annuity is one payable weekly from the date of the deed for the rest of her life. The appellants, on the other hand, insist that the obligation to make the payment ceased on the testator's death. The learned county court judge decided that the contention of the widow was right and that the covenant to pay her the £2 during her life remained for her benefit notwithstanding the death of her husband. Hence this appeal.

Turning now to the deed, its language is clear, simple, unambiguous and intelligible. No one can read it without appreciating that the payment of £2 is to continue during the lifetime of the wife. It is so stated in the recital, in clause (c) of the husband's covenant and in the wife's covenant (c). I cannot adopt the view that its language when properly considered shows any intention of basing the whole contract upon the assumption of a basic condition that involves the necessity if the contract is to operate that both parties are living at any time when it is sought to enforce the deed and that they cannot properly be said to be living apart within the meaning of the agreement when one of them is dead. With all respect, I am not sure that I understand the meaning of what I have just read, but in so far as it recognises the fact that the document we are dealing with is intended to regulate the subsequent lives of a separated pair, I agree that the document is of the nature, but assert that the regulations are to be found in that deed before us and not upon assumptions or intentions which might at the proper time have been introduced into the contract in a very few appropriate words, but were not. In my opinion the relations of Mr. and Mrs. Kirk were regulated so far as related to the only matter with which we have to deal, that is to say, her right to a continuance of the annuity after her husband's death, by the terms of the document as construed by the learned county court judge. They are plainly stated in the deed and no case has been made out for disregarding those terms. In my opinion the appeal ought to be dismissed.

Appeal allowed. Leave to appeal.

Solicitors: *F. Eustace & Co.* (for the appellants); *A. E. Hamlin, Brown & Co.*, agents for *Pearlman & Rosen*, Hull (for the respondent).

[*Reported by* FRANK ROWE, ESQ., *Barrister-at-Law.*]

WOODWARD AND ANOTHER v. WOLFE.

[KING'S BENCH DIVISION (Hilbery, J.), **October 28, 29, November 6, 1936.**]

Gaming and Wagering—Time or difference bargains—Cotton futures—Principal and broker.

The plaintiffs were cotton merchants who, *inter alia*, transacted business in the cotton market on behalf of members of the public who wished to gamble in cotton futures. Only members of the Liverpool Cotton Association are permitted to buy and sell cotton futures on the Liverpool market, and by the regulations of the association the plaintiffs, who were members, when buying on behalf of a customer, were required to enter into a contract with a selling member of the association, binding themselves on the terms of a printed contract which they were obliged to use. The plaintiffs then filled in another printed form, under which in form they sold to the customer at the same price at which they had bought with, in addition, an amount for brokerage. A duplicate of this sale note, in the form of a bought note from the customer to the plaintiffs, was sent to the customer at the same time for signature and return. The defendant requested the plaintiffs to deal in cotton futures on his behalf, and the plaintiffs duly carried out the transactions set out above. In an action to recover sums owing in respect of certain transactions the defendant contended that as there was a contract made by the plaintiffs directly with the defendant of purchase and sale as principals and as there was an express understanding that there should be no question of deliveries on either side, but only an eventual payment of differences, the claim was one in respect of gaming and wagering contracts and was therefore unenforceable at law:—

HELD: (i) the true relationship between the parties was that of principal and broker, and there was no gaming or wagering contract between them.

(ii) the plaintiffs were entitled to recover the sums claimed.

[EDITORIAL NOTE.] It is clear that if the broker is employed merely to buy and sell upon the market the contract between the principal and the broker is not a wager. The difficulty in these cases is to know how far the broker can act without really consulting his so-called principal in these transactions without bringing them within the category of wagers or gaming transactions. This is the more difficult owing to the regulations of the exchanges which deal with securities or commodities; but the real test of the enforceability of these contracts by brokers is, whatever the form of contract, did they act as brokers entering into specific contracts for the alleged principal. If the answer to that question is in the affirmative their claim must succeed as not being based on a wager.

AS TO TIME OR DIFFERENCE BARGAINS, see HALSBURY, Hailsham Edn., Vol. 15, pp. 492-494, paras. 893-895; and FOR CASES, see DIGEST, Vol. 42, pp. 833-836, Nos. 424-458.]

Cases referred to:

- (1) *Ironmonger & Co. v. Dyne* (1928), 44 T.L.R. 497; Digest Supp.
- (2) *Universal Stock Exchange v. Strachan*, [1896] A.C. 166; 42 Digest 834, 430.
- (3) *Weddle, Beck & Co. v. Hackett* (1928), 140 L.T. 303; 42 Digest 801, 101.
- (4) *Barnett v. Sanker* (1925), 41 T.L.R. 660; 25 Digest 394, 1.
- (5) *Franklin (H. W.) & Co. v. Dawson* (1913), 29 T.L.R. 479; 42 Digest 801, 100.
- (6) *Thacker v. Hardy* (1878), 4 Q.B.D. 685; 42 Digest 834, 432.
- (7) *Forget v. Ostigny*, [1895] A.C. 318; 42 Digest 835, 435½.
- (8) *Cooper v. Stubbs*, [1925] 2 K.B. 753; 28 Digest 22, 113.

ACTION for £153 15s. 10d. in respect of contracts made by the plaintiffs as brokers for the defendant for the sale and purchase of bales of cotton for future delivery. The contracts were made subject to the rules of the Liverpool Cotton Association, Ltd. The defendant contended that the claim was made in respect of gambling transactions.

Robert Segar (R. Etherton with him) for the plaintiffs: These are perfectly good contracts and are not tainted with any illegality. They are clearly not gaming contracts: see *Barnett v. Sanker* (4), *Ironmonger & Co. v. Dyne* (1), *H. W. Franklin & Co. v. Dawson* (5), *Thacker v. Hardy* (6), *Forget v. Ostigny* (7), *Weddle, Beck & Co. v. Hackett* (3), *Universal Stock Exchange v. Strachan* (2), *Cooper v. Stubbs* (8).

D. G. A. Lowe, for the defendants: The contracts are quite clearly gambling transactions and the plaintiffs are therefore not entitled to succeed in law.

HILBERY, J.: In this case the plaintiffs are cotton merchants, members of the Liverpool Cotton Exchange, who deal for themselves on the exchange as merchants and in addition do a considerable amount of business in the cotton market on behalf of customers, members of the public who are gambling in cotton futures. At the times when the transactions, the subject matter of this claim were entered into, the plaintiffs had an office in Manchester which was entirely under the management of a Mr. Greenwood, who gave evidence at the trial before me. He was employed at first as the manager of the office on a half commission basis, paying a proportion of the expenses of the Manchester office and at a later date upon a half commission basis, paying the whole of the expenses of the Manchester office. The defendant is a man who for a number of years has been a shopkeeper and trader in wireless apparatus and equipment. The defendant and Mr. Greenwood knew one another and shortly before the first of the transactions in question in this action was entered into, Mr. Greenwood suggested to the defendant that the defendant should have a gamble in cotton futures. He informed the defendant, who said that he knew nothing about cotton or the cotton market, that he would do all that was necessary on the defendant's behalf; that the defendant need only give him authority to buy or sell as he, Mr. Greenwood, thought advisable, and he would buy at one price and sell when there was a profit and that all the defendant would have to do would be to take the profit. He informed the defendant that in the unlikely event of there being a loss he would make good the loss. It was in truth a term of Mr. Greenwood's employment with the plaintiff firm that he should guarantee the account of any customers he introduced and be responsible for them in the event of the customer not paying, and in his evidence before me Mr. Greenwood swore that he had offered to pay the amount for which the defendant in this action

was being sued by the plaintiffs, out of a sum due to Mr. Greenwood more than sufficient to satisfy this claim which remained in the plaintiffs' hands. The defendant asked who would do the actual business of buying and selling and Mr. Greenwood informed him that the business would be done through the plaintiffs in Liverpool. The defendant thereupon authorised Mr. Greenwood to speculate for the defendant in the way which Mr. Greenwood had suggested.

On Mar. 19 a letter was written from Liverpool by the plaintiffs to the defendant informing him that the plaintiffs on that day had granted him credit up to the amount of £100 for his transactions in cotton futures and that should that sum be reached or exceeded the defendant was then to remit such amount as might be owing by him and the plaintiffs reserved to themselves the right to cancel that credit at any time without reason. On July 30 the first transaction in question was entered into.

Having regard to the state of the authorities, it appears to me to be of the utmost importance to follow exactly how the transactions between the parties were, in all the circumstances, carried out. No member of the public can buy or sell cotton futures on the Liverpool market unless he is a member of the Liverpool Cotton Association and every transaction in cotton futures must be carried out in accordance with the rules, regulations and usages of the Liverpool Cotton Association. That association has certain printed forms of contract which the members of the association are obliged to make use of in any transaction in cotton futures, on the Liverpool Cotton Exchange Market. When the plaintiffs are acting on behalf of a customer who wishes to speculate in cotton futures, they are obliged by the rules of the association to follow the routine that was followed in this case. That is to say, on receipt of a telephonic order from their Manchester office that the defendant wished to purchase 100 bales October delivery American cotton, the plaintiffs went into the market and made a purchase of 100 bales of American cotton for October delivery from another member of the association and they entered into a contract in form No. 5 of the forms of the Liverpool Cotton Association contracts under which they bound themselves as buyers of 100 bales of American cotton, on the terms of that contract. They entered into that contract, of course, at a price which had been the price which they had fixed as between themselves and their sellers in the market. After they had thus bound themselves as buyers in the market of the quantity which the defendant wished to buy they filled in a buff form of contract, form No. 6 of the association, as they were bound to do by the association rules and usage, under which in form they sold to the defendant at precisely the same price at which they had bought in the market the 100 bales. But this contract in terms stated that the price was not only a certain number of pence per pound (the equivalent

of what they had themselves undertaken to pay) but had in addition the words "with £..... brokerage to us." A duplicate or counterfoil of that sale note in the form of a bought note from the defendant to the plaintiff was sent at the same time for signature and return by the defendant.

I have had produced before me in every case which is included in the account the subject of this claim, the contracts made by the plaintiffs in the market, whereunder they have purchased from or sold to another member of the association the exact amount which the defendant was buying or selling, and in every case the transaction was carried out in exactly the way I have indicated. The plaintiffs always made their purchase or sale in the market before sending on to the defendant the bought and sold notes on contract form No. 6, with the brokerage added to the price. In every case the plaintiffs enclosed the bought and sold notes between themselves and the defendant under cover of a letter, which stated that, in accordance with instructions received from their Manchester office, the plaintiffs confirmed having transacted the business thereafter described in detail "for the defendant's account." The business transacted was then set out. In every case in due course an account sales was rendered, in the same form as the one produced before me. This begins by stating that it is an account sales of 100 bales, October, 1936, delivery, American futures bought and sold for account of Walter Wolfe, Esq., Manchester, by Woodward & Co., Liverpool. It then continues: "To purchase of 100 bales on Mar. 19; by sale upon Mar. 30" and then shows the difference due. The account sales is in printed form with blanks to be filled in to make it represent the particular transaction. The account then sets out the interest due and then the charges. The first item of the charges is "To brokerage—£7." The plaintiffs' manager, Mr. Fraser, stated in cross-examination that in that account the words "To purchase" referred to the contract of purchase from the plaintiffs signed by the defendant and the words "By sale" referred to the contract of sale to the plaintiffs signed by the defendant in course of completing the particular transaction in the way I have already described.

On June 15 the last transaction between the parties was completed and the defendant's account was closed and showed an amount due from the defendant of £153 15s. 10d. for differences, interest and brokerage charges. The plaintiffs claim in this action, as appears by the endorsement on the writ, that amount as the sum due in respect of contracts made by the plaintiffs as brokers for the defendant.

It was urged before me on behalf of the defendant that, as there was a contract made by the plaintiffs directly with the defendant of purchase and sale as principals, and as there was an express understanding that there should be no question of deliveries on either side but only an

eventual payment of differences, the claim was one in respect of gaming and wagering contracts and was therefore unenforceable in law. Reliance was placed upon the decision in *Ironmonger & Co. v. Dyne* (1), and it was contended that that case established that once it was shown that, notwithstanding the forms of contract between the parties, the intention was that no deliveries were to be made and that nothing was to happen except payment of differences, the contracts were gaming and wagering contracts. But *Ironmonger & Co. v. Dyne* (1) was a case in which foreign bankers whose business it was to buy and sell foreign currency were the contracting parties on the one side. I cannot find from an examination of that case that they acted in any way as brokers in the transactions. In the fullest sense of the word they were principals in the transactions with the defendant in that case. In such circumstances the Court of Appeal decided that the test applied by CAVE, J., in *Universal Stock Exchange, Ltd. v. Strachan* (2), at p. 167, i.e., whether the bargains were real ones for purchase and delivery or whether they were simply gambling transactions intended to end in the payment of differences, was the correct test for resolving the question whether the contracts in question were or were not gaming and wagering contracts. But the plaintiffs in the case before me did in fact act in every transaction as brokers. They made a genuine contract in the market binding them in respect of that and exactly that which the defendant was buying or selling. That afterwards, because the rules of the association and the market bound them so to do, they sent a form of contract as between themselves and the defendant as direct contractors obscures and, I think, falsifies the true position. It is noteworthy that that contract in express terms adds to the price a charge for brokerage, a charge wholly inconsistent with the plaintiffs being in reality principals in a plain vendor and purchaser contract with the defendant. Once I am satisfied as I am that in fact the plaintiffs acted in every transaction as brokers and claim only to be indemnified by the principal for whom they have entered into contracts on the market, I think the case is one which is more nearly covered by the decision in *Weddle, Beck & Co. v. Hackett* (3). True, it is that the plaintiffs agreed, by Mr. Greenwood who entirely controlled their Manchester office, with the defendant that the defendant would not be expected to take delivery of the cotton or to deliver it and that it was to be a matter only of the differences between the purchases and the sales, but the plaintiffs in fact merely allow the defendant in form to buy from or sell to them. They acted for the defendant to enable him to gamble and they acted in the capacity of brokers in the market in which the defendant wished to gamble in the only way in which the defendant could gamble in that market. If all that the plaintiffs had done was to pass a form of contract made directly between themselves and the defendant with an existing arrangement that only differences should be

paid, the matter might well be concluded on the principle of the decision in *Universal Stock Exchange v. Strachan* (2). It is not, however, what took place here. The plaintiffs made contracts on the market for the defendant to give effect to his orders. Those contracts I am satisfied in the evidence bound him and they have, I am satisfied, had to meet their obligations under them.

I come to the same conclusion in those circumstances as SWIFT, J., in *Weddle, Beck & Co. v. Hackett* (3), which is that the plaintiffs are entitled to recover.

Solicitors: *W. Pingree Ellen*, agent for *Peace & Darlington*, Liverpool (for the plaintiff); *Lewis Shane & Co.*, agents for *Linder, Myers & Pariser*, Manchester (for the defendant).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

HOMER v. DONISTHORPE COLLIERY COMPANY, LTD.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 22, 1936.**]

Workmen's Compensation—Industrial disease—Medical referee's certificate—Variation of certifying surgeon's certificate—Form—"Therefore" used instead of "thereby."

A workman obtained a certificate from the certifying surgeon which certified that he was suffering from miner's nystagmus and that he was thereby disabled from earning full wages at the work at which he was employed. The employers appealed to the medical referee, who certified that the workman was suffering from the disease "and was therefore disabled from earning full wages," but that he was fit for light work on the surface, adding that there was an increased susceptibility to a fresh attack should he again work below the ground. This certificate was given on form P (ii), the form prescribed when a medical referee allows an appeal. In an application for compensation the county court judge held the certificate was unintelligible on the grounds: (a) that form P (ii) had been used instead of form P (i), the form prescribed when a medical referee dismisses an appeal; (b) the medical referee had used the words "therefore disabled" instead of "thereby disabled" which appeared in the Workmen's Compensation Act, 1925, s. 43 (1), and (c) the medical referee had certified with regard to increased susceptibility, whereas it was clear on the form that he had power to do so only if he found that the workman was no longer incapacitated by the disease, and he ordered that the matter should be referred to another medical referee. The workman appealed:—

HELD: (i) the medical referee, by stating that the workman was fit for light work on the surface and that there was an increased susceptibility to a fresh attack, had varied the certificate in several respects, and these qualifications amounted to an allowance of the appeal in part. The use of form P (ii) did not therefore vitiate the certificate.

(ii) the use of the word "therefore" instead of the word "thereby" rendered the certificate a nullity.

(iii) the county court judge had no power to refer the matter to another medical referee.

[EDITORIAL NOTE. The certificate of a medical referee is conclusive of a workman's condition, and where there has been an appeal to a medical referee it is upon his certificate that a workman must rely in an application for compensation for injury by industrial disease. Two forms are prescribed for the use of the medical referee, P (i) where he dismisses an appeal by either the workman or the employer from the certificate of the certifying surgeon, and P (ii) where he allows the appeal. In the present case it was suggested that form P (i) was the appropriate form, but the medical referee's finding was clearly a modification of the certifying surgeon's certificate, and consequently was, as SLESSER, L.J., said, an allowance of the appeal in part. Form P (ii) was therefore the correct form, and that form requires the medical referee, when he certifies the workman's condition, to state whether the workman is or is not suffering from the scheduled disease, and in the former case, whether he is thereby disabled from earning full wages. In view of the importance of the medical referee's certificate, it must comply strictly with the requirements of the Workmen's Compensation Act, 1925. Thus, although in some cases the words "therefore disabled" might be given the same meaning as "thereby disabled," deviation from the prescribed requirements may lead to confusion, and the requirements will be strictly enforced.

AS TO APPEALS TO MEDICAL REFEREES, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 519-521; and FOR CASES, see DIGEST, Vol. 34, pp. 467-469, Nos. 3823-3834.]

APPEAL by the workman from an award of His Honour JUDGE GALBRAITH, K.C., made on July 3, 1936, at Ashby-de-la-Zouch County Court.

Ernest Homer, a miner, believing himself to be suffering from miner's nystagmus, submitted himself for examination by a certifying surgeon in accordance with the Workmen's Compensation Act, 1925, s. 43 (1). The certifying surgeon certified that the workman was suffering from miner's nystagmus, and that he was thereby disabled from earning full wages at the work at which he had been employed. The employers appealed to a medical referee, who, after examining the workman, certified that he was suffering from the scheduled disease known as miner's nystagmus, but was fit for light work on the surface, and that there was an increased susceptibility to a fresh attack of the disease if he should again work below ground. This certificate was given on form P (ii). By the Workmen's Compensation (Medical Referees in England and Wales) Regulations, 1932, reg. 32, the referee is required to give his certificate on form P (i) if dismissing, or P (ii) if allowing, the appeal. The medical referee's certificate contained the words :

I decide . . . that . . . Homer was, at the time of his examination by the certifying surgeon, suffering from miner's nystagmus, and was therefore disabled from earning full wages at the work at which he was employed . . .

In an application for compensation based on this certificate the county court judge held that, in view of (a) the use of the form P (ii) instead of form P (i), (b) the use of "therefore" for "thereby," and (c) the fact that the referee had certified with regard to increased susceptibility

whereas it was made clear on the form that he had power to do so only if he found that the workman was no longer incapacitated by the disease, the certificate was unintelligible, and he ordered that the matter should be referred to another medical referee. The workman appealed.

R. T. Paget, for the appellant : If there was any doubt as to what the medical referee had decided, the county court judge ought to have referred the matter back to him and not to another medical referee. With regard to the substitution of the word "therefore" for "thereby," although the Workmen's Compensation Act, 1925, s. 43 (1), requires the referee to certify that the workman is "thereby disabled," it is not necessary that the referee in giving a certificate to that effect should use the actual word "thereby." The important matter is not how the referee has expressed himself, but what he meant to say. "Therefore" in this certificate means exactly the same as "thereby." Taking the meaning as a whole, the workman has obtained a certificate saying that he is disabled.

Trevor Hunter, K.C., and *R. H. Norris*, for the respondents : The medical referee had issued such a confused certificate that the judge was right in thinking it best to refer the whole matter to a different referee, as he was entitled to do under the Workmen's Compensation (Medical Referees in England and Wales) Regulations, 1932, reg. 3 (b).

SLESSER, L.J. : This is a case that has been in a very confused condition, and at times I thought that the respondents were arguing the appellant's case, and the appellant was arguing the respondents' case, but I think now the matter has clarified itself to some extent. The matter arises in this way : A Mr. Ernest Homer, who was a miner, believed himself to be suffering from miner's nystagmus, and on Apr. 2, 1936, he submitted himself to examination by the certifying surgeon in accordance with the Workmen's Compensation Act, 1925, s. 43 (1), for the purpose of getting a certificate that he was suffering from a disease mentioned in the third schedule, and was thereby disabled from earning full wages at the work at which he was employed. The workman was successful in obtaining such a certificate. The employers were not satisfied with the certificate, and in accordance with sect. 43 (1) (f) they appealed. The provisions affecting their appeal are these :

If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final, and the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive.

The regulations which are there referred to, the regulations as to a

medical referee, contain a number of matters which are material, and in particular reg. 32, which says :

The medical referee shall, by certificate, in such one of the forms prescribed in the schedule to these regulations as may be appropriate, notify in writing his decision to the registrar of the county court, and give a certificate (as required by sect. 43 (1) (f) of the Act), as to the condition of the workman at the time of his examination.

The forms P (i) and P (ii) are said to be respectively a decision of the medical referee under sect. 43 (1) (f) dismissing an appeal, and a decision of the medical referee under sect. 43 (1) (f) allowing an appeal. Now the medical referee duly gave his certificate, and it is that certificate which, in fact, was relied upon by the workman in his application to the court, although he did, in fact, in drawing up his application, refer only to the certifying surgeon's certificate; yet it appears, in fact, that the medical referee's certificate was treated throughout the proceedings as the only operative certificate on which he could hope to succeed. Now it was objected by counsel that that certificate being sought to be used for the purpose of supporting an application for compensation, it was not in order, and one of the grounds which was given was that, whereas the medical referee had, in fact, dismissed the appeal, he had used a form, P (ii) appropriate to allowance of the appeal. The learned judge, as I read his judgment, was impressed by that argument. In my view, although it is not conclusive of the argument of the case, for reasons which I will hereafter state, that view was ill-founded. The certifying surgeon had certified that the man was suffering from the disease on Apr. 2. The medical referee had varied that certificate in several respects. He had, for example, said this, that the miner was suffering from the scheduled disease known as miner's nystagmus, but was fit for light work on the surface, and so, to comply with that part of the requirements of the certificate, which was that he should certify as to his then condition, he continued: "There is an increased susceptibility to a fresh attack should he again work below the ground." Those qualifications seem to me to amount to an allowance of the appeal, at any rate in part, and not to a dismissal, and if the matter had remained there, I think that the referee might properly have stated those matters as he did as to his then condition, which he was required to certify.

But there is a much more fundamental and serious objection taken to this certificate, and the objection which is taken can be stated very shortly. It is this: that the medical referee has, in his certificate, used language, the effect of which is to prevent this certificate from becoming a certificate at all within sect. 43 of the Act. Whereas the Act requires that the medical referee and the certifying surgeon shall certify that the man who is suffering from the disease is "thereby disabled from earning full wages," the medical referee has substituted

the phrase "therefore disabled from earning full wages." In my opinion the two words do not necessarily mean the same thing, and, in any event, the employer is entitled to claim that before he is made liable under a certificate issued under the Act the certificate must comply with the requirements of the Act. Now this matter is not, in my opinion, a mere procedural or adjectival matter. The word "thereby" is actually to be found in sect. 43 (1) itself:

(i) The certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the third schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed.

The certificate of the certifying surgeon, which is set out among the forms prescribed by the rules as to certifying surgeons, similarly uses the word "thereby"—"and is thereby disabled." That will be found in form 3: "Certificate of disablement," and in a supplementary form. Now, in the matter of the medical referee, the matter coming before him, as I have said, under para. (f), his decision shall be final. That matter is also dealt with by regulation, and in form P (ii) where the medical referee has found that the workman was suffering from the disease. Of course, the question does not arise where it is found that he was not suffering, for example, in the case of an appeal by the employer from a decision of the certifying surgeon that the workman was suffering from the disease. Where, however, the medical referee finds that the workman was suffering, he has to find either that he was or was not thereby disabled from earning full wages in the work upon which he was employed. The result is that the statement made in this application, that this workman was in possession of a certificate that he was suffering from an industrial disease, which certificate constitutes the only evidence to make an industrial disease an accident under the Workmen's Compensation Act, was erroneous. There was never such a certificate at all before the county court judge, and it follows, therefore, that the applicant fails to make out his case, and therefore is not entitled to an award.

But the learned county court judge has dealt with the matter in this way: He has thought that he had jurisdiction, notwithstanding the fact that he treated the medical certificate as not conclusive of the matter, to refer the matter for re-consideration by another medical referee. There is a rule to which we have been referred whereby a county court judge, in exceptional cases, instead of sending a case to the medical referee in the district, may send it elsewhere to another medical referee. In my view that rule has no application to the case which is now before the court. This case had been sent to the medical referee in the district, and he had dealt with it, although, as I have said, he dealt with it in-

effectually. That rule which is to refer the matter, in the first instance, to someone else, has no application here.

There only remains now the question of costs. As I said at the outset, it has been very difficult throughout the case for me to ascertain exactly what the two parties were contending for, but I have come to the conclusion that the learned judge, who said he failed when he tried to persuade the parties to agree to refer the matter to another referee, was in error in trying to exercise any such persuasion except in so far as the matter might be done by consent. But notwithstanding the refusal of Mr. Paget, who elected to stand on his contention that the heading ought to be disregarded, the case turned, in his view, on whether form P (i) or form P (ii) should be used, rather than the substitution of the word "therefore" for "thereby." Nevertheless, the learned judge did think that the case should be referred to another referee, and he said: "and as I decided against this contention, I gave the costs to Mr. Norris of this hearing." We do not propose to disturb the finding of the learned judge as to the costs in the court below, but we think, so far as this court is concerned, in so far as one party, apparently, was arguing for reference to another referee, and the other party was arguing, either that the matter should stand dismissed altogether, or that the appeal should be allowed, neither party can be said to have been sufficiently successful in this appeal to permit of costs being awarded at all. Our order, therefore, is that this appeal be allowed, and the original application stand dismissed, that there be no costs of this appeal, and the costs of the county court stand as they were ordered by the learned county court judge.

SCOTT, L.J.: I agree, and have nothing to add except this, that it follows from my Lord's judgment that the appeal is allowed, and the award of the county court judge is set aside, but that the certificate of the medical referee which was the subject of discussion is, in our view, a nullity. I have nothing further to add.

EVE, J.: I agree.

Solicitors: *Gibson & Weldon*, agents for *C. Leslie Hale*, Leicester (for the appellant); *Peacock & Goddard*, agents for *Elliot, Smith & Co.*, Mansfield (for the respondents).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

**Re MAINWARING'S SETTLEMENT TRUSTS,
MAINWARING'S TRUSTEE IN BANKRUPTCY
v. VERDEN.**

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
November 2, 3, 1936.]

Mortgage—Two properties mortgaged together—Sale of one subject to the mortgage—Debt discharged by property retained—Exoneration or contribution.

M. was entitled to a life interest and a contingent reversionary interest under a settlement. He mortgaged these interests together with a life policy and subsequently was adjudicated bankrupt. The trustee in bankruptcy sold the interests under the settlement and assigned them subject to the mortgage but retained the life policy. The purchasers of the interests under the settlement paid the mortgage interest and the premiums on the policy as they fell due. M. then died and the mortgage was satisfied out of the policy moneys. The question raised was whether the discharge of the mortgage debt fell (i) wholly upon the proceeds of the policy or (ii) wholly upon the settlement interests or (iii) must be apportioned between the proceeds of the policy and the settlement interests in the proportion of their respective values :—

HELD : the mortgage debt must be rateably apportioned between the policy moneys and the settlement interests. The assignment was subject to the mortgage, and there was nothing in the assignment or in the relevant surrounding circumstances to displace the *prima facie* rule that contribution takes place. It was true that the trustee in bankruptcy stood in no better position than the bankrupt, but the latter, though he retained one of the properties mortgaged, was not compelled to bear the whole debt when he had expressly assigned the other subject to the mortgage.

[EDITORIAL NOTE.] The facts set out in the headnote are simplified in accordance with the treatment of the case in the judgments. There were in fact one or two minor complications in the case which did not affect the argument and are neglected in the judgments. The first argument advanced was based on a passage in the judgment of LORD ELDON in *Waring v. Ward* (3). The contention was that in an assignment subject to a mortgage not containing an express covenant of indemnity against the mortgage debt a covenant to that effect is always implied. This was rejected and the passage explained as referring to the case where the whole property mortgaged is subsequently sold. The second argument, which was advanced by the other side, was that where part of the mortgaged property is sold and the mortgage debt is one created by the assignor himself, the assignee takes his part of the property free from the mortgage. This was rejected by reason of the inclusion in the assignment of the express words that the property was assigned subject to the mortgage. It is to be noted that the incumbrance here was one made by the owner of the properties and was not what is called a paramount charge, i.e., paramount to the title of the creator of the charge. An equity to exoneration may arise where the assignment of one property is not made subject to the mortgage, or is given with a covenant for further assurance or a representation, though only verbal, that the property assigned is free from incumbrances; but the words of the assignment itself negated such a suggestion in the present case.

FOR EXONERATION FROM A MORTGAGE DEBT, see HALSBURY, 1st Edn., Vol. 21,

pp. 306, 307, para. 545 ; and FOR CASES, see DIGEST, Vol. 35, pp. 597-603, Nos. 3385-3419.]

Cases referred to :

- (1) *Re Darby's Estate, Rendall v. Darby*, [1907] 2 Ch. 465 ; 35 Digest 600, 3399.
- (2) *Re Best, Parker v. Best*, [1924] 1 Ch. 42 ; 35 Digest 600, 3400.
- (3) *Waring v. Ward* (1802), 7 Ves. 332 ; 35 Digest 359, 1018.
- (4) *Mills v. United Counties Bank, Ltd.*, [1912] 1 Ch. 231 ; 35 Digest 359, 1020.
- (5) *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461 ; 35 Digest 599, 3398.
- (6) *Ker v. Ker* (1869), 4 I.R. Eq. 25 ; 35 Digest 599, case r.
- (7) *Harbert's Case* (1584), 3 Co. Rep. 11 b ; 21 Digest 566, 1416.

APPEAL by the plaintiff trustee from an order made by BENNETT, J., on Apr. 1, 1936.

Sir Harry Mainwaring had a life interest and reversionary interests in two settlements : the Peover Hall Settlement and the Outlying Lands Settlement. He borrowed £5,500 from the Legal & General Assurance Society, Ltd., and secured the loan by creating a mortgage in favour of the Society on his interests under the Peover Hall Settlement, and by taking out a life policy with the Society for £6,000. He afterwards borrowed a small sum from Sir Robert Bulkeley and secured it by a mortgage of his interests under both settlements and under the policy. He was adjudicated bankrupt on July 1, 1931. The trustee in bankruptcy afterwards sold the interests in the Peover Hall Settlement to the defendants Sir R. Bulkeley and Mr. T. L. Guinness, and the conveyance stated that the purchasers were to hold " subject as to all the premises so far as respectively affected thereby to the incumbrances mentioned in the second schedule hereto." These incumbrances represented the mortgage on the debtor's interests. The conveyance also referred to the policy. The purchasers paid the mortgage interest and the premiums on the policy as they fell due. Sir Harry Mainwaring died, and the insurance company paid itself off out of the policy moneys, which were more than sufficient for the purpose. The small mortgage to Sir R. Bulkeley was paid off out of the remainder.

The trustee in bankruptcy took out an originating summons seeking a declaration that the sum due to the insurance company on the security of the mortgage dated Dec. 23, 1920, and the small sum due to Sir R. Bulkeley and secured by the later mortgage, ought to be borne exclusively by the bankrupt's interests in the Peover Hall Settlement to the exoneration of the policy ; or rateably according to the respective values of these properties at the time of discharge of the mortgages. At the hearing on Mar. 13, 1936, BENNETT, J., held that the applicants were not entitled to either of these declarations, basing himself on the decision of WARRINGTON, J., in *Re Darby's Estate* (1). He said that the debt which was paid out of the proceeds of the insurance policy was a debt of the borrower, and the trustee in bankruptcy was in no different position

from that of the borrower. Upon the authority of *Re Darby's Estate* (1) the borrower had no right of indemnity, as his position was an exception to the general rule.

The trustee in bankruptcy appealed.

J. M. Gover, K.C., and *L. W. Byrne* for the appellant trustee in bankruptcy.

Fergus D. Morton, K.C., and *F. McMullan* for certain respondents entitled to beneficial interests purchased from the trustee in bankruptcy, for the purchasers, and for the bankrupt's widow and two daughters.

E. M. Winterbotham, for *A. S. Verden* and *H. E. Morgan*, trustees of the two settlements.

Gover, K.C. : The trustee in bankruptcy is entitled to be repaid, out of the rest of the security in the hands of the purchasers, the whole amount of the mortgage debt recovered by the Assurance Society and by Sir R. H. W. Bulkeley out of the policy moneys. The trustee in bankruptcy, to whom the equity of redemption in the estates belongs, is entitled to be subrogated to the rights of the mortgagees as against the rest of the subject matter of the mortgage which had been sold and assigned to the purchasers merely as an equity of redemption and expressly subject to the mortgage. The debt was paid off out of the interests of the trustee in bankruptcy, and the mortgagees were not concerned with any rights that might exist between the trustee in bankruptcy and the purchasers of the interests. The trustee is therefore entitled to stand in the shoes of the mortgagees to be recouped out of the settlement interests. Alternatively, the mortgage debt should be borne, proportionately to value, by both the subject matters of the mortgage. If the mortgagees had realised their security by selling the settlement interests and had paid themselves off, the purchasers could not have required the trustee in bankruptcy to repay the mortgage, for they purchased subject to it (see per LORD ELDON, L.C., in *Waring v. Ward* (3), at p. 336). The principle is more elaborately expounded by the Court of Appeal in *Mills v. United Counties Bank* (4), in which this court concluded that there were circumstances which showed a clear intention of the parties to exclude the application of the principle.

ROMER, L.J. : Where the owner of an equity of redemption sells it, in the absence of an express covenant of indemnity, the purchaser has to indemnify the vendor against the mortgage. *Mills's* case (4) is exceptional, because the equity of redemption was of a contingent reversionary interest which had not fallen into possession. In the present case the ordinary principle does not apply, because there is a modified covenant of indemnity. The trustee in bankruptcy may have here to meet the ordinary doctrine of marshalling. To have the whole mortgage debt thrown on the equity of redemption sounds grossly inequitable, though

it may be that a proportionate part of the mortgage should be thrown on the reversionary interest.

Gover, K.C. : *Prima facie* the doctrine in *Waring v. Ward* (3) applies : the assignee is under an implied obligation to indemnify the assignor. If Sir Harry Mainwaring had assigned his interests under the settlement either to a purchaser or voluntarily without any indication that it was an assignment of an equity of redemption subject to the mortgage, he would have been liable personally to indemnify the assignee. Where a person sells or assigns an equity of redemption as such expressly subject to a mortgage, he sells and the purchaser buys on the footing that the purchaser's subject matter and not that of the vendor is to bear the mortgage debt. It would be grossly inequitable if, merely because the mortgagee, who has a paramount right to do what he likes, pays himself out of the retained subject matter or sues the mortgagor on the covenant and is paid personally, the assignee of part of the subject matter expressly subject to the mortgage should claim to have taken entirely free from the mortgage. The doctrine relates to every case in which an intention can be implied that the purchaser should take subject to the mortgage. In the ordinary case, in the absence of any special circumstances which would lead to the conclusion that the parties had a contrary intention, where a mortgagor assigns the whole of the mortgaged property in terms subject to the mortgage, then, if there are no circumstances which enable the court to arrive at any other conclusion, the conclusion at which equity would arrive is that indicated in *Waring v. Ward* (3) : that the purchaser or assignee must indemnify the vendor or assignor against the personal liability on the covenant.

Where there are two subject matters to the mortgage and the mortgagor assigns or sells for value one subject matter only in terms of an equity of redemption subject to the mortgage and retains the other, if it can be predicated that the fact of there having been two subject matters and one mortgage is itself sufficient indication of an intention contrary to the principle in *Waring's* case (3), then the doctrine cannot apply and the obligation to indemnify the vendor or mortgagor would not arise. Then the ordinary doctrine of equity would apply in favour of contribution between the two subject matters. The mere fact that the transaction involves a retention by the mortgagor of part of the subject matter of the mortgage without anything more is not sufficient to take the case within the principle in *Waring's* case (3). Although this case is not the same as the simple case dealt with in *Waring's* case (3) and *Mills'* case (4), yet that fact in itself is not sufficient in equity to preclude the application of the ordinary principle. The fact that the vendor has in terms sold the equity of redemption subject to the mortgage must carry weight.

In *Re Darby's Estate* (1), it was held that where a charge was created

by the assignor himself, and was not a charge paramount to his own title, his widow was under no liability to contribute. In *Re Jones* (5) there was a covenant for further assurance, which there is not in the present case. Apportionment should be made according to the values at the time the security was enforced or the debt was paid.

Morton, K.C. : There should be no apportionment at all. The plaintiff is in no better position than Sir Harry Mainwaring, having had a debt of Sir Harry's paid off out of these policies. In order to ascertain whether there is any implication in the contract, arising from the circumstances, that the respondents should pay any part of this debt, the court should consider the nature of the property sold and retained, and the terms of the contract and the conveyance. The policy was producing an immediate income during Mainwaring's life. The contingent reversionary interest was reversionary not only on the expiration of Mainwaring's life interest but also upon the death of his wife, who was considerably younger and who survived him ; at Mainwaring's death it produced neither income nor a capital sum ; the trustees have nothing but a reversionary interest expectant on the death of the widow. Premiums had to be paid on the policy, and the persons retaining it had no funds in their hands out of which to meet those premiums ; but as soon as Mainwaring died they would have £6,000—a sum larger than the capital of the mortgage debt. The intention of the parties was that the purchasers of the life interest should pay the premiums and the interest, they alone having the funds to do it, and that on the death of Mainwaring the person who retained the policy should discharge the capital moneys, he being—unless Lady Mainwaring predeceased her husband—the only person with any moneys to do it. So explained, the transaction is perfectly sensible and workable. The life interest and the policy are sold so that the purchaser keeps up the premiums out of the life interest and then repays the mortgage out of the capital moneys which fall in at the death ; therefore the trustee in bankruptcy keeps the policy, which is intended to provide a fund for the repayment of capital moneys on Mainwaring's death. There is no intention to apportion these payments. Similarly, there was no intention to apportion the capital, because the retained fund is intended to meet the debt on the death of Sir Harry, when no income is available for the payment of the principal. The trustee in bankruptcy has had all the contribution which was intended, as the purchaser paid the interest and premiums throughout Sir Harry's life. If this is simply a case in which A.B., having mortgaged Blackacre and Whiteacre for his own personal debt, sells Whiteacre subject to the mortgage but without more, there is no contribution.

Re Darby (1) establishes that where A.B. creates a debt on two properties and sells one, retaining the other, the *prima facie* liability is that

of the property which he retains. WARRINGTON, J., there said, at p. 470, that the case he had to deal with was the exception mentioned by CHRISTIAN, L.J., when in his judgment in *Ker v. Ker* (6) he stated the conclusions he derived from *Harbert's Case* (7):

Darby's case (1) was followed in *Re Best* (2), where TOMLIN, J., at p. 43, made the interlocutory observation that *Darby's case* (1):

was a case where the question arose whether there was any right to contribution. That involved the consideration of the equities, and in determining what was equitable the court could take into account the fact that the debt was a personal debt of one of the parties.

The *ratio decidendi* of *Darby's case* (1) did not depend on the words "subject to the debt," but on the words "who in equity ought to bear this particular debt?" The determining fact was that the debt was a personal debt of the assignor.

ROMER, L.J.: *Waring's case* (3) was not cited in that case, and the decision seems to be quite contrary to the decision in *Waring's case* (3).

Morton, K.C.: The assignment need not be expressed as subject to the mortgage. If the purchaser knows that there is a mortgage, that is enough. *Waring's case* (3) is not in point in this case because, if a debtor assigns the whole of the property subject to a mortgage and the purchaser knows that he is buying an equity of redemption, then he takes subject to the mortgage. The only distinction between *Darby's case* (1) and this case is that in *Darby's case* (1) the conveyance was not expressed to be subject to the mortgage; here it was. If contribution is due, the appropriate date for ascertaining the rateable values as a basis for apportionment is the date of the execution of the conveyance, not the date of the payment of the debt. It is the date at which the intention may be presumed to be in the minds of the parties. The purchasers are entitled to a charge for the sums so paid, and they should be taken into account.

Gover, K.C., in reply: The fund to be contributed must include the interest and premiums paid since the sale.

LORD WRIGHT, M.R.: This is an appeal from a judgment of BENNETT, J., dealing with a question raised on an originating summons. The parties to the proceedings are, on the one side, the trustee of the property of Sir Harry Stapleton Mainwaring, a bankrupt, now deceased, and on the other side one set of defendants who are the beneficiaries of the purchasers of certain property which passed to them under the deed of conveyance, to which I shall refer in a moment. The other defendants are the actual purchasers, and the widow and the two daughters of the deceased who have certain beneficial interests, or may have certain beneficial interests, in the matter. The question stated

in the originating summons is in somewhat complex terms, and may, I think, be stated more simply in this way. The question is whether as between two properties the charge by way of mortgage for the same mortgage debt is to be borne by the one exclusively or, failing that, is to be borne in rateable proportions between the two properties both charged for the same debt. That involves a short statement of the facts of the case. Perhaps for convenience I may say at once that I am not going to deal in detail with the suggestion that the whole of the debt should be borne by the one property, because I do not gather Mr. Gover has contested that point very strongly, and I do not think it could possibly succeed. But the material question is whether there is contribution between the two properties. I shall also disregard a small further mortgage which I think it was conceded might be abnormal.

The deceased baronet was entitled to a life interest in certain property referred to as the Peover Hall Settlement. That had originally been freehold property, but at a time before it is necessary to consider the particular questions here involved it became converted into investments which represent and take the place of the freehold hereditaments. Under the settlement the deceased baronet was entitled to a life interest subject to certain rentcharges. On his death there was the remainder to the use of his son, subject again during the lifetime of the widow to a life interest of hers. On her death or re-marriage the property was to pass to the son or sons of the deceased baronet. That is immaterial because he died leaving no sons. Then on the failure of these limitations the property was to pass in fee simple to the use of the deceased baronet. There was another settlement called the Outlying Lands Settlement, in which the baronet was also interested in not identical but somewhat similar terms. I need not discuss that in detail because it does not come into question on this application.

Now, the debtor, Sir Harry Stapleton Mainwaring, was made bankrupt on July 1, 1931. Before that date he had effected a mortgage with the Legal & General Assurance Company for £5,500, which was charged on his interests in the Peover Estate; that is to say, on his life interest, and on his remainder in fee simple, on the failure of the intervening limitations. The mortgage also was secured on a life policy for £6,000, which had been effected some years before on his life. I pass over the small second mortgage on the same property of Mar., 1931. After his adjudication in bankruptcy the trustee in bankruptcy sold his interests in the Peover Estate for the sum of £2,000 to the first two defendants. The second schedule to the conveyance refers to the mortgage to secure the sum of £5,500 with interest, and a further small mortgage, and it also mentions the covering policy, as it is called, for £6,000. The conveyance, after setting out the subject matter of the transfer in full, states that the purchasers are to hold, subject to the duties payable on the

death of Sir Harry Stapleton Mainwaring, or to any duty payable upon the death of the widow, and :

subject as to all the premises so far as respectively affected thereby to the incumbrances mentioned in the second schedule hereto—

that is to say, for the purposes of this proceeding, that it is subject to the mortgage on the debtor's interests. It also refers to the policy which is not the subject of the sale, which stands outside the thing altogether.

Under these circumstances the trustee has brought these proceedings asking to have it declared that the discharge of the mortgage must fall entirely upon the policy ; in fact, the insurance company as mortgagees have repaid themselves out of the proceeds of the policy. The purpose of this application is to have the whole charge thrown upon the Peover Estate. That is resisted by the defendants.

Now, the question has been discussed in certain cases to which we have been referred, as to whether and under what circumstances it is right in a case of this character that there should be, if not an indemnity, which I do not discuss further, at least a contribution made between the properties respectively charged for the same debt. The first of these cases to which I need refer, and I am only going to refer to two, is a decision of WARRINGTON, J., in *Re Darby's Estate* (1). There there was an assignment by way of mortgage, or charge, by an assignor on certain properties, freehold premises, together with a policy of insurance on his own life, and certain other properties. The assignor subsequently by a voluntary deed assigned the leasehold premises to his wife. The deed contained no reference to the charge and memorandum of deposit, and no covenants for title express or implied. On the death of the assignor his executors paid off the debt due to the bank, and they applied to the court to determine whether the widow, as assignee of the leaseholds, was liable to contribute to the payment of the debt. Various points were taken. It was said, among other things, that the assignment was purely voluntary. It was further said that there was no covenant against incumbrances. The learned judge, however, decided the case in favour of the widow. He pointed out that the debt in question was the debt of the assignor, which he, and his executors, were personally bound to pay. The position he said would have been different if the debt had been what is called a paramount incumbrance, that is one which had been charged on the property before it came to the assignor. He held, in accordance with the various authorities, that where the debt in question is the personal debt of the debtor himself, *prima facie* that debt is to be paid entirely out of the assets of the assignor, and there is no claim to a contribution in respect of property which has been assigned even though to a volunteer. But the learned judge was careful to point out that the equity position would or might

have been different if the property had been assigned subject to the debt. He held, however, on the facts of that case, that there was no such term in the assignment, and that being so the debt had to be discharged *in toto* by the executors out of the property of the deceased man without any right of contribution from the other property which was being charged. It was held that there was no equity of contribution in such a case.

Again in a later case, *Re Best* (2), it was held by TOMLIN, J., that there was no right of contribution there. The learned judge in his judgment does not refer in terms to the question of whether or not the assignment was made subject to any charge. He said, at p. 44 :

prima facie equality or the imposition of proportionate burdens on different properties charged with a debt is equity, but there may be circumstances which disturb the *prima facie* distribution of the burden and throw it wholly on one person—

and he followed and referred to the case of *Re Darby's Estate* (1). I notice, however, in the headnote, it is specially stated, that the deed of assignment contained no reference to the mortgage, and counsel for the widow, who was opposing the claim to a contribution, puts in the forefront of his argument that :

The policies having been assigned to the widow not subject to the mortgage, the widow is entitled to be recouped the amount deducted from the policy moneys in respect of the debt.

In this case the conveyance clearly makes the sale subject to the mortgage, and I think that is the essential point to consider in a case like this. It is perfectly true that the debt was a personal debt of the assignor, and that the sale which was made was a sale for value, and that the assignor retained part of the property mortgaged. But I think all these considerations are outweighed by the fact that the sale was in terms a sale of an incumbered property and that the purchasers took it on that footing. Mr. Fergus Morton contended that the reference to the policy and certain other points in the conveyance carried with it the necessary implication that there was to be no contribution as between the two properties. But I do not think he is right in that, and I think this is a case in which with all respect to the learned judge it should be declared that there is a right of contribution between the two properties, and that to that extent the appeal should succeed.

ROMER, L.J. : By the notice of appeal the plaintiff asks for a declaration that the sums due on the two mortgages ought to be borne either exclusively by the properties mortgaged other than the policy of insurance, and alternatively rateably according to the respective values of the two properties.

Now so far as the first declaration is sought, it is obviously based

upon the following proposition, that where a mortgagor mortgages his property to secure a loan to himself and subsequently assigns part of that property to a purchaser subject to the mortgage, there is an equity arising between him and the assignee under which the assignee becomes liable to indemnify the assignor against the whole of the mortgage debt. I venture to think that a more astonishing proposition than that was never advanced in a court of equity. It purports to be based upon a dictum of LORD ELDON, which is found in the case of *Waring v. Ward* (3). There LORD ELDON said this, at p. 337, in reference to the purchase of an equity of redemption :

The party [the purchaser] means at the time of the contract to buy the estate subject to that mortgage ; in relation to which mortgage the personal contract was entered into [by the mortgagor] and that was not his. If he enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage ; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage.

Now it is apparent from that passage that LORD ELDON is dealing with a case where the whole of the mortgage property is sold subject to the mortgage. It was indeed held by TOMLIN, J., as he then was, in a later case of *Re Best* (2), that where in such a case as LORD ELDON was dealing with, a mortgagor having created the mortgage debt sells the whole of the property, but sells it not subject to the mortgage, so far from the assignee being bound to indemnify the assignor, the assignor was to indemnify the assignee. TOMLIN, J., does not actually, I think, in his judgment refer to the fact that there the assignment was not made subject to the mortgage, but that matter, of course, was in his mind. It is mentioned in the headnote, and it is relied upon by Mr. Wilfrid Hunt in his argument there on behalf of the assignee.

In the present case we are not dealing with a sale of the whole of the mortgage property, which was the only matter with which LORD ELDON was dealing in his *dictum* ; we are dealing with a case where the assignment made to a purchaser is of part only of the mortgage property, and the remainder of the property was to be retained by the assignor. In such a case as that the *prima facie* rule is that the mortgage debt as between assignor and assignee shall be borne rateably in proportion to the respective values of the items of the mortgage property. As TOMLIN, J., said in his judgment in *Re Best* (2), to which I have just referred :

prima facie equality or the imposition of proportionate burdens on different properties charged with a debt is equity, but there may be circumstances which disturb the *prima facie* distribution of the burden and throw it wholly on one person.

Now the circumstances in which that rule is disturbed, that is to say circumstances which constitute an exception to that general rule, are these : Where the debt is one created by the assignor himself, and where no intention is shown that the assignee shall take the property assigned to him subject to the mortgage—an intention will be shown by an assignment made expressly subject to the mortgage—the assignor must indemnify the assignee against the debt. That was laid down in the case to which LORD WRIGHT, M.R., has already referred, *Re Darby's Estate* (1), decided by WARRINGTON, J., as he then was, in the year 1907. WARRINGTON, J., dealing with a case where there were two items of property subjected by the mortgagor to the same debt, the debt being a debt of the mortgagor's own, and where the mortgagor subsequently had assigned one of the mortgage properties to his widow without any reference to the mortgage debt at all, said this, at p. 470 :

The case I have here to deal with is the exception—

he is really stating the law more or less as I endeavoured to state it just now ; he is dealing with what I call the exception—

How can it be said that the assignee under this deed, whether it be voluntary or not, is liable to contribute to the debt of the assignor ? The assignor owed a sum of money charged on certain property. What equity would he have had in his lifetime to call upon an assignee from him to pay any part of that debt ? I can see none, unless he assigned the property subject to the debt.

In the present case, although the debt was created by the mortgagor himself, the assignor, or rather by the person through whom the trustee in bankruptcy claims—the trustee in bankruptcy stands in no better position than the bankrupt—and the debt having been created by the bankrupt, yet the assignment was made expressly subject to the mortgage. The case is not brought within the exception to which I have referred, and to which WARRINGTON, J., referred, and therefore the *prima facie* rule of equality will count, that is to say, the two mortgage debts must be apportioned between the property assigned and the property retained in the proportion to their respective values.

I will only add this, that Mr. Fergus Morton asked us to say that, looking at the deed of assignment in this case and the relevant surrounding circumstances, we ought to arrive at the conclusion that the arrangement between the parties was this, that the interest on the mortgage debts and the premium on the policy should, during the remainder of the life of the bankrupt, be borne by the assignees, and in exoneration of the policy retained by the assignor, but that the principal sum should be borne exclusively by the policy of insurance. All I can say with reference to that is that that might have been a very wise and a very proper arrangement for the parties to have made, but for myself I can see no evidence in the deed or in the relevant surrounding circumstances

that such an arrangement ever was in fact made. The result of it is that, in my judgment, the order of BENNETT, J., must be varied, and a declaration must be made that the two mortgage debts, with principal, interest, and the mortgagee's costs, must be borne by the two properties rateably according to their values at, I imagine, the date when the bankrupt died, because it was on that date that the insurance company, the mortgagees themselves, received, or must be deemed to have received, the policy moneys, and must be deemed to have paid themselves the first mortgage debt. So far as regards the second mortgage debt, I suppose there may have to be added some later interest to the principal sum, that is to say, interest after the death of the bankrupt, because the balance of the insurance money was retained in the hands of the insurance company, pending, no doubt, a decision upon this summons. I imagine that that is the date that will be taken for the valuation of the properties. Otherwise, of course, the parties would have to value the life interest at that time, the reversion at that time, the policy of insurance at that time, and also, so far as regards the second mortgage under the second settlement, the interest at that time of the second settlement which had not ceased to be of any material advantage.

GREENE, L.J. : I agree. When the true meaning of the conveyance of Apr. 29, 1932, is understood in connection with the relevant circumstances of the case, it appears to me quite impossible to accept either of the extreme views which have been put before us.

The essential facts in the case are these : The vendor was entitled to two properties subject to one mortgage. He sells one of them, and in the conveyance that sale is expressed to be subject to the mortgage. No reference is made to what is to happen, as between the parties to that deed, to the property retained by the vendor in relation to the mortgage. Now, taking that document by itself, what does it mean ? It means, I should have thought, this, that the property which is being bought is to remain, after the conveyance, subject to the mortgage as it was before the conveyance, but there is nothing in the document to disturb the position with regard to the property retained. It appears to me that when the matter is looked at in that way it becomes quite impossible to accept the view urged by Mr. Gover that, under the principle enunciated by LORD ELDON in *Waring v. Ward* (3), he is entitled to throw the whole of this burden upon the assignee. Once it is appreciated that the moment before this document was executed both properties were subject to the mortgage, and that when it was executed the two properties fell into different hands without any provision being made for exonerating the property retained, but providing in terms that the property taken is to remain subject to the mortgage, it appears to me that, so far from an equity arising which would result in throwing the

whole of the burden upon the purchaser, the equity remains an equity to apportion the burden of the mortgage as between the two properties.

That brings me to the opposite contention put forward by Mr. Fergus Morton. Accepting the rule that contribution *prima facie* takes place, he points out that there is an exception to that rule where the vendor himself of one of the two mortgaged properties is the person who is under the personal obligation to pay the debt to the mortgagee. In the present case, of course, the trustee in bankruptcy, so far as that is concerned, stands in no better position than did the bankrupt. Mr. Fergus Morton says that where the property retained, which was subject to the mortgage, is still in the hands of the mortgagor himself, then the exception applies, and the mortgagor should be compelled to bear the whole of the burden.

Now, here again, when this transaction is appreciated and the language used by the parties is understood, it appears to me that that contention cannot be supported. What do the parties mean when they say that the purchaser is to take the property assigned subject to the mortgage? That is not the proper way to express an intention that, as between the two properties the property assigned is to be deemed to be free from the mortgage with a consequent indemnity by the assignor. The result of the language used appears to me to be totally different, and the authority which was referred to of *Re Darby* (1), decided by WARRINGTON, J., brings out, in my judgment, the distinction quite clearly. In a case where an assignee of one property takes that property without any reference in the document to its being subject to the mortgage, in a case where the vendor or the assignee enters into a covenant for further assurance, and cases of that kind, it would indicate, as a matter of construction of the document, that the intention of the parties was that the ordinary rule of contribution should be excluded; but where, on the other hand, the document itself says that the assignee is to take the property subject to the mortgage, it appears to me quite impossible to read any such intention into their minds. So far as the application of the equitable rule is concerned, in my opinion the rule applicable here is the rule of contribution. That is the rule. The other is the exception. The exception, in my opinion, only applies in cases where, either from the language used or from the circumstances of the case, it is possible for the court to say that it is either inequitable or against the presumed intention of the parties that the rule should apply. Here I find no language used and nothing in the circumstances to displace the rule. On the contrary, it appears to me that the circumstances and the language all point to its being not merely equitable, but the intention of the parties that the rule should prevail. It is perfectly true that more careful conveyancing might have put in some express provision dealing with the event which has happened, but in the absence of such express

provision it appears to me that the matter has been left by the parties in such a form that the rule prevails. That appears to me to be in accordance with good sense and fairness, because a person who is buying one of two mortgaged properties, and is told nothing more than that he is buying his property subject to the mortgage, would reasonably assume, it seems to me, that as between himself and the vendor, the mortgage is to continue as a mortgage on the two properties.

I agree with the order proposed by ROMER, L.J.

Order varied by a declaration that each mortgage debt, with interest, mortgagees' costs and premiums as from the date of the contract for sale, ought to be borne rateably according to the respective values of the property sold and the property retained, ascertained at the death of the bankrupt ; liberty to apply as to values ; costs of all respondents as between solicitor and client to be retained or paid out of the capital of the two settlements, otherwise no order as to costs.

Solicitors : *Tarry, Sherlock & King* (for the appellant) ; *T. D. Jones & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

BERRY v. TOTTENHAM HOTSPUR FOOTBALL AND ATHLETIC COMPANY, LTD.

[CHANCERY DIVISION (Clauson, J.), **November 10, 1936.**]

Companies—Transfer of shares—Registration—Directors' discretion to refuse—Systematic refusal—Splitting of holding increasing voting power.

By one of the articles of association of the defendant company it was provided that: "The directors may decline to register any transfer of shares made by a member who is indebted to the company, or in case the transferee shall be a person of whom the directors do not approve or shall be considered by them to be objectionable or the transfer shall be considered as having been made for purposes not conducive to the interest of the company and the directors shall not be bound to specify the grounds upon which the registration of any transfer is declined under this article." A shareholder sought to transfer a number of his shares, but the directors declined to register the transfer. By another article the holder of 1 share had 1 vote, the holder of 5 shares had 2 votes and there was an additional vote for every additional 10 shares, with the result that by splitting a holding of shares, the voting power could be increased. It was alleged that the directors had systematically rejected transfers in order to prevent an increase in the voting power of the shareholders. In an action to enforce registration of the transfer it was sought to adduce evidence that the directors had refused registration in accordance with that systematic practice:—

HELD: (i) evidence as to the rejection of transfers on previous occasions was inadmissible, as it could not be material to the issue in the present case.

(ii) in the absence of evidence to the contrary the directors must be taken to have acted reasonably and *bona fide*, and as they were not bound to disclose their reasons, there was no ground for interfering with their exercise of their discretion.

[EDITORIAL NOTE.] An attempt was here made to adduce evidence that directors had systematically refused to register transfers of shares which would increase the voting power of shareholders. This result would have been obtained in the case of transfers splitting holdings, by reason of the fact that the article providing for the votes of shareholders favoured those with small holdings.

AS TO THE DIRECTORS' DISCRETION TO REFUSE REGISTRATION, see HALSBURY, Hailsham Edn., Vol. 5, pp. 270-272, para. 469; and FOR CASES, see DIGEST, Vol. 9, pp. 375-380, Nos. 2388-2410.]

Cases referred to:

- (1) *Re Gresham Life Assurance Society, Ex p. Penney* (1872), 8 Ch. App. 446; 9 Digest 379, 2408.
- (2) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 14 Digest 371, 3924.
- (3) *Re Bede Steam Shipping Co., Ltd.*, [1917] 1 Ch. 123; 9 Digest 378, 2404.
- (4) *R. v. Rhodes*, [1899] 1 Q.B. 77; 14 Digest 386, 4057.
- (5) *R. v. Ollis*, [1900] 2 Q.B. 758; 14 Digest 386, 4060.

ACTION for a declaration that the directors of the defendant company had wrongfully refused to register the transfer of 6 shares which the

plaintiff, H. Berry, was desirous of transferring to the plaintiff, J. A. Stewart, and for rectification of the register. In refusing to make the transfer as requested the directors claimed to be acting in accordance with article 16 of the company's articles, which is set out in the judgment. The plaintiffs, however, desired to set up the case that the directors had regularly refused to register transfers of shares whereby the voting power of the shareholders was increased. It was possible to do this by splitting up holdings of shares by reason of the following article, which was art. 49 of the company's articles :

Each member who is a holder of 1 share shall have 1 vote, if he is the holder of at least 5 shares he shall have 2 votes, and he shall be entitled to have an additional vote for every 10 shares held by him beyond the first 5 shares. No member shall be entitled to any vote in respect of any share unless he has been the registered holder thereof for a period of not less than one calendar month.

On Aug. 11, 1920, the directors had passed a resolution, the minute of which was as follows :

It was resolved that no existing shareholder be allowed to split his holding without getting the consent of the board.

The plaintiffs alleged that this resolution had been acted on since 1925 to prevent the increase of voting power of members. In the present case, what had happened, so far as was proved, was that the directors held a meeting on Nov. 6, 1935, and informed the plaintiff, Berry, on Nov. 8, that in the exercise of their discretion under art. 16, the directors had refused to register the transfer.

R. E. Manningham-Buller, for the plaintiffs : The burden is upon the plaintiffs of establishing that the directors of the defendant company have acted wrongly and not in accordance with the power given them by article 16 in refusing to transfer these shares. The directors were not prepared to sanction any transfers which increased the voting powers. There have since 1925 been other refusals by the directors of the defendant company to register similar transfers and the evidence of those transactions might be relevant if the facts throw light upon the question whether the acts were intentional or designed. [Counsel referred to : *Re Gresham Life Assurance Society Ex p. Penney* (1), *Re Bede Steam Shipping Co., Ltd.* (3), *Makin v. A.-G. for New South Wales* (2), *R. v. Rhodes* (4), *R. v. Ollis*. (5).]

Fergus Morton, K.C., and *J. B. Lindon*, for the defendant company : The plaintiffs have failed to discharge the burden of proof which rests upon them. [Counsel referred to art. 16 of the company's articles and to *Re Bede Steam Shipping Co., Ltd.* (3).]

CLAUSON, J. : This is an action by Mr. Berry and Mr. Stewart against the Tottenham Hotspur Football & Athletic Co., Ltd. Mr. Berry

is a shareholder in the company and he was minded to transfer certain shares in that company to Mr. Stewart. There was some question with which I need not deal, but ultimately Mr. Berry executed a transfer on Oct. 20, 1935, of 6 shares to Mr. Stewart, and by a letter of the same date he requested the company to register the transfer. The directors held a meeting on Nov. 6, 1935, and on Nov. 8, 1935, they informed Mr. Berry that the transfers had been considered at a board meeting of the company held on Nov. 6, 1935, and, in the exercise of the discretion given to them by art. 16 of the articles of association of the company, the board had decided to decline to register the transfers. Art. 16, the article referred to, is in these terms :

The directors may decline to register any transfer of shares made by a member who is indebted to the company, or in case the transferee shall be a person of whom the directors do not approve or shall be considered by them to be objectionable, or the transfer shall be considered as having been made for purposes not conducive to the interest of the company and the directors shall not be bound to specify the grounds upon which the registration of any transfer is declined under this article.

It is well settled law—*Re Gresham Life Assurance Society, Ex p. Penney* (1)—that where there is an article of this character, the directors are not bound to disclose their reasons, provided they have fairly considered the question. It is also well settled law that where a meeting has been held, in the absence of evidence to the contrary, the court will take the view that the persons present acted reasonably and *bona fide*. I am bound to hold that they acted *bona fide* and that there is no ground for my interfering with their exercise of their discretion under art. 16, or that the plaintiffs had the right to require the directors to specify the ground on which they refused to register the transfers.

The plaintiffs asked for a declaration that the defendant company was not entitled to decline to register the transfers and also for an order for rectification of the register. They sought to establish their case by putting in certain evidence which was directed to show that on certain previous occasions the directors had rejected other transfers for reasons which would not justify the rejection and were not within the terms of the article. I rejected that evidence on the ground that the issue before me was as to what the directors did on Nov. 6, 1935, and that I was not entitled to listen to evidence as to what took place on other occasions, as it could not be material to the issue. I have been referred to a certain number of authorities, but it will be sufficient to indicate the nature of them if I mention *Makin v. A.-G. for New South Wales* (2). It was, I think, at long last admitted in argument by counsel for the plaintiffs that none of the cases he cited had a direct bearing upon the matter. In my view, that evidence being ruled out, there is no evidence before me in any shape or way to justify the inference that the directors have exercised their powers otherwise than reasonably and *bona fide*, as I

am bound to assume that they did. The consequences must be that I must dismiss this action with costs.

Solicitors : *Claude Hornby, Dodds & Co.* (for the plaintiffs) ; *Parker, Garrett & Co.* (for the defendant company).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

PERFORMING RIGHT SOCIETY, LTD. v. CAMELO.

[CHANCERY DIVISION (CLAUSON, J.), **November 9, 1936.**]

Copyright—Infringement—Public performance—Wireless loud-speaker—Room adjoining restaurant.

A loud-speaker was played in a private room adjoining a public restaurant, but the arrangements were such that the door of the room had to be frequently open for the purposes of service. The music broadcast was audible in the restaurant:—

HELD : there was a public performance and an infringement of the plaintiffs' rights.

[**EDITORIAL NOTE.** This case carries the subject of infringement by loud-speaker "performance" a step further than in *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.* (2). There the instrument was upon the public premises, but in the present case it was in an immediately adjoining private room and the sound was audible in the public part of the premises.

FOR INFRINGEMENT BY PUBLIC PERFORMANCE, see HALSBURY, *Hailsham Edn.*, Vol. 7, pp. 572, 573, para. 888 ; and FOR CASES, see DIGEST, Vol. 13, p. 212, Nos. 482, 483 and Supp.]

Cases referred to :

- (1) *Performing Right Society, Ltd. v. George* (1936), Apr. 30, unreported.
- (2) *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.* [1934] Ch. 121 ; Digest Supp.
- (3) *Messenger v. British Broadcasting Co.*, [1927] 2 K.B. 543 ; Digest Supp.

ACTION for damages for infringement of copyright and for an injunction.

The plaintiff society is an association of authors, composers and publishers, who take an assignment of copyright of the works of their members and grant licences of the copyright to anyone who wishes to give a performance of any of the works. The defendant, Mr. Guiseppe Camelo, is the lessee of premises at 175, City Road, London. His wife has a restaurant on part of the premises. On the ground floor of the premises are 3 rooms. The front room, to which the entrance is from City Road, is used for the restaurant business and the room at the back is used as a kitchen where the more substantial food is cooked for customers in the restaurant. The room between the above-mentioned two rooms is used as a living-room for the family, but food for the restaurant customers is carried through it from the kitchen. In the living-room was a wireless set, and when the premises were visited by the plaintiff society's

inspectors, music was being played so loudly that, it was contended, it amounted to an entertainment in the restaurant.

The defence was, in substance, that the performance was in private and it was accidental if the performance was heard in the restaurant.

K. E. Shelley, for the plaintiff society : The performance of the musical items on the wireless set in the living-room in such a way that the sound percolated into the restaurant so as to afford entertainment to the customers constituted a performance in public. The case is within *Performing Right Society, Ltd. v. George* (1), and *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.* (2).

M. R. C. Overton, for the defendants : There is no substantial proof of the facts. If a man has a wireless set on his private premises and the sound percolates into a part of the premises to which the public is admitted, that is not an infringement of copyright. Upon a reasonable construction of the Act, copyright is not infringed if the performance is in private and not done with a view to giving entertainment to other people. It is a question of fact as to whether the music was played for the public or for the benefit of the family. The music was put on without any reference to the customers in the place and there is no reason to suppose it was done to entertain the customers. [Counsel referred to *Messenger v. British Broadcasting Co.* (3).]

Shelley, in reply : It is a question of fact in every case as to what is the area in which there is a performance. Sounds which are so confined that they cannot be heard do not constitute a public performance, but on the facts of this case there was a public performance of musical works in the restaurant.

CLAUSON, J. : This is an action brought by the Performing Right Society, Ltd., against the defendants, one Guiseppe Camelo and his wife, in the following circumstances.

Guiseppe Camelo is the lessee of the building in the City Road where his wife carries on the business of a restaurant. The male defendant tells me that he has no other business than that of helping his wife in her business. The husband is the lessee and the wife carries on the business. There are bedrooms on the upper floors. On the ground floor there is the restaurant which has a frontage to the City Road of 16 feet and is 30 feet in depth. Next behind it is a room which is shown on the plan which is agreed as correct, and this room is described as a living-room. There is a window which is kept closed. There are a few steps leading from the restaurant to the door of this room, which has only the window I have mentioned. The living-room opens into the kitchen behind. The living-room is no part of the restaurant. It is obviously intended to be private and it is used as a passage-way from the kitchen to the restaurant. I am told that the living-room is in fact

a living-room for the family, namely, the male defendant and his wife, an aged grandmother, and the children. There is in the living-room a wireless set placed immediately inside the room near to the door leading from the restaurant and near to the window which I have already mentioned. The sounds from that wireless set would obviously penetrate into the restaurant if the door were open. As one would expect in the circumstances the door is normally open. I have no doubt that the sound penetrates into the restaurant and I have evidence that the music is perfectly audible in the restaurant and one of the witnesses has stated that some of the customers in the restaurant were paying attention to it—I suppose, by beating time. There are persons so constituted that wireless forms a pleasure to them and that while eating their meals in a restaurant they have a pleasure in listening. Those are the facts.

The action is one for infringement of copyright. The music is broadcast in the usual way. It is clear that the action cannot succeed unless it is true to say that there was a performance in public. I take the view that when the wireless set reproduces the music within the area in which that wireless set stands, the performance which ensues seems to me to take place wherever that music is audible as music to a person hearing it as a musical piece. I think that that is a sufficiently accurate definition for the purpose. The performance may be in the private living-room and extend far beyond that area and on the facts of this case I should say it extends over substantially the whole restaurant. All sorts of suggestions were put to me as to what might happen if a person passing along a road was listening to a performance on a wireless set he might hear. Upon the facts of this case, the performance extended beyond the living-room and extended throughout the restaurant. The matter is not covered by authority, but there was a case before my learned brother, FARWELL, J., *Performing Right Society v. George* (1), in which a wireless installation was in a room used occasionally as the saloon bar of a public house, and FARWELL, J., held that the performance on the wireless set was a performance in public, and he laid down something which appears to me of great assistance in the present case. The words are as follows :

Now it is said by Mr. George that this room is only a small room, and it is a room that is used by himself and his family for private purposes. But I do not think it is disputed that it is used at times as a saloon bar for the members of the public who choose to go in there, and although it may be on some occasions a private room nevertheless if at any time members of the public are entitled to resort to it, and music is played in such a way that the persons who do resort to it can hear the music plainly, then, that does constitute an infringement of the plaintiffs' right unless the plaintiffs' consent has been obtained for such performance. Further even eliminating that room, if the wireless is played in such a way that the music can be heard in the bar in the front of the house to which members of the public are entitled to resort if they desire, that also again is quite plainly an infringement of the copyright and the performance in public within the meaning of the Act.

That last sentence seems going beyond what FARWELL, J., had to decide, but it covers the case I have to decide. I am glad to think that I have his guidance in coming to this conclusion. In the case before me there was an infringement of the plaintiff society's rights. There will be an injunction against the female defendant with a limitation as to the duration of the copyright and an injunction against the male defendant and 20s. damages and costs.

Solicitors : *Syrett & Sons* (for the plaintiff society) ; *Good, Good & Co.* (for the defendants).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

KNAPP-FISHER v. CRISP.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.), **November 9, 10, 1936.**]

Practice—Summary judgment—Leave to defend—Parol agreement varying agreement within Statute of Frauds—Part performance—R.S.C., Ord. 14.

The plaintiff, a legal mortgagee, brought an action to recover possession of the mortgaged land, and applied for judgment under R.S.C., Ord. 14. The defendant alleged that the terms of the mortgage deed had been varied by a parol agreement to the effect that the mortgagee should not exercise his right of re-entry before the end of 1936. To this the plaintiff objected that the mortgage being required to be in writing under the Statute of Frauds the alleged variation must be in writing. The defendant then alleged that he had entered upon the land and spent money upon the property, in effect, setting up a plea of part performance :—

HELD : it could not be said that the defence was unarguable and the defendant ought to be given leave to defend, and the action should be transferred to the Chancery Division.

[**EDITORIAL NOTE.** Where a defendant sets up a defence that is perfectly impossible in law the plaintiff is entitled to judgment under R.S.C., Ord. 14, but, if it is not possible to say that the question is quite unarguable, the defendant should be given leave to defend.

AS TO SUMMARY JUDGMENT UNDER R.S.C., ORD. 14, see HALSBURY, *Hailsham Edn.*, Vol. 19, pp. 226-229, paras. 528-531 ; and FOR CASES, see DIGEST, *Practice*, pp. 284-294, Nos. 176-267.]

Cases referred to :

- (1) *Vezey v. Rashleigh*, [1904] Ch. D. 634 ; 12 Digest 354, 2944.
- (2) *Berry v. Berry*, [1929] 2 K.B. 316 ; Digest Supp.
- (3) *Morris v. Baron & Co.*, [1918] A.C. 1 ; 12 Digest 354, 2945.

APPEAL from an order of GREAVES-LORD, J., dated Oct. 13, 1936. The plaintiff commenced an action in the King's Bench Division, by means of a specially indorsed writ, and claimed to recover possession of land under a legal mortgage, or failing that, the appointment of a receiver. The defendant alleged that the terms of the mortgage had been varied by a parol agreement that the mortgagee should not re-enter

until the end of 1936, and that on the strength of that agreement he had expended money on the estate. The plaintiff applied under R.S.C., Ord. 14, for leave to sign judgment, but Master Moseley, after hearing the matter, gave the defendant unconditional leave to defend. The plaintiff appealed to the judge in chambers, who allowed the appeal. The defendant appealed to the Court of Appeal.

P. B. Morle for the appellant.

T. K. Wigan for the respondent.

Morle : It is suggested that it is improper for a parol agreement to be set up as a defence to vary the terms of a covenant under seal. The defendant should be allowed to defend in order to argue this point. The question here is, was there any agreement which bound the plaintiff not to enter before the end of 1936 ? It is submitted that the mortgagee has misconceived his proper remedy, which was to ask for the appointment of a receiver. There is disclosed here a sufficient agreement to entitle the defendant to defend this action. R.S.C., Ord. 14, was only intended to apply to cases where there is obviously no defence.

Wigan : The rights of a chargee are governed by the Law of Property Act, 1925, s. 87 ; he was entitled to start proceedings by a specially indorsed writ. It is submitted that even if the facts set up are true, they afford no defence to this action. The question here is, can a legal mortgage be varied by a parol agreement ? The respondent does not rely upon the old common law rule that a contract under seal cannot be varied except by another contract also under seal. It is a recognised rule that a contract required by the Statute of Frauds—now the Law of Property Act, 1925, s. 40—to be in writing cannot be varied except by another contract in writing. It was once suggested that it could be varied if the second contract was not one required to be in writing ; that is not so. It can be entirely rescinded by a parol agreement, but it cannot be varied. In *Berry v. Berry* (2), the second agreement did satisfy the Statute of Frauds. An agreement not to take possession for a limited time is distinctly an agreement to vary the first contract. Only one term was not to be enforced, all the other rights were to stand ; the contract now set up varies from the original. [He referred to *Vezev v. Rashleigh* (1), and *Morris v. Baron & Co.* (3).] If this is not an agreement to vary the contract, it is an agreement not to enter before the end of 1936, and that in itself is a contract affecting land and ought by the Statute of Frauds to be in writing.

Morle, in reply : If the judge had given leave to defend, he could have made an order transferring the matter to the Chancery Division. If the judge's order is reversed, this court can order the transfer. The question is whether the setting up of this plea entitles the defendant to defend in this action. The cases cited are on the Statute of Frauds ; here, if the agreement is pleaded, the answer is that the statute does not

apply because there has been part performance. The mortgagor is already in possession; in reliance of the agreement he has expended money on the property—that is part performance.

GREER, L.J.: This is an appeal from a judgment of GREAVES-LORD, J., in chambers reversing an order of Master Moseley with reference to the order to be made under an application under R.S.C., Ord. 14, in an action for possession. The master gave the defendant unconditional leave to defend. Upon appeal to the judge, the decision was reversed and judgment entered for the plaintiff. If there was no case fit to argue, the learned judge was right; but we are not satisfied that there was no case to be argued. The defence raised was that, although the plaintiff had power to regain possession of the land, there was an agreement for good consideration to postpone entering until the end of 1936. It is impossible to say that this agreement was a mere variation and as it related to land it could not be enforced unless something else happened. We are not satisfied that an agreement of this kind is necessarily to be regarded in law as a variation of the original contract. We are not satisfied that it is not arguable that the principle of *Vezey v. Rashleigh* (1) does not apply—that the real agreement is not to vary, but in fact to rescind the contract. That is a question of law, and it is a question that the defendant ought to be entitled to argue. There is also the question of fact—whether such an agreement was ever made. The evidence is not entirely satisfactory. The learned judge has not directed his mind as he should have done. We think the master was right and the judge wrong. The next question is, what is the most convenient way of dealing with the matter? In my judgment, the defendant having had to come here, he ought to have the costs of this appeal in any event. The most convenient way to deal with the matter is to transfer the action to the Chancery Division. The plaintiff will have to deliver a fresh statement of claim, claiming all the remedies which as mortgagee he considers advisable. The appeal will be allowed, with costs of the appeal in any event. The costs up to the judge in chambers to be costs in the cause.

SCOTT, L.J.: I agree, and have nothing to add.

EVE, J.: As it may be my duty later on to consider these matters, I think it right and proper to reserve anything I may have to say until then.

Solicitors: *Landman & Foy* (for the appellant); *Russell-Cooke & Co.* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

claim of BUCKNILL, J., at p. 568,
proved. THE SUSAN V. LUCKEN-
 CH. [1951] 1 All E.R. 753.

THE "KAFARISTAN."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **October 30, November 12, 1936.**]

Shipping—Salvage—Collision—Apportionment of blame—Salvage services by ship in same ownership as ship in collision—Remuneration—Circuity of action.

The "Empress of Britain" collided with the "Kafaristan," blame being apportioned by agreement as to three quarters to the "Empress of Britain" and one quarter to the "Kafaristan." The "Kafaristan" was badly damaged and salvage assistance was rendered, *inter alia*, by the "Beaverford." The owners of the "Beaverford" were also the owners of the "Empress of Britain." The owners of the "Beaverford" claimed salvage:—

HELD: (i) the doctrine of circuity of action can only apply where the rights of the litigants are such that the defendants would be entitled to recover back from the plaintiffs the same amount of damages which the plaintiffs seek to recover from the defendants. As the "Empress of Britain" was only three quarters to blame, the doctrine did not apply in the present case.

(ii) the fact that the "Empress of Britain" was partly to blame for the collision disentitled her owners as the owners of the "Beaverford" to a salvage award for services rendered to the "Kafaristan."

[EDITORIAL NOTE.] The decision in this case lays down the doctrine of circuity of action in more formal terms than it has previously been laid down and it is now clear that this doctrine only applies where the damages recoverable by either party from the other are the same in amount.

AS TO CIRCUITY OF ACTION, see HALSBURY, Hailsham Edn., Vol. 13, p. 12, para. 8, and FOR CASE, see DIGEST, Vol. 41, p. 604, No. 4313.

Cases referred to:

- (1) *The Capella (Cargo Ex)* (1867), L.R. 1 A. & E. 356; 41 Digest 850, 7133.
- (2) *The Glengaber* (1872), L.R. 3 A. & E. 534; 41 Digest 843, 7059.
- (3) *The Glenfruin* (1885), 10 P.D. 103; 41 Digest 843, 7056.
- (4) *The Parlement Belge* (1880), 5 P.D. 197; 41 Digest 815, 6758.
- (5) *The Duc d'Aumale* (No. 2), [1904] P. 60; 41 Digest 837, 6990.
- (6) *Schloss v. Heriot* (1863), 14 C.B.N.S. 59; 41 Digest 604, 4313.
- (7) *The Harvest Home*, [1905] P. 177; 41 Digest 691, 5217.
- (8) *The Valverde*, [1936] 1 All E.R. 350; Digest Supp.

APPEAL by way of case stated from a decision of SIR WILLIAM RAE BURN, K.C., sitting as a Lloyd's arbitrator, in which he held that in the circumstances hereinafter set out the owners of the "Beaverford" were not entitled to salvage remuneration in respect of services rendered to the "Kafaristan."

In June, 1935, the "Empress of Britain" was in collision with the "Kafaristan." The "Kafaristan" was badly damaged and salvage assistance was rendered by, *inter alia*, the "Beaverford." The salvage services were rendered under a Lloyd's salvage agreement signed by the master of the "Kafaristan." By agreement between the owners of the "Empress of Britain" and the owners of the "Kafaristan" the liability

for the collision was settled on the basis of both to blame, the "Empress of Britain" to the extent of three quarters and the "Kafaristan" to the extent of one quarter. The owners of the "Empress of Britain," the Canadian Pacific Railway Company, were also the owners of the "Beaverford." At the arbitration on the salvage claims the question was raised, whether the owners of the "Beaverford," being the same as owners of the "Empress of Britain," were entitled to salvage remuneration. The arbitrator made alternative awards, and on appeal SIR WILLIAM RAEBURN, K.C., held that the owners of the "Beaverford" were not entitled to salvage remuneration.

R. F. Hayward, K.C., and Vere Hunt, for the owners of the "Beaverford": The owners of the "Kafaristan" are estopped from saying that the services rendered were not salvage services because: (i) they asked for them, and (ii) they waived any rights they may have had by signing the Lloyd's salvage agreement.

We rely on *The Glengaber* (2). *The Glenfruin* (3) was decided purely on the question of circuity of action. Here there is no circuity of action. The doctrine of circuity of action applies only when the same sum is concerned in each action; it cannot apply to one quarter of a salvage award.

If public policy applies in this case, it is a matter of public policy that vessels injured and in danger should be towed to safety by vessels under no obligation to do so, without the latter having to stop to consider whether they are spending their own money without a right of recovery. The decision in *The Capella (Cargo Ex)* (1) is in accord with public policy and the maxim that no one may take advantage of his own wrong. In the present case the "Kafaristan" has no possible claim to at least one quarter of the sum awarded. In *The Harvest Home* (7) a guilty ship was awarded towage remuneration.

On the question of waiver and the Lloyd's salvage agreement, see *The Valverde* (8), which is under appeal.

J. V. Naisby, for the owners of the "Kafaristan": The only question for decision here is whether the fact that the "Empress of Britain" was partly responsible for the collision disentitles her owners to a salvage award. To award them salvage would: (i) enable them to benefit by their own wrong; (ii) be paying them salvage for conferring a benefit on themselves; (iii) entail circuity of action. As to (i), see *The Capella (Cargo Ex)* (1). *The Glengaber* (2) is inconsistent with *The Capella (Cargo Ex)* (1) and *The Glenfruin* (3), which was a case of breach of contract, but the reasoning in the case would apply equally to a collision. No case attempts to draw a distinction between the extent to which a man is in the wrong. As to (ii), the owners of the "Beaverford," as the owners of the "Empress of Britain," are responsible to the extent of three quarters for the collision. If the "Kafaristan" had become a

total loss they would have had to pay much more than in the events which have happened. By their action they were minimising their own loss, and they cannot get a salvage award for benefitting themselves. As to (iii), upon the doctrine of circuity of action, the claim must fail.

The only difference between this case and *The Glenfruin* (3) is that the owners of the "Beaverford" are liable for three quarters instead of the whole of the blame. There is no distinction in principle between the two.

The question as to the effect of the Lloyd's salvage agreement is not before the court.

Hayward, K.C., in reply.

BUCKNILL, J. : This case raises a question of law submitted for the opinion of the court in the form of a special case.

In June, 1935, a collision occurred between the steamship "Empress of Britain," owned by the Canadian Pacific Railway Company (hereinafter called "the claimants") and the steamship "Kafaristan." In consequence of the collision the "Kafaristan" was so badly damaged as to require salvage assistance. The "Empress of Britain" stood by until the steamship "Beaverford" came up. The "Beaverford" is also owned by the claimants. The "Empress of Britain" then left and the "Beaverford" made fast to the "Kafaristan" and towed her for about 100 miles and thereby contributed to her ultimate safety. In the following month the claimants and the owners of the "Kafaristan" signed a Lloyd's form of salvage agreement. The question of liability for the collision was subsequently settled on the basis that the "Empress of Britain" was 75 per cent. to blame and the "Kafaristan" was 25 per cent. to blame.

At the hearing of the arbitration the question was raised as to the right of the claimants to recover salvage in the event of the "Empress of Britain" being wholly or partly to blame for the collision, and in due course the matter has come before this court for its opinion. The main point taken against the claimants' right to recover salvage remuneration for the services rendered by the "Beaverford" is that the necessity for these services was partly occasioned by the negligence of their agents in charge of the "Empress of Britain," and that therefore their claim was barred on the principle that no man can profit by his own wrong. In *The Capella (Cargo Ex)* (1) the plaintiffs as owners of the "Southern Empire" sought to recover salvage in respect of services to cargo on board the "Capella." The danger to the cargo was caused by a collision between the two ships for which both were to blame. DR. LUSHINGTON in his judgment said, at p. 357 :

I don't seek for authorities, but I look to the principle which ought to govern the case. In my mind, the principle is this, that no man can profit by his own

wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English court. . . . The rule would bar any claim by them for services rendered to the other ship which was a co-delinquent in the collision. . . .

In *The Glengaber* (2) a vessel was placed in danger by the negligence of the tug "Black Prince," and was then salvaged by that tug and also by another tug, the "Warrior." Some of the owners of the "Warrior" were also owners of the "Black Prince." SIR ROBERT PHILLIMORE decided that the owners of the "Warrior," who were also owners of the "Black Prince," could claim salvage in respect of the services of that tug. In the course of his judgment SIR ROBERT said, at p. 535 :

I have already decided that the "Black Prince" has failed in her defence as defendant in the suit of collision brought by the "Glengaber" against her, and I am of opinion that she cannot recover in this court salvage reward for services which were rendered necessary by her own misconduct. I shall therefore dismiss the claim of the "Black Prince" with costs. With regard to the "Warrior" it has been contended that that vessel is not entitled to be considered as a salvor, because it appeared in evidence that some of her owners were also owners of the "Black Prince." This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the "Warrior" who are not owners of the "Black Prince," and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief. I shall therefore hold that the "Warrior" is entitled to salvage reward.

In *The Glenfruin* (3) the cargo of a ship was in danger, owing to a breach by the owners of the carrying ship of their contract of carriage. Another ship also belonging in part to the same owners salvaged the cargo and claimed salvage remuneration. BUTT, J., held that they could not recover, and in his judgment said, at pp. 108 and 109 :

The result is that the part owners of the "Glenavon," who were also part owners of the "Glenfruin," would be liable to the owners of cargo on board the "Glenfruin" for any loss occasioned by the breakdown of machinery. In other words, such part owners (plaintiffs in the present suit) would be liable to reimburse the defendants any amount of salvage which I might award. To avoid what is termed "circuitry of action" I must decline to make any award to those plaintiffs.

In the present case Mr. Naisby, on behalf of the "Kafaristan," argued that the decision in *The Glenfruin* (3) was also right as an application of the principle that no man can profit by his own wrong. The decision in *The Glengaber* (2) was apparently not cited in *The Glenfruin* (3).

In the work of KENNEDY, L.J., on SALVAGE this passage appears at p. 83 of the second edition :

So entirely is the regard of the court, in reference to the right of salvage, fixed upon the ship itself, and not upon the owners or the mariners as individuals, that where a ship, which has been injured by collision through the negligent navigation of another ship, is salvaged, not by the "wrong-doing" ship . . . unconnected with

the act of mischief, not only the crew, but even those owners of the salving ship who are also interested in the "wrong-doing" ship are held to be entitled to salvage reward.

In a note to this passage the learned author indicated that it is doubtful whether the decision in *The Glengaber* (2) is in principle reconcilable with the decision in *The Glenfruin* (3). It was argued on behalf of the "Kafaristan" that in 1872 when *The Glengaber* (2) was decided the tendency of the court was to personify the ship and to regard her rather than her owners as the entity responsible for collision damages. This tendency so far as claims for damage are concerned is illustrated by the decision of SIR ROBERT PHILLIMORE himself 7 years later in *The Parlement Belge* (4), which was reversed on appeal. It was argued that the proper view in the present case is to fix liability not merely on the property, but also on the owner through the property, and that the claimants, being the persons who are partly responsible in law for the damage, cannot claim salvage for their work done in reducing the amount of the damage.

Another case to which I was referred which deals indirectly with the question which I have to decide is *The Duc d'Aumale* (No. 2) (5). In that case the sailing ship "Duc d'Aumale" in tow of the tug "Challenger" was in collision with the steamship "Camrose," owing to the negligence of all three vessels. The "Duc d'Aumale" was seriously damaged and the "Challenger" subsequently towed her into safety and then claimed salvage. The attention of the court was mainly directed to the question whether the tug by reason of the terms of her towage contract was able to claim salvage, and to the question whether the crew of the tug apart from the actual wrong doing master could claim salvage. The facts therefore are very different to the facts which are material to the decision in the present case before me. GORELL BARNES, J. (as he then was), held that the tug owners and all the crew of the tug were debarred from claiming salvage, and in the course of his judgment, at p. 73, referred to *The Glengaber* (2) and to *The Glenfruin* (3). The whole passage must be considered in so far as it refers to the difference between the two decisions. It is as follows :

I proceed now to deal with the further contention that, at any rate, the crew can recover—that is, those who were not responsible for the disaster. . . . There is also the case of *The Glengaber* (2), where by the improper navigation of a steam-tug a vessel at anchor was sent adrift and placed in jeopardy. Another steam tug rendered assistance to the drifting vessel, and it was held that the owners of that steam tug were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. SIR R. PHILLIMORE, in giving judgment in favour of the owners, master, and crew in that case, said that he knew of "no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief." That case differs from the view

taken by BUTT, J., in *The Glenfruin* (3), where it was held that the master and crew and one owner of the salving ship were entitled to salvage against the cargo of the salved vessel, though the other owners of the salving ship, who were also owners of the salved vessel, were disentitled by reason of a breach of the implied warranty that the salved vessel was seaworthy at the beginning of the voyage.

GORELL BARNES, J., having thus referred to the two decisions, then went on to say :

I can understand that where the vessel which renders salvage services is entirely unconnected with the ship that is salved, those persons, like the master and crew or owners, who are not owners of the ship that is salved, or under no contractual liability to persons on board that ship, can recover salvage; but I do not think that applies to the case of a tug and her tow.

In the report of the case in 9 Asp. M.L.C., at p. 504, this passage is different in this respect. The words there are :

owners who are in no way owners of the ship that is salved, or under no liability to persons on board that ship.

If the report in Aspinall is correct the passage does not assist the claimants because they are under a liability to persons on board the "Kafaristan" owing to their negligence. If the words are "contractual liability" the passage is not detrimental to the claimants in this case. A little further on GORELL BARNES, J., again refers to *The Glengaber* (2) in his judgment, without any criticism of the decision, and appears to think it may be justified on the ground that the salving tug had nothing to do with the accident which brought about the salvage.

I do not think that in this case circuity of action could be pleaded as a defence to this claim for salvage. Any sum awarded for salving the "Kafaristan" will be included as part of the "Kafaristan's" damage and her owners will in theory recover three quarters of the amount from the claimants. But circuity of action can only be pleaded when the rights of the litigants are such that the defendants would be entitled to recover back from the plaintiffs the same amount of damages which the plaintiffs sought to recover from the defendants: see *Schloss v. Heriot* (6) and *BULLEN & LEAKE*, 3rd Edn., p. 558, note (a).

It appears to me that on the whole the decided cases do not lay down any clear principle for my guidance in this case, other than the principle that no man can profit by his own wrong. A general principle, often laid down as governing the validity of salvage claims, was referred to by GORELL BARNES, J., in *The Duc d'Aumale* (No. 2) (5), at p. 74, where he said :

It appears to me that the court is guided by due regard to the benefit conferred, combined with due regard to the general interests of ships and commerce.

I have to consider whether, in my view, it is in the general interests of ships and commerce that in a case such as the present the claimants

should receive salvage remuneration for the work done by their ship the "Beaverford" at considerable expense to themselves in assisting the "Kafaristan," or whether it is in the general interests of ships and commerce that they should be debarred from receiving any salvage remuneration because the negligent navigation of another ship also belonging to them was partly to blame for the damage to the "Kafaristan." In the first place it appears to me that so far as the point under consideration is concerned, there is not any legal difference between the case where both ships are to blame for the collision and a case where one ship is wholly to blame for the collision. On behalf of the claimants, it was argued that under the Maritime Conventions Act, 1911, in cases of both to blame the liability to make good the damage is in proportion to the degree of fault, and that therefore in this case the claimants are only liable for three quarters of the respondent's damage, and ought to be entitled to salvage remuneration in respect of the remaining one quarter. But I do not think that this argument is sound. Salvage services are rendered to property and not to intangible interests or liabilities in respect of property. Moreover, if this argument were correct, then the claimants would be entitled to salvage in respect of any services rendered to the "Kafaristan" by the "Empress of Britain" herself. But such a result would be clearly contrary to the decisions in *The Capella (Cargo Ex)* (1) and *The Duc d'Aumale (No. 2)* (5), to which I have already referred. The general interests of commerce and navigation no doubt require that when assistance is asked by a ship in distress there should be a willing response by all other ships in a position to render assistance. And in this case if the claimants who at the request of the master of the "Kafaristan" rendered services at considerable expense to themselves are held in law to be entitled to recover nothing, the result will not be encouraging as a guide to other potential salvors in the future. But I think that they are not debarred from recovering any part of such expenses, because, when I look at the case in a general way to ascertain what is fair and just, my present impression is that the expenses and loss incurred by the claimants, due to the work of the "Beaverford" in rendering services to the "Kafaristan", ought to be considered as part of the general damage arising from the collision, and ought to be apportioned between the claimants and respondents in proportion to their degree of blame for that collision. It is not, however, my duty in this case to deal with this aspect of the case, or to decide whether such expenses are recoverable in law, but to give my opinion on the question raised in the case. For the same reason I have not dealt with the point referred to by Mr. Hayward on behalf of the claimants that the respondents by entering into a Lloyd's salvage agreement with the claimants waived their right to dispute salvage. It appears to me that I have no material before me on which I could deal

with the point, and that if I were to deal with it I should travel outside the question raised for my opinion in the special case.

In answer to the question raised in the special case, my opinion is that the fact that the "Empress of Britain" was partly to blame for the collision disentitles her owners as owners of the "Beaverford" to a salvage award for services rendered to the "Kafaristan."

Solicitors: *William A. Crump & Son* (for the owners of the "Beaverford"); *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the owners of the "Kafaristan").

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

LEDWITH AND ANOTHER v. ROBERTS AND ANOTHER.

[COURT OF APPEAL (Greer, Greene and Scott, L.JJ.), **June 29, 30, July 30, October 12, 1936.**]

Criminal Law—Arrest—Without warrant—Under statutory provisions—"Suspected person or reputed thief"—"Loose, idle or disorderly person"—Vagrancy Act, 1824 (c. 83), ss. 4, 6—Liverpool Corporation Act, 1921 (c. lxxiv), s. 513.

In an action for malicious prosecution the plaintiffs alleged that they had been wrongfully arrested by the defendants, two police constables. The defendants said that the plaintiffs had been for 25 minutes under observation, during which time one defendant was inside a telephone kiosk without making use of the telephone, and the other defendant was standing outside the kiosk, and that the defendants having, as a result of such observation and upon grounds set out in the particulars to the defence, reasonable and probable cause for suspecting that the plaintiffs had been attempting or were about to commit a felony, namely to steal from the coin box at the telephone kiosk, they, as was their duty, arrested the plaintiffs and detained them while certain inquiries were made. At the hearing the defendants sought to amend their defence by adding a statement that the plaintiffs were idle persons, but the judge refused to allow the amendment. The trial proceeded on the assumption that the allegations in the defence were true, and the judge decided that these allegations disclosed no defence in law. The defendants appealed:—

HELD: (i) the right of a police constable, under the Vagrancy Act, 1824, s. 4, to arrest without a warrant is confined to persons who belong to the class of "suspected persons" or "reputed thieves," and he is not entitled to arrest without a warrant any person whom he suspects to be loitering for the purpose of committing a crime.

(ii) the defendants could not rely on the Municipal Corporations Act, 1882, s. 193, as justifying the arrest and imprisonment of the plaintiffs in the absence of an amendment of the defence to include a statement that the plaintiffs were idle persons, which amendment was refused.

(iii) the right of a police constable under the Liverpool Corporation Act, 1921, s. 513 (2), to arrest without a warrant is confined to persons who can be shown to belong to the class of "loose, idle or disorderly persons." The defendants could not in any event rely upon this subsection as they had not alleged in their pleadings that either of the plain-

tiffs was a loose, idle or disorderly person, and an amendment to enable them so to do was refused.

(iv) although one of the defendants might have come within the words "loitering in any street . . . and not giving a satisfactory account of himself," in the Liverpool Corporation Act, 1921, s. 513 (3), if the defendants desired to rest their defence on any part of sect. 513 of that Act, which was a private Act, they ought to have given notice of it in their defence.

(v) the defendants had disclosed no defence at law and the plaintiffs' action ought to succeed.

[EDITORIAL NOTE. This case considers the powers of arrest of police constables in the case of idle or suspected persons. It appears that "idle" persons must be construed to comprise only persons that can be included in the expression "loose, idle or disorderly persons" and must not be construed with reference to idleness alone. A suspected person, it would appear, is not a person suspected by the constable making the arrest but one who is suspected by reason of his previous convictions or activities of having criminal tendencies.

AS TO A CONSTABLE'S POWER OF ARREST WITHOUT WARRANT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 88-95, paras. 117, 118; and FOR CASES, see DIGEST, Vol. 14, pp. 183-186, Nos. 1617-1660.]

Cases referred to :

- (1) *Bowditch v. Balchin* (1850), 5 Exch. 378; 14 Digest 183, 1619.
- (2) *Hartley v. Ellnor* (1917), 117 L.T. 304; 37 Digest 364, 1659.
- (3) *Trebeck v. Croudace*, [1918] 1 K.B. 158; 14 Digest 183, 1622.
- (4) *Isaacs v. Keech*, [1925] 2 K.B. 354; Digest Supp.
- (5) *Re Timson* (1870), L.R. 5 Exch. 257; 37 Digest 364, 1653.
- (6) *R. v. Pavitt* (1911), 75 J.P. 432; 14 Digest 183, 1621.
- (7) *Horley v. Rogers* (1860), 2 E. & E. 674; 14 Digest 185, 1647.

APPEAL by the defendants, two constables in the Liverpool City Police Force, from a decision of SIR FRANCIS TAYLOR, K.C., the presiding judge of the Liverpool Court of Passage given on Jan. 9, 1936, in an action for false imprisonment.

The two plaintiffs, who being under the age of 21 sued by their next friends, alleged that on Feb. 28, 1935, the defendants maliciously and without reasonable or probable cause arrested and imprisoned them. They gave the following particulars :

At about 7.15 in the evening of Feb. 28, 1935, the plaintiff Crothers entered a telephone kiosk in King Street, Liverpool, to receive a call and the plaintiff Ledwith stood waiting outside. The defendants came to the kiosk and wrongfully imprisoned and detained both plaintiffs for about 10 minutes while they interrogated the plaintiffs and while a third constable made a telephone call in the kiosk. The plaintiffs at once explained that the plaintiff Crothers was receiving a call. One of the defendants then took hold of the plaintiff Crothers and both defendants escorted both plaintiffs through the streets to the Heald Street Bridewell. At the Bridewell the plaintiff Crothers was accused of tampering with the box in the kiosk, and both plaintiffs were wrongfully imprisoned and detained for about three-quarters of an hour. At the end of that time the plaintiffs were informed that the truth of their explanation with regard to the telephone call had been established, but that the charge of tampering with the box still remained. Thereupon both

plaintiffs were wrongfully imprisoned and detained for a further 2 hours and were allowed to leave at about 10.30 p.m., when they were told that they would probably be summoned. Neither of the plaintiffs had been summoned.

The plaintiffs alleged that by reason of the premises they had suffered severe humiliation and discomfort, and they claimed damages from the defendants.

The defendants by their defence denied that the plaintiffs were wrongfully arrested or imprisoned by the defendants, and they said that the plaintiffs were for a period of 25 minutes kept under observation by the defendants, and that the defendants having, as a result of such observation and upon the grounds set out in the particulars to the defence, which are set out in the judgment of GREER, L.J., reasonable and probable cause for suspecting that the plaintiffs had been attempting or were about to commit a felony, namely, to steal from the coin box at the telephone kiosk, they, as was their duty, arrested the plaintiffs and escorted them to Heald Street Bridewell, where they were detained by the officer there in charge until the completion of the inquiries which in the circumstances it became necessary for the police to make.

At the hearing no evidence was called. Counsel for the two defendants admitted that he could not prove any facts beyond those stated in the defence and particulars thereto, and he relied upon those facts as constituting both the plaintiffs as suspected idle and disorderly persons. Both counsel were content that the judge should decide whether upon the pleadings the plaintiffs were entitled to a judgment. The judge, on the assumption that the allegations in the defence were true, held that they disclosed no defence at law, and he gave judgment for each of the plaintiffs for £15. The defendants appealed.

D. P. Maxwell Fyfe, K.C., Hartley Shawcross and R. S. Trotter for the appellants.

Noel B. Goldie, K.C., and Basil E. Nield for the respondents.

GREER, L.J. : This is an appeal from a judgment of the presiding judge of the Liverpool Court of Passage in favour of the two plaintiffs awarding them each £15 damages for false imprisonment.

The hearing of the case took a somewhat unusual form. No evidence was called, but it was admitted by the counsel for the two defendants, who were Liverpool police constables, that if he was called upon to give evidence in support of the defence which had been pleaded he could not prove any facts beyond those stated in the defence and the particulars thereto. We were told by both counsel who appeared before us that the point was put to and decided by the judge as a preliminary question, and that in any event whether we agreed with the learned judge's decision or not, there should be an order for a new trial, and that we ought not to confirm the judgment. In my view this involves a misunderstanding

of what took place at the hearing. It seems to me clear that both counsel were content that the judge should decide the question whether on the pleadings the plaintiffs were entitled to a judgment. No doubt in the first instance the point was referred to as a preliminary question, but towards the end of the argument Mr. Shawcross for the defendants said :

So far as I am concerned my evidence would establish at the highest what I have pleaded—no more—and I rely on what I have pleaded as constituting these plaintiffs both suspected and idle, and, indeed, disorderly persons.

The learned judge then said :

I should not be prepared to hold that they (that is, the two plaintiffs) were lying in the street or loitering in the sense of the statute.

and Mr. Shawcross said : “ If your Lordship pleases.” The judge then turned to the counsel for the plaintiffs and said :

Are you satisfied with that, or do you want to give any evidence ?

and Mr. Nield, who appeared for the plaintiffs, said :

I think that I should be satisfied with that, my Lord.

After a little further discussion the judge said, addressing Mr. Shawcross :

Very well. Thank you Mr. Shawcross. That will be judgment for these two plaintiffs for £15 each, with costs.

The amount of the damages had been agreed at that sum. Then the judgment as drawn up by the registrar of the court was a judgment to the effect that each of the plaintiffs recover against the defendants £15. Then there was a stay of execution. It seems to me that if we agree with the view of the learned judge that the facts stated in the defence and particulars are insufficient to justify the imprisonment of the two plaintiffs, we ought to affirm the judgment, and not order a new trial. The fact of the apprehension and detention of the two plaintiffs was not disputed, but the defendants contended that the facts that they pleaded in para. 2 of the defence and the particulars thereto amounted to a justification in the law of the apprehension and detention of the two plaintiffs. In para. 2 it was alleged that the defendants had as a result of their observation and upon the grounds thereafter mentioned, that is, in the particulars, reasonable and probable cause for suspecting and each of them in fact suspecting that the plaintiffs had been attempting or were about to commit a felony, namely to steal from the coin box at a telephone kiosk the contents thereof. The particulars were as follows :

(i) The plaintiff Crothers was seen standing in the telephone kiosk in which there was no light. He was not telephoning, and the plaintiff Ledwith was loitering outside apparently keeping watch and screening the plaintiff Crothers in the said

kiosk from passers-by. (ii) The plaintiff Crothers remained inside the said kiosk for a period of about 25 minutes during which time, although he handled the receiver, he did not make use of the telephone. (iii) From time to time during the said 25 minutes the plaintiff Crothers was seen to bend down and apparently examine the coin container in the said kiosk. (iv) During the whole of the said 25 minutes the plaintiff Ledwith remained outside the said kiosk in the manner hereinbefore indicated. (v) At the end of the said 25 minutes the defendants approached the said kiosk whereupon the plaintiff Ledwith kicked the door of the same and shouted and the plaintiff Crothers at the same time picked up the telephone receiver. (vi) The plaintiff Ledwith in answer to questions by the defendants as to what the man inside had been doing during the previous 25 minutes and as to whom he was then talking to said he did not know, and on being asked if he had been keeping a look-out outside the kiosk he did not reply. (vii) The plaintiff Crothers stated that he had been speaking to his mate on the telephone, but on being asked by the defendants who his mate was and from where his mate had been speaking he said he did not know. (viii) The telephone operator and supervisor on an inquiry then and there made over the telephone by the defendant Pearce stated that no calls had been received to or from the said kiosk within the previous half-hour. (ix) The plaintiffs were again asked by the defendants to explain what they had been doing during the previous 25 minutes but neither gave any reply.

It will be seen that the defendants nowhere stated that the plaintiffs were idle or disorderly persons, or that they had reasonable and probable cause for suspecting that they were idle and disorderly persons. The learned judge was asked to amend the defence by adding a statement that the plaintiffs were idle persons, but he refused, and in my judgment rightly refused so to amend the defence. The defendants' counsel argued that they had by statute a sufficient justification for the alleged false imprisonment, and the question to be determined is whether the facts stated in para. 2 of the defence and the particulars thereto justify the apprehension and detention of the two plaintiffs. The relevant statutory provisions that it is necessary to consider are the Vagrancy Act, 1824, s. 4, the Municipal Corporations Act, 1882, s. 193, and the Liverpool Corporation Act, 1921, s. 513. The Vagrancy Act, 1824, s. 4, provides, *inter alia*, that every suspected person or reputed thief frequenting any river, canal or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway or place adjacent, with intent to commit felony, apprehended by a constable or police officer and brought before a justice of the peace, shall be deemed to be a rogue and vagabond, and therefore punished as provided by the statute. The words of the section are not very clear, but I think they must be construed as meaning that every suspected person or reputed thief may be apprehended by a police officer without warrant and brought before a justice of the peace and convicted as a rogue and vagabond. By the Penal Servitude Act, 1891, s. 7, this section of the Vagrancy Act was

made applicable also to every suspected person or reputed thief loitering about or in any of the places mentioned in the Vagrancy Act. The question for consideration, so far as these statutes are concerned, is whether the right of the police to apprehend or arrest is confined to persons who are within the description "suspected persons" or "reputed thieves." In my judgment, apart from the authorities, which I will deal with presently, the special powers given to constables are confined to a class of persons described as "suspected persons" or "reputed thieves." They can only be apprehended without warrant if they already are at the time of their arrest and imprisonment suspected persons or reputed thieves. I do not think this means that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant. The person so apprehended must be some person who has become suspect, that is to say, some person who belongs to the class of suspected persons by reason of his antecedent conduct. I think "suspected person" means a person who has acquired the character of a suspect and does not mean whom the apprehending constable suspects to be loitering with intent to commit a felony. It appears to me very difficult to think that the legislature intended to leave it to a constable to arrest without a warrant any citizen whom he found loitering in a street, if on what he deemed to be reasonable grounds he suspected that he was loitering for the purpose of committing a crime. In my judgment the powers of a constable to arrest without warrant are confined to cases in which he finds frequenting or loitering, etc., a person who has by his previous conduct become a suspected person. Any other view would put a respectable person loitering in a street for a reasonable cause at the mercy of any constable who knew nothing about him except that he was loitering, and therefore chose to suspect him of loitering for the purpose of committing a felony or misdemeanour. I think the exceptional powers conferred on the police by the Vagrancy Act were so conferred with respect to a class of persons who were, apart from the particular occasion, within the description of suspected persons.

In the argument before us counsel for the defendants also relied upon the Municipal Corporations Act, 1882, s. 193, as justifying the apprehension and imprisonment of the two plaintiffs, but I do not think the defence, in the absence of the amendment which was refused, enables the defendants to rely upon this section. The chief argument on behalf of the defendants was based on the Liverpool Corporation Act, 1921, s. 513 (2), (3). That statute provides that it shall be lawful for any police constable to arrest and detain without warrant any loose, idle or disorderly person whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace and any person whom he shall find between sunset and the

hour of 8 in the morning lying or loitering in any street, yard or other place and not giving a satisfactory account of himself. I think the learned judge was right in concluding that subsect. (2) only gives authority to arrest without warrant loose, idle or disorderly persons whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace. In order to justify apprehension under that section, it must be established first that the person apprehended belongs to the class of loose, idle or disorderly persons. The power to apprehend does not arise where all that can be proved is that the constable honestly believed on reasonable grounds that the person apprehended was a loose, idle or disorderly person. The subsection does not say that the power of apprehension without warrant arises in respect of any person whom the constable shall have good cause to suspect to be a loose, idle or disorderly person, but if he finds a person of that description and has good cause to suspect that such person has been committing or was about to commit any felony or misdemeanour he may then arrest him without warrant. In any event, the defendants are disentitled to rely upon this subsection on the ground that they had not alleged in their pleadings that either of the plaintiffs was a loose, idle or disorderly person, and an amendment to enable them so to do was refused. Subsect. (3) creates some difficulty, especially with regard to the apprehension of the plaintiff Ledwith, inasmuch as he was in what may be considered in one sense of the word, loitering in a street, but I do not think when we are dealing with a criminal matter we ought to interpret the word "loitering" in the wide sense of standing or waiting in the street. I think it means loitering in such a way as to indicate that the person was idling in the street for some unlawful purpose. I think the particulars do indicate that Ledwith did not give a satisfactory account of himself, if the meaning of these general words be that he did not give a satisfactory account of what he was doing, and why he was doing it. But there is, I think, another objection to allowing the defendants to rely upon subsect. (3). Sect. 513 is contained in a private Act of Parliament, which by its title gives no indication that it is an Act dealing with the authority of police constables. It seems to me that if the defendants desired to rest their defence on any part of sect. 513 of this private Act of Parliament they ought to have given notice of it in their defence, either by using the exact words of the material parts of the section, or at least have pleaded that they relied on that section of the Liverpool Corporation Act, 1921.

It remains for me to deal with the authorities. In *Bowditch v. Balchin* (1), the Court of Exchequer had to decide whether a plea based on the City of London Police Act, 1839, s. 18, was bad because it had not therein been alleged that the plaintiff was a loose, idle and disorderly

person. By that section power was given to any man belonging to the police force to :

take into custody without warrant all loose, idle and disorderly persons whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanour, or breach of the peace, and all persons whom he shall find between sunset and the hour of 8 in the forenoon lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves.

The plea contained no averment that the plaintiff was a loose, idle or disorderly person. The court held that the plea was bad in that it contained no averment that the plaintiff was a loose, idle or disorderly person. The decision of the court involves a decision, that it is not sufficient to justify the apprehension of the plaintiff, if the police officer had good cause to suspect and did suspect the plaintiff of having committed the offence with which he was charged. The case is very shortly reported, and does not help us to solve the question whether it would have been sufficient to justify the apprehension of the plaintiff if the police believed on reasonable grounds that the plaintiff was a loose, idle or disorderly person. It only decides that the police could not claim the protection of sect. 8 of the Act, unless they pleaded and proved that the person was not only suspected for good cause of having committed or intending to commit a felony or misdemeanour, but also that he came within the description of "a loose, idle or disorderly person." It does not seem to me that this case is very helpful.

The next case cited in the argument was the case of *Hartley v. Ellnor* (2). This case was concerned with a charge before the magistrates made under the Vagrancy Act, 1824, as amended by the Prevention of Crimes Act, 1871. The facts and the decision of the justices are stated in the second paragraph of the headnote as follows :

E. was kept under observation by the police in a certain part of the city of B. on a certain day for a period of about 40 minutes. During that time he was seen to mix with various crowds of people who were in the act of boarding tramcars, and he was noticed to tap the pockets of various individuals in the crowds. He was then arrested by the police as a suspected person and charged before the justices of B. with being a rogue and vagabond within the meaning of the Vagrancy Act, 1824, s. 4. There was no evidence of any previous offence against E. The justices were of opinion that, by reason of the Prevention of Crimes Act, 1871, s. 15, E. could not be convicted as a rogue and vagabond on a charge of frequenting a public place for the purpose of committing a felony without it being shown that he had been previously convicted, or that he was a suspected person or a reputed thief, or that he was a person of known bad character prior to the date on which the act or acts took place on account of which he was arrested as a suspected person, and dismissed the charge.

It was held by a divisional court, consisting of LORD READING, L.C.J., RIDLEY and AVORY, JJ., that the justices were wrong. It is to be

observed that the case does not directly raise the question whether the police were entitled to take the respondent into custody without a warrant. It only deals with the question whether the justices were right in refusing to convict on the ground that it had not been shown that the respondent had been previously convicted, or that he was a suspected person or reputed thief, but I think the case necessarily involves a decision of the question whether the appellant was entitled to arrest the respondent without a warrant, because his power to do so depends upon the same considerations as those which affect the correctness or otherwise of the decision of the justices. In stating the question, AVORY, J., said, at p. 305 :

The only question which we are called upon to decide is whether they [that is, the magistrates] were right in coming to the conclusion that there must be evidence of a previous conviction or of previous bad character in order to render an individual a suspected person within the meaning of the section of the statute under which these proceedings were taken.

The learned judge goes on to say :

A person may be a suspected person even though he is not a reputed thief, and a person may be a suspected person on a particular day, even though he has not been previously convicted, or even though he has not had a reputation for bad character in the past. When one examines the facts of the present case there can be no doubt whatever that the respondent was a suspected person on the day in question. For a period of about 40 minutes he had been kept under observation by police officers, and during the whole of that time he was engaged on and off in doing acts which, to say the least, gave rise to a reasonable suspicion that he was attempting to pick the pockets of various passengers who were boarding tram-cars. He was seen to be acting in a suspicious manner on no less than 7 separate occasions in different parts of the city of Birmingham during the 40 minutes that he was being watched by the police.

The court then came to the conclusion that when he was arrested the respondent was a suspected person. It seems to me obvious that the magistrates were wrong in refusing to regard him as a suspected person when he was arrested, inasmuch as he had been acting in a manner which would have satisfied anybody that he was a person whom it was reasonable to suspect. In my view this decision was plainly right, because the evidence showed that at the time of the arrest he had brought himself within the description of a suspected person, that is to say, a person who had been acting in such a way as to make it proper to describe him as a suspected person, meaning thereby a person who had by his acts shown that he was a person of whom it was right to say, he had been acting in a manner which raised a suspicion that he was acting in furtherance of an unlawful and criminal purpose. It does not seem to me that this decision assists the appellants in the present appeal. Nor do I think that the decision of the Court of Appeal in *Trebeck v. Croudace* (3), establishes any proposition of law which is inconsistent

with the decision of the presiding judge in the present case. In that case the plaintiff had been apprehended without warrant as a person charged with "being drunk in charge on any highway, of a carriage." His being drunk while in charge of a carriage was the essence of the charge against him. The court held that the power to apprehend conferred by the section authorised the apprehension of persons who honestly and upon reasonable grounds were believed to be committing the offence at the time when they were arrested, and that it was not necessary to prove, in order to justify the apprehension of the plaintiff, that he was in fact drunk. The decision was a decision under the Licensing Act, 1872, and in my judgment it does not compel us to hold that the statutes to which I have referred mean that the police have power to apprehend any person whom they suspect to be a suspected person or reputed thief, or whom they suspect to be an idle or disorderly person.

The other case relied on by Mr. Maxwell Fyfe for the appellants is a decision of a divisional court, consisting of BANKES and SCRUTTON, L.JJ. (*Isaacs v. Keech* (4)), on the question whether under the Town Police Clauses Act, 1847, s. 28, a police officer, who honestly believed that the plaintiff was a common prostitute or night-walker loitering and importuning passengers for the purpose of prostitution, justified her apprehension without warrant. In this case it was an essential part of the offence that the importuning of passengers should be an importuning by a common prostitute or night-walker, and the question and the decision thereon seem to me exactly similar to the decision of the Court of Appeal in *Trebeck v. Croudace* (3), which decision the divisional court were bound to follow.

As above indicated, I think that under the Vagrancy Act, 1824, in order to justify an arrest without warrant, the authority to apprehend is confined to persons who come within the description stated in the relevant section of the statute. The power of arrest is confined to persons of that class, though I think it follows from the decisions that, once it is established that the person arrested belonged to the class of persons with respect to whom the special power to arrest is given to the constables, then if the constable honestly and on reasonable grounds believes that the person apprehended has been committing or attempting to commit a felony or misdemeanour, he has power to arrest, even though it should be established later that the person arrested was not in fact attempting to commit a felony or misdemeanour. I do not think the statutes mean that any person whom a constable thinks has been acting in a suspicious manner may be arrested without warrant, or that any person whom he suspects to be an idle or disorderly person can be so arrested. I think the power of a constable to arrest any person whom he honestly and reasonably suspects to have committed or be about to commit a felony or misdemeanour is confined to the class of persons

who have been acting suspiciously, or have been behaving as idle or disorderly persons. To read these statutes as giving the police power to arrest without warrant any person whatsoever though not belonging to the class of suspected persons or the class of idle or disorderly persons would be holding that they had been given a power extremely dangerous to any well-behaved person who may have good reason for frequenting or loitering in the places mentioned in the statutes.

I agree with the judgment of the presiding judge with the result that this appeal is dismissed with costs.

GREENE, L.J. : The trial of this action proceeded in a rather unusual manner. In the course of the opening by the plaintiffs' counsel the learned presiding judge intimated a view that the facts alleged in the defence, even if proved, would afford no defence in law to the action. This view was not displaced by arguments addressed to him by the defendants' counsel. In this situation counsel for the plaintiffs, when asked by the learned judge whether he wished to call evidence, said that he was satisfied with the view expressed by the learned judge and accordingly he called no evidence. The case therefore was decided upon the basis that the allegations in the defence were to be assumed to be true ; and it was held upon this assumption that they disclosed no defence in law. The present appeal can only be dealt with on the same basis.

It is contended on behalf of the appellants that the facts alleged in the defence, assuming them to be true, bring the case within all or some or one of three statutory provisions which give a power to arrest without a warrant. I will deal with these three provisions in order. The earliest is the Vagrancy Act, 1824, s. 6. That section gives power to any person to apprehend "any person who shall be found offending against this Act." The particular offence in respect of which it is contended that the respondents were found offending against the Act is one of a long list of offences set out in sect. 4 of the Act which provides that a person who commits any of those offences shall be deemed a "rogue and vagabond." This category is the second in order of the three categories of knavery which the Act defines—the first is "idle and disorderly person" the second is "rogue and vagabond" the third is "incorrigible rogue." The offence in question is described in the section as amended by the Prevention of Crimes Act, 1871, s. 15, and the Penal Servitude Act, 1891, s. 7, as follows—I omit words not relevant for the present purpose :

Every suspected person or reputed thief frequenting . . . any street . . . or any highway or any place adjacent to a street or highway with intent to commit felony and every suspected person or reputed thief loitering about or in any of the said places and with the said intent.

When the defence is examined in connection with this provision it is, I think, apparent that if it was intended to plead facts which would bring the case within it the language used has singularly failed to effect

its intention. It is not alleged that either of the respondents was a "suspected person." All that is alleged is that as a result of observing certain things described in the particulars and upon the grounds stated in the particulars each of the appellants had reasonable and probable cause for suspecting and did in fact suspect that the respondents had been attempting or were about to commit a felony. I will deal with this point more fully later. Next, there is no allegation of "loitering"—an essential matter to allege and prove—except with regard to the respondent Ledwith and in his case the allegation is qualified by the words "apparently keeping watch and screening the plaintiff Crothers." Neither this allegation nor the allegations with regard to Crothers' behaviour in the kiosk or the remaining allegations with regard to Ledwith's actions outside the kiosk are in my judgment sufficient allegations of "loitering" within the meaning of the statute. In a case of this kind I consider it essential that the allegations upon which it is proposed to say that the arrest was justified by a statute should be made with clearness and precision so that the plaintiff may know the case which he has to meet. The third matter in respect of which there is a failure to allege facts essential to justify the arrest is the "intent to commit felony." There is no allegation of any such intent, merely an allegation that the appellants suspected on reasonable grounds that the respondents were about to commit a felony. This point also I will deal with presently. It is said that the allegation that the appellants suspected on reasonable grounds that the respondents were about to commit a felony is a sufficient allegation that they were "suspected persons," and in support of this contention reliance is placed upon the decision of a Divisional Court in *Hartley v. Ellnor* (2). I am unable to take this view. If correct, it would amount to this, that it is sufficient for a constable to suspect a person on reasonable grounds of being about to commit a felony to justify him in making an arrest. If the legislature had so intended nothing would have been easier than to say so. The statute does not say "any person suspected of loitering with intent to commit felony"—it says "any suspected person or reputed thief." The context to my mind makes it clear that the only persons who can commit this particular offence are persons who fall within one or other of these two classes. A man is not a reputed thief merely because a constable thinks he is a thief and I cannot see how a man can be said to be a suspected person merely because a constable suspects him. The phrase "a suspected person" in this context, particularly when it is placed in juxtaposition to the words "reputed thief," is, in my judgment apt to describe and to describe only a person who, quite apart from the particular occasion and antecedently thereto, has become the object of suspicion, just as a "reputed thief" is a person who already has the reputation of a thief. In the case of *Hartley v. Ellnor* (2), it was held that a person was a

“suspected person” within the meaning of the statute on the ground that two police constables had seen him tap the pockets of various persons at different places during a period of 40 minutes. With all respect I cannot agree with the reasoning of the court in that case upon this point. AVORY, J., who delivered the judgment of the court says, with reference to the argument that the person must previously have been the object of suspicion: “By whom must he have been suspected before the day in question?” Speaking for myself I see no difficulty in answering this question any more than I do in answering the question: “By whom must he have been reputed to be a thief?” But in any event the facts in *Hartley v. Ellnor* (2) were very different from those in the present case and I cannot regard it as an authority binding us to decide this case in favour of the appellants.

With regard to “loitering with intent to commit felony” it is said that whereas, when a person is charged with the offence, it is essential to prove the intent (as to which see the Prevention of Crimes Act, 1871, s. 15) yet the power of arrest extends to cases where the person making the arrest on reasonable grounds believes that the person whom he arrests: (a) is loitering, (b) is doing so with intent to commit felony. In other words, the Vagrancy Act, s. 6, is to be construed as if it had said:

It shall be lawful for any person whatsoever to apprehend any person whom on reasonable grounds he suspects of offending against this Act—

or, to take the precise offence in question:

any person whom on reasonable grounds he suspects to be loitering with intent to commit a felony.

This is not what the section says; and if the legislature had intended so to extend the very limited power of arrest without a warrant which exists at common law I should have expected it to say so in clear language, having regard to the importance of the subject matter in relation to the liberty of the subject (see as an example the Larceny Act, 1861, s. 104). It is to be observed further that if the construction of the words “suspected person” is what the appellants say it is, the effect of this construction of sect. 6 is, so far as regards the power of arrest, to make the words “suspected person” entirely otiose. However that may be, the power of arrest—which, be it observed, is given not merely to constables but to any person whatsoever—is in terms given by the section only where the person is “found offending” which I should have thought meant “found doing a thing which in fact constitutes an offence.” It is said, however, that the matter is concluded by authority binding on this court, namely, the case of *Trebeck v. Croudace* (3). The provision under which the arrest was held to be justified in

that case was the Licensing Act, 1872, s. 12, which enacts that a person who while drunk is guilty of riotous or disorderly behaviour or is drunk while in charge of a carriage or in possession of loaded firearms may be apprehended and shall be liable to fine or imprisonment. The jury found that the sergeant of police who made the arrest honestly believed at the time that the plaintiff, a taxi-cab driver, was drunk. It was held that this finding entitled the defendant to judgment on the issue of false imprisonment. SWINFEN EADY, L.J., based his construction of the section so far as it relates to the power of arrest on the nature of the offences described. He said, at p. 165 :

The cases mentioned in the section are all matters where it is reasonable to apprehend danger to life or limb.

Further on he says :

The nature of the offences specified requires this construction.

A similar reason is the basis of the judgment of WARRINGTON, L.J. He says, at p. 169 :

It is to be observed that in each of the three cases mentioned in the second part of the section the apprehension of the person in question must be immediate if it is to serve the purpose for which it is obviously intended, namely, to prevent disorder or injury to the person in question himself or to others—

and again, on p. 170 :

In my judgment, considering the obvious purpose of the section, it ought to be construed so as to justify apprehension on reasonable suspicion of drunkenness.

There does not appear to me to be any such reason of emergency in the case of some at any rate of the offences mentioned in the Vagrancy Act, s. 4 ; and I do not think it would be permissible to construe sect. 6 as justifying an arrest on honest suspicion in the case of some of those offences and not in others—it must be all or none. BANKES, L.J., on p. 167, says :

Though the language in which this authority has been conferred varies greatly in different statutes, and in different sections of the same statute, the object of the legislature must have been the same, namely, to provide for cases where, in the interests of public safety, or where danger to life or limb or property is threatened, prompt action is called for, and action which must of necessity be founded on the circumstances of the moment, and mainly probably on such information as the senses of a police constable, his sight and hearing, convey to him—

and in my opinion in his case also this is the real basis of his decision. It is true that later on in his judgment (see p. 168) he uses language which appears to deal with all cases where power to arrest without warrant is given by statute, but I think that this language must be construed as dealing only with the case of statutes where the nature of the offence is of the kind described in the passage above quoted from his

judgment. I cannot myself read this decision as extending to cases other than those where the nature of the suspected offence requires prompt action.

Trebeck v. Croudace (3) was followed by a Divisional Court (BANKES and SCRUTTON, L.JJ.) in *Isaacs v. Keech* (4). There the arrest was justified under the Town Police Clauses Act, 1847, s. 28. Under that section power is given to a constable to arrest without warrant :

every common prostitute . . . loitering or importuning passengers for the purpose of prostitution.

The defendant honestly believed that the plaintiff was a common prostitute (which she was found not to be) and that she was committing the acts mentioned. It was held that this constituted a good defence to an action for false imprisonment. BANKES, L.J., said, at p. 360 :

I think, however, that the whole trend of authority has been to put a uniform construction upon enactments giving power to arrest without a warrant a person found committing an offence, and to hold that what the legislature has in mind is not a mere power to arrest the person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence.

This appears to me to go a great deal farther than what was said in *Trebeck v. Croudace* (3), and lays down a principle of construction applicable to all cases where a statute gives power to arrest without warrant. SCRUTTON, L.J., thought that the case was governed by *Trebeck v. Croudace* (3)—a decision with regard to which he apparently felt some doubts which I respectfully share, particularly if, contrary to my own view, it is to be construed as extending beyond cases where in the nature of things prompt action is required. I am not myself prepared to write words into a section dealing with a subject matter so important unless on a fair construction of the section and its context or by reason of clear authority I am compelled to do so and in the present case I do not find either of these reasons. In the words of POLLOCK, C.B., in *Bowditch v. Balchin* (1) at p. 381 :

In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.

If I am wrong in the view which I take as to this point and as to that with regard to "suspected person" I still hold that there is no sufficient allegation that either of the respondents was suspected to be "loitering" within the meaning of the statute.

The other two statutory provisions relied on are both contained in the Liverpool Corporation Act, 1921, s. 513. This section empowers a constable to arrest :

(2) Any loose idle or disorderly person whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or being

about to commit any felony misdemeanour or breach of the peace or to instigate or abet any such breach :

(3) Any person whom he shall find between sunset and the hour of eight in the morning lying or loitering in any street yard or other place and not giving a satisfactory account of himself :

With regard to the former of these two provisions it is in my opinion clear that the defence contains no sufficient allegation that either of the respondents was a "loose idle or disorderly person." It is said that the particulars amount to an allegation that the respondents were "idle" at the time when they were under observation. This appears to me to be hopelessly far-fetched and I need only refer to what I have said above as to the necessity of precise pleading. With regard to the second provision quoted above, similar observations apply as to the absence of any sufficient allegation of the facts necessary to bring the case within it. I have already referred to the allegation of "loitering" when dealing with the Vagrancy Act. It is suggested that the particulars in effect allege that the respondents did not give a satisfactory account of themselves within the meaning of the provision. I cannot agree with this. If that was intended the proper way of pleading was to say so in terms. The truth of the matter is, I think, that the defence was not framed with a view to the language used in any one of the three statutory provisions relied on and I am not prepared to place an elastic construction upon it in order to bring it into accordance with that language.

I agree that the appeal should be dismissed with costs.

SCOTT, L.J. : This case was disposed of by arrangement in the court below as if the plaintiffs had put in a reply submitting that the defence disclosed no ground of defence in law to the cause of action alleged by the plaintiffs in the statement of claim ; in other words, it was tried almost as a demurrer on the simple issue of law as to whether the allegations in the defence did or did not afford legal justification for the action of the defendants in arresting the plaintiffs and then detaining them subsequently at the police station. No evidence was called, because counsel for the defendants in answer to a question from the learned judge, said that his evidence would not go beyond the pleaded justification, and counsel for the plaintiffs being willing to assume that the facts alleged in the defence were true, the case was argued on that footing, inconsistent allegations in the statement of claim being disregarded. The trial began before a jury, but the jury were discharged by consent. The learned judge did not deliver a reasoned judgment, but we have had the advantage of reading a transcript of the whole argument and his reasons appear quite clearly from his observations made in the course of the discussion. I find myself in complete agreement with all that the learned judge said. I concur in the conclusion

of my brethren, but the case raises important questions affecting the rule of law, and I prefer to state my reasons in detail.

No particular statute is pleaded in the defence as justifying the arrest, but if there is any general statute applying to the facts as pleaded in the defence, the defendants were entitled to take advantage of it. The defendants relied at the trial, and before us, on three statutes: the Vagrancy Act, 1824, ss. 3, 4 and 6 (with subsequent amendments); the Municipal Corporations Act, 1882, s. 193, and the Liverpool Corporation Act, 1921, s. 513. The last, being a local and not a general statute, ought to have been pleaded, but this omission was waived by counsel for the plaintiffs at the trial, and by consent of both counsel the case was argued on the footing that if the facts alleged in the defence disclosed a justification within any one of the three Acts the defendants should be entitled to judgment, but if those allegations were not enough, the plaintiffs should get judgment and be given £15 each as damages. It is to be observed that there was no allegation in the defence that on the occasion in question all or any of the conditions authorising arrest, as specifically prescribed in the Acts, had been fulfilled by reason of the facts of the case alleged in the defence, as for instance that the plaintiffs were loose, idle and disorderly persons. None the less, having regard to the course taken at the trial, I think it is now incumbent upon us to assume that all necessary allegations of this kind were in fact made, and to consider whether the alleged facts (including such assumptions) do or do not disclose a good defence in law under the statutes; although, whilst taking this course, I feel bound to add, that when by consent a trial proceeds on issues not pleaded, the necessary amendments ought to be in fact inserted in the record in order both to prevent doubts at the trial itself and in the event of appeal to enable the Court of Appeal to know definitely what the issues were.

Our first step must be to scrutinise the provisions of the three statutes and see what precisely are the powers of arrest without warrant given to a constable and what conditions are attached. It is convenient to take the Vagrancy Act, 1824, first, both because it is earlier in point of time, and because it was the last of a long line of enactments *in pari materia*, and in sects. 3, 4 and 6 was largely a repetition of earlier legislation. Sect. 6 of that Act enacts that it shall be lawful for any person whomsoever to apprehend any person who shall be "found offending against this Act." Sects. 3, 4 and 5 define those offences. Sect. 3 relates to "idle and disorderly persons"; sect. 4 to "rogues and vagabonds"; and sect. 5 to "incorrigible rogues." Each section purports to make it a punishable offence to be "an idle and disorderly person," "a rogue and vagabond" or "an incorrigible rogue" as the case may be; but in none of them is the class treated as having any objective existence apart from the commission of the particular acts

enumerated in the section. Sect. 3, for instance, does not assume that there is a recognisable class of person generally known as an "idle and disorderly person"; it describes a list of particular offences, the commission of any of which is to be deemed to constitute the offender an "idle and disorderly person" within the true intent and meaning of the Act. A person commits an offence under sect. 3 by (1) failing to maintain his family when able to do so; (2) becoming chargeable on a parish from which he shall have been legally removed by order of justices; (3) if a pedlar by wandering abroad and plying without licence; (4) if a prostitute by wandering in the public streets and behaving in a riotous and indecent manner; (5) by wandering abroad or taking up a position in a public place to beg, or causing children to do the same. It follows that for the purpose of this statute no one is "an idle and disorderly person" unless he has committed one or more of the above specific offences. It was not alleged in the defence that the plaintiffs were doing any of these particular things and consequently it could not be contended that the plaintiffs were idle and disorderly persons within the meaning of the Vagrancy Act, 1824.

Sect. 4, which deals with "rogues and vagabonds," follows a similar method of approach; it does not purport to predicate the existence outside the section of a recognisable class of such persons, but like sect. 3 enumerates a series of specific offences and provides that every one of such offenders shall be deemed to be a "rogue and vagabond." This list in an abbreviated form is as follows: (i) a second conviction under sect. 3 as an "idle and disorderly person"; (ii) telling fortunes by palmistry or otherwise to deceive His Majesty's subjects—this was the old legislation against "the Egyptians" or gipsies; (iii) wandering abroad and lodging in barns, or unoccupied buildings, or elsewhere—meaning on private property—without having any visible means of subsistence; (iv) wilfully exposing to view in any street, etc., obscene prints, etc.; (v) exposing the person in a public place with intent to insult any female; (vi) wandering abroad and endeavouring by the exposure of wounds and infirmities to obtain alms; (vii) going about as a collector of alms under any false pretence; (viii) running away and leaving a wife or child chargeable to the parish; (ix) betting in any street with any instrument of gaming; (x) having in his possession house-breaking instruments with intent, etc.; (xi) being in possession of firearms, etc., with intent to commit a felony; (xii) being on various private premises for any unlawful purpose; (xiii) *being a suspected person or reputed thief* and frequenting any place of public resort with intent to commit felony; (xiv) being apprehended as an idle and disorderly person and violently resisting arrest and being subsequently convicted. All these persons "are to be deemed rogues and vagabonds" within the Act.

It is unnecessary to discuss sect. 5 about "incorrigible rogues" as it has no relevance.

Of all the various acts described in sect. 4 making a person amenable to arrest and punishment as a rogue and vagabond, there is only one upon which counsel for the defence relied in the court below and before us. This was the act described in the thirteenth item of the list—of which the actual words in detail so far as relevant are :

every suspected person or reputed thief, frequenting any river, canal or navigable stream, dock, wharf or warehouse . . . or any street leading thereto, or any place of public resort or any avenue leading thereto, or any street . . . adjacent, with intent to commit felony.

Parliament in passing this provision evidently had in mind first the risk of thefts of goods from the kind of places where in those days merchandise awaiting or in course of transport was likely to be lying, viz., places connected with transport by water, substantially the main form of goods transport before railways; and secondly the danger of pickpockets in or near places of public resort. But the actual intent to commit a felony was plainly made an essential of the offence and therefore a condition of the power of arrest under sect. 6 and in the court below counsel for the defendants in effect conceded that such an intent was not alleged and could not have been proved. The section has been amended subsequently several times and two of the amendments must be mentioned. By the Prevention of Crimes Act, 1871, s. 15, the local limits of this particular provision were widened so as to include *any* street or highway or any place adjacent thereto. (This was to meet the decision in *Re Timson* (5).) By the same section it was also enacted that :

in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony.

The result of the first amendment is no doubt to bring the two young plaintiffs at the telephone kiosk within the local ambit of the section; but the second amendment leaves felonious intent in fact an essential of the offence and therefore does not help the defendants since it was not contended that the plaintiffs had any intent in fact to commit a felony. There was some discussion before us on the meaning of the phrase "suspected person" in sect. 4, it being contended as I understood that it covered not only the case of a person who had already become on his previous record reasonably suspected by the police, so as to bring him into a definite and *quasi*-objective category—on the analogy of the phrase "reputed thief"—but also a case where on the

very occasion of arrest the arresting constable observes the person doing something which arouses his suspicion—a subjective instead of the *quasi*-objective criterion. I disagree with this construction, both on the mere meaning of the English words standing alone, and also by reason of the long history of the phrase in the Vagrancy Acts upon which I shall have more to say later. The contention for the appellants was put forward largely on the strength of *Hartley v. Ellnor* (2), it being submitted that that decision supports the proposition that if it is proved that a constable has reasonable ground for suspecting and does suspect, the person thus suspected is brought within the statute. In my view this decision establishes no such proposition. Indeed, it rather assumes the contrary—that the person must have already, before the occasion of arrest, passed into the category of suspected persons; for the court in that case based its conclusion on the evidence that the person had for 40 minutes previously in various incidents been behaving rather like a pickpocket, and thought this antecedent record sufficient. I find it difficult to understand the court reaching that conclusion on the facts of that case, and on the whole I agree with GREENE, L.J., that it was wrongly decided; but in any view the case is no authority for the appellants' proposition.

The result is that the Vagrancy Act neither in its original wording nor as amended in 1871 afforded the appellants any justification for arresting the respondents. There have been, however, certain other amendments which must be considered. The powers of arrest conferred by the Vagrancy Act were extended by the Larceny Act, 1861, s. 104, which is in the following terms:

Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.

This section is not directly relevant but it is *in pari materia* and may properly be considered in connection with references to "suspicion" of crime and "suspected persons" in the relevant statutes. It is noticeable that the liberty of the subject is protected by the adoption of the objective test of good cause to suspect, even although the person is already "lying or loitering" at night.

In 1882, by the Municipal Corporations Act, s. 193, it was provided that:

A borough constable may, while on duty, apprehend any idle and disorderly person whom he finds disturbing the public peace, or whom he has just cause to suspect of intention to commit a felony.

In this statute also it will be noted that Parliament adopted the

objective criterion of "just cause to suspect." It was argued for the appellants that the facts alleged in the defence brought the case within this statute; but I do not understand this argument. What ground was there for contending that the appellants had "just cause for suspecting" that the respondents were going to rob the money box? They did not even know whether the respondents had any tools on them with which to prise it open; and they knew the respondents could not do it with their fingers!

Lastly, in 1891, by the Penal Servitude Act, s. 7, of that year, the Vagrancy Act, 1824, s. 4, was amended by a provision that it should be:

construed as if the provisions applying to suspected persons and reputed thieves frequenting the places and with the intent therein described, applied also to every suspected person or reputed thief loitering about or in any of the said places and with the said intent.

This amendment by its final words brought the section into line both with the Larceny Act, 1861, s. 104, and with the Municipal Corporations Act, 1882, s. 193, and made it plain that to constitute an offence under sect. 4 and confer the right of arrest under sect. 6 an actual intent to commit a felony was essential. Mere suspicion is not enough: see *R. v. Pavitt* (6), a case heard in 1911 in the Court of Criminal Appeal, of a man who had served two terms of imprisonment, one of 5 years and one of 6 months, with 3 years police supervision, who was seen by a police officer going into private premises in a suspicious manner. He was questioned and gave certain more or less untruthful answers, and was then arrested. He was convicted before the South London sessions and sentenced to 9 months imprisonment, the charge being that he was found in a public place under such circumstances as to satisfy the court that he was about to commit an offence punishable on indictment. But the Court of Criminal Appeal, consisting of LORD ALVERSTONE, L.C.J., and BRAY and LORD COLERIDGE, J.J., quashed the conviction and said, at p. 432:

This court has said before and now repeats that the provisions of this section of the Prevention of Crimes Act, being very stringent, must not be invoked on mere suspicion. There must be positive testimony to enable the police to bring a proper prosecution. Where the circumstances were consistent with the prisoner being in the public place for a purpose other than that suggested by the police there should be no prosecution.

This judgment is clear authority for the views that my brethren and I are expressing in the present case.

The above considerations are more than sufficient to dispose of the contentions of the appellants so far as they sought to find a justification in the amended sect. 4 of the Vagrancy Act, 1824. But even if there had been an arguable case under sect. 4 they would have failed under sect. 6, as the power of arrest there given to anybody—not only to the

police—is limited to the case of a person found offending; and as the court (consisting of COCKBURN, L.C.J., CROMPTON, HILL, and BLACKBURN, JJ.) said in the case of *Horley v. Rogers* (7) at p. 677 :

The facts sufficient to create the alleged offence were out of the knowledge of the constable. The summary power to apprehend without a warrant, given by the statute, applies only to cases where the offence is apparent, and is in course of perpetration by the offender, before the eyes of the constable; not to cases where it depends upon circumstances unknown to the constable whether the offence has been committed or not.

In the present case it is not alleged that the defendants had any such knowledge or that any offence was in course of perpetration before their eyes.

It remains to consider the Liverpool Corporation Act, 1921, s. 513. So far as relevant it is as follows :

It shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant :

(2) Any loose, idle or disorderly person whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace or to instigate or abet any such breach.

(3) Any person whom he shall find between sunset and the hour of eight in the morning lying or loitering in any street, yard or other place and not giving a satisfactory account of himself.

The two subsections call for separate consideration. Subsect. (2) seems to predicate a definite class or classes of persons possessing what I have called an objective character and existence, antecedent to and independent of the particular occasion. In spite of the disjunctive “ or ” I do not think that more than one class is intended. Even on the mere language of the subsection I should read the “ or ” as meaning “ and ” on the simple ground that it would be absurd—in modern legislation—to put it into a statute interfering with personal liberty such wide and indefinite words as “ loose ” or “ idle.” Why should such persons—in the ordinary English sense of those words—be selected for summary arrest? Surely Parliament could not have intended anything so foolish. But there is a further reason for construing “ or ” as “ and ” in this section. The Act was a consolidating Act and these subsections were not new in 1921. They were a re-enactment of identical provisions contained in the Liverpool Act, 1842, s. 276 (that Act was repealed in 1921), and appeared in that Act as one undivided section. It is true that the word “ or ” was there present; but I find that the Liverpool Act, 1842, s. 276, was copied bodily from the City of London Police Act, 1839, s. 8 (see *Bowditch v. Balchin* (1), at p. 380, where it is quoted in the argument); and in the London Act the word is “ and ” and not “ or.” I cannot imagine a deliberate change by the draftsman or Parliament in 1842 of the “ and ” of the London Act into “ or ” in the Liverpool

Act intentionally and in order to express a different idea without changing the other language so as to make the new meaning clear. I therefore infer that the change was not intended and was a clerical error.

In the case of *Bowditch v. Balchin* (1) the court apparently held that there was no power to arrest unless: (a) the person arrested fell within the class described by the words "loose, idle and disorderly," and (b) the constable had ocular or other evidence of his senses of the commission of the offence, or of an intention to commit it. The same considerations apply to the defence based on sect. 513 (2) of the Liverpool Act in the circumstances pleaded in the present case. I therefore hold that the defence contains no effective allegation of facts showing either that the respondents were within the class of "loose, idle and disorderly persons" or that the constables had "good ground to suspect them," etc., both of which are essential to subsect. (2). Subsect. (3) raises two questions: do the facts relied on disclose: (a) a case of "lying or loitering," (b) a failure by the respondents to "give a satisfactory account of themselves"? In my opinion they disclose neither. "Lying" differs from "loitering" as it seems to me only in that whilst the latter word imports movement, the former imports absence of movement, with perhaps a hint of attempted concealment. The Oxford Dictionary defines "loitering" in its early use as "vagrancy, vagabondage, or leading a vagabond's life," and "loiterer" as "a vagabond or sturdy beggar." For reasons which I will presently state, I think this is the true meaning of the word in this statute. If this is right, the word "loitering" would colour the more neutral word "lying" on the maxim of *noscitur a sociis*; and there is nothing in the facts on which the defence was based to show that the respondents' conduct was either "lying" or "loitering" in that sense. Even if I am wrong in this view, there are two other grounds for concluding that subsect. (3) does not help the appellants. It must be read in the light of subsect. (2)—particularly as the two subsections were formerly undivided—and so read I think the words "not giving a satisfactory account of himself" refer back to the words "having good cause to suspect," and must certainly in this context mean failing to give an account which if not removing *all* suspicion from the mind of the constable at any rate would show him that there was no "good ground" for suspicion of actual crime committed or intended. If so, for this reason also subsect. (3) does not help the appellants. The other ground is that a local Act dealing with a topic also covered by general public statutes ought in case of any ambiguity in the local Act to be construed in the light of the general law of the land. This principle applies to subsect. (3) and makes it right to interpret the phrase "satisfactory account" in the light of provisions like the Larceny Act, 1861, s. 104, and the Municipal Corporations Act, 1882, s. 193, both of which require the existence of "good cause" for the suspicion.

I do not think it necessary to add much about the two cases of *Trebeck v. Croudace* (3), and *Isaacs v. Keech* (4), which were discussed before us, because I agree with the whole of what GREENE, L.J., has said about them and desire to adopt it as part of this judgment. But I feel bound to add a caveat. If the view of the Court of Appeal in the former case was that where the offence, for which a constable has it in mind to arrest a person, is one of immediate importance to public order, he is empowered to act on a reasonable belief that the crime has in fact been committed or that the intent to commit it is in fact present, even although the statute does not contain any express words to that effect—if that is the law of this country (and until revised by the House of Lords it is), a very difficult discretion is entrusted to the police, and one as I think fraught with considerable danger to the liberty of the subject. I should like respectfully, but earnestly, to express the opinion that powers of arrest without warrant should be expressed in quite unambiguous and simple language which anyone can understand, and that the occasions for reliance on the constable's discretion should be defined with care in any statutory provision conferring such a power.

Although the conclusion that sect. 513 of the Liverpool Act, 1921, affords no justification for the defendants can be reached, as both my brethren and myself have in fact reached it, without praying in aid any peculiar sense imparted to the two expressions "idle and disorderly persons" and "loitering" by their use in a very large number of previous statutes *in pari materia*, in my view those phrases have acquired a statutory meaning of that kind, and one which is directly relevant to the submission of the appellants founded upon that section. It leads us by a different road to the same conclusion, as that which we have already stated. So construed sect. 513 is restricted to a class of persons to which it is quite impossible to hold that the two respondents—perfectly respectable citizens of unimpeachable character—belonged. The same considerations apply to both subsect. (2) and subsect. (3); for the word "loiterer" was habitually and indifferently used in the old statutes as having the same meaning as "idle and disorderly person" the meaning which I have already quoted from the Oxford Dictionary. In my view those two expressions both refer to members of a class once prevalent in England to an extent which made it for four or five centuries a major political problem, a problem which taxed the forces of law and order to the uttermost and produced a long succession of repressive statutes. These laws were framed exclusively in relation to that particular class of the community, and had three purposes. The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were: (a) settlement of the able-bodied in their own parish, and provision of work for them there; (b) relief of the aged and infirm, i.e., those

who could not work ; (c) punishment of those of the able-bodied who would not work.

The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century, till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the poor law in the first half of the 19th century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages ; the break up of the monasteries in the reign of Henry VIII, and the consequent disappearance of the religious orders which had previously administered a kind of " public assistance " in the form of lodging, food and alms ; and lastly the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the " wild rogues," so common in Elizabethan times and literature who had been born to a life of idleness and had no intention of following any other. It was they and their confederates who formed themselves into the notorious " brotherhoods of beggars " which flourished in the 16th and 17th centuries. They were a definite and serious menace to the community, and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed.

It is unnecessary to go into further historical detail ; the broad features of the class can be found in any history of the labouring classes—see for instance WEBB'S ENGLISH POOR LAW HISTORY, Part I. The statutory history of Parliamentary attempts to deal with the class goes back to the Statute of Labourers in 1349 ; but for the purpose of this judgment I can begin with 11 Hen. 7, c. 2 (1494), which provided that :

Vagabonds, idle and suspected persons, shall be set in the stocks three days and three nights, and have none other sustenance but bread and water, and then shall be put out of the town : (2) And whosoever shall give such idle person more, shall forfeit xii. d. (3) Every beggar not able to work shall report to the Hundred where he last dwelled, is best known, or was born, and there remain upon the pain aforesaid.

22 Hen. 8 c. 12 (1530) directed :

how aged, poor, and impotent persons, compelled to live by alms, shall be ordered, and how vagabonds and beggars shall be punished.

27 Hen. 8, c. 25 (1535) compelled every sturdy vagabond to be kept in continual labour ; governors of shires, etc., to find and keep

every poor and infirm, or aged person who was born or had dwelt 3 years within their limit, and sect. (3) says :

A valiant beggar, or sturdy vagabond, shall at the first time be whipped and sent to the place where he was born or last dwelled by the space of three years, there to get his living ; and if he continue his roguish life, he shall have the upper part of the gristle of his right ear cut off ; and if after that he be taken wandering in idleness, or doth not apply to his labour, or is not in service with any master, he shall be adjudged and executed as a felon.

1 Ed. 6, c. 3 (1547) the notorious "Slavery Act" was entitled "An Acte for the punishment of vagabondes and for the relief of the poor and impotent persons," and its preamble was in these terms :

Forasmuche as idlenes and vagabundrye is the mother and roote of all theftes robberyes and all evill actes and other mischiefs and the multitude of the people given thereto hath allwaies been here within this realme verie greate and more in nombre as it maye appere then in other regions, to the greate impouwerishment of the realme and daunger of the Kings highness subjects, the which idlenes and vagabundrye all the Kings highness noble progenitors Kings of this realme and this highe courte of Parlament hath often and with greate travaile goon abowte and assayed with godlie Actes and statutes to repressse, Yet until this our tyme it hath not had that successe which hath byn wished, but partelie by folishe pitie and mercie of them which shoulde have seen the said godlie lawes executed, partelie by the perverse nature and longe accustomed idlenes of the parsons given to loytringe, the saide godlie statutes hitherto hath had small effecte, and idle and vagabounde persons being unprofitable membres or rather enemyes of the comen weal the hath byn suffered to remayne and encrease and yet so doo, who yf theie should be punished by deathe whippinge emprysonement or with other corporall payne it were not without their deserts for the example of others and to the benefits of the comen wealth, Yet yf thei cowlde be brought to be made profitable and do service it were much to be wished and desired.

The whole Act deserves perusal, although it only remained on the statute book for 2 years, for the sake of the picture of the times which it presents. But it is enough for the purpose of my judgment to recall that the Act :

ordained that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink and refuse meat ; should wear a ring of iron round their necks, arms or legs, and should be compelled by beating, chaining or otherwise, to perform the work assigned them—

(see STEPHENS COMMENTARIES : 12th Edn., Vol. II, p. 234). This Act was repealed 2 years later, and a scheme for dealing with the poor was drawn up in 1553 by a committee of 24 citizens of London. HOLINSHED (quoted by WEBB, ENGLISH POOR LAW HISTORY, Part I, p. 49) records that :

after sundry meetings . . . they agreed upon a book that they had devised, wherein they first considered of nine special kinds and sorts of poor people, and these same they brought in these three degrees : (1) the poor by impotency ; (2) poor by casualty ; (3) thriftless poor.

the last class was divided into : (a) " the rioter that consumeth all " ; (b) " the vagabond that will abide in no place " ; (c) " the idle person, as the strumpet, and others." The spirit of all the 16th and 17th century statutes was that of helping classes 1 and 2, and punishing class 3—the thriftless poor—more or less severely, according as its members were inclined to cling to, or give up, their vagrant way of life. 14 Eliz., c. 5 (1572), is the forerunner of the Vagrancy Act, 1824, it gives in sect. 5 a lengthy catalogue of the persons who shall be deemed rogues, vagabonds and sturdy beggars. This includes :

all common labourers being persons able in body using loitering, and refusing to work for such reasonable wages as is taxed and common given.

It also ordains (sect. 2), that persons above the age of 14 :

being hereafter set forth by this Act . . . to be rogues, vagabonds or sturdy beggars and . . . taken to begging in any part of this realm, or taken vagrant wandering and misordering themselves contrary to the purport of this present Act—

shall be punished. 39 Eliz., c. 4 (1597), defines rogues and vagabonds on the same lines as the Act of 1572. Sect. 2 again refers to : " persons able in body and using loitering " and refusing to work for reasonable wages, and in sect. 3 provides that :

Any person who is by this present Act declared to be a rogue vagabond, or sturdy beggar, which shall be . . . taken begging, vagrant, wandering or misordering themselves—

is to be whipped. In the same year a further statute was passed—c. 17, entitled " An Act against lewd and wandring persons, pretending themselves to be soldiers or mariners." Sect. 2 enacts that :

all idle and wandring soldiers or mariners, or idle persons, . . . shall settle themselves in some service, labour or other lawful course of life, without wandring, or otherwise repair to the places where they were born, or to their dwelling places, if they have any, and there remain, betaking themselves to some lawful trade or course of life, as aforesaid ; upon pain that all persons offending contrary to this Act to be reputed as felons, and to suffer as in case of felony, without any benefit of clergy to be allowed.

These last Acts contained the germ of the 19th century workhouse in their provision of " houses of correction " where the able-bodied, idle and disorderly should be made to work. And it is also perhaps permissible to note—even if not directly relevant to this appeal—that out of the Acts of Elizabeth's reign, which I have cited, directly grew her Act of 1601, the foundation of our poor law and rating systems. The Act of 7 Jas. 1, c. 4 (1609), sought to enforce more rigorously " all laws and statutes now in force for punishing of rogues, vagabonds and other wandering and idle persons," and setting them to work in houses of

correction. An Act passed in 1713 (13 Anne, c. 26) continued the same type of legislation, and in 1739 (13 Geo. 2, c. 24) an Act was passed for :

amending and enforcing the laws relating to rogues, vagabonds, and other idle and disorderly persons, and for reducing the same into one Act of Parliament ; and also for amending the laws for erecting, providing, and regulating houses of correction.

This codifying Act was followed by another in 1744 (17 Geo. 2, c. 5), and then in 1792 by 32 Geo. 3, c. 45. These last three Acts are all on the same lines in their treatment of idle and disorderly persons as offenders to be punished if they will not work. The Vagrancy Act of 1824 differs little from the long string of earlier Acts in the legislature's attitude to the clan of idle and disorderly persons except that it is simply a punishment Act, and not as the early Acts were partly a punishment Act and partly an Act for the relief of the poor. There runs all through this chain of statutes the recognition of a well known and notorious class of unemployed poor persons, dealt with as such by Parliament according to their willingness or unwillingness or ability or inability to work. The phrases "idle and disorderly" and "those who use loitering" are recurrent and both apply to the class. When those phrases appear again in statutes of the 19th century passed not long after the Act of 1824 which was the last of the series, they should not in my view be interpreted in a sense foreign to that in which they had previously been used. It may be said that my historical statements and my recital of extracts from the long line of Vagrancy Acts do not establish any precise sense for the two expressions in the Liverpool Act which I have construed in this appeal. I do not dissent from that criticism ; but it is beyond dispute that there was in our earlier history an unemployed class which was only too well known and always regarded as a public menace ; and that it was this class which was intended by all the expressions "idle and disorderly persons," "person using loitering," "rogues and vagabonds" and "sturdy beggars." That the class was treated as semi-criminal is also beyond argument ; they were referred to by such phrases as "outrageous enemies of the common weal" (see 14 Eliz., c. 5, s. 2). When the City of London Police Act, 1839, was passed, the phrase "loose, idle and disorderly" persons must in my view be presumed to have been used by Parliament in the same sense as before, viz., as applying to an unemployed idle class given to preying on those who worked or were possessed of other means ; and if that phrase was used in the London Act of 1839 in that sense, it must equally have been used in the Liverpool Act of 1842 in the same sense. Finally that same sense must be attributed to the consolidating Act of 1921. If that interpretation be sound, the position in the appeal is that in the conduct of the defence there was no hint of an allegation that the two plaintiffs belonged to any such class ; and unless they did, sect. 513 had no application to them.

This reasoning constitutes a separate and additional ground for affirming the judgment below.

I cannot part with the case, however, without making two observations. It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecution, when in their historical meaning they are so utterly out of keeping with modern life in England. The class against which the legislation was directed has ceased to exist. The poor law legislation and the increased industrial and commercial employment of the 19th century together reduced it to much narrower proportions. The legislation of the 20th century, unemployment insurance, national health insurance, public assistance, and all the other social reforms of recent years have abolished it altogether. The old phrases have to-day lost their meaning, but they remain on the statute book as vague and indefinite words of reproach. Is it not time that our relevant statutes should be revised and that punishment and arrest should no longer depend on words which to-day have an uncertain sense and which nobody can truly apply to modern conditions? To retain such laws seems to me inconsistent with our national sense of personal liberty, or our respect for the rule of law. Clear and definite language is essential in penal laws.

Finally I would make one more suggestion. If the Liverpool Corporation Act, 1921, s. 513, and the old City of London Police Act, 1839, s. 18 (which is, I believe, still in force) create different offences and confer different powers of arrest to those of the general law of the land contained in the public statutes, it is surely time to abandon the system of such local variations, whatever may have been their justifications in earlier times. To-day crime and personal liberty ought not to vary from town to town as must be the case if they are to depend on municipal variations in "local and personal" Acts of Parliament. They ought to be the same throughout the length and breadth of the land. Why should such provisions be inserted in local Acts at all?

I agree that the appeal should be dismissed and the judgment below affirmed.

Appeal dismissed.

Solicitors: *F. Venn & Co.*, agents for *Walter Moon*, Town Clerk, Liverpool (for the appellants); *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the respondents).

[Reported by LESLIE CARNEGIE, Esq., Barrister-at-Law.]

GEORGE LEGGE & SON, LTD. v. WENLOCK CORPORATION.

[COURT OF APPEAL (Slessor, Romer and Greene, L.J.J.), **November 9, 10, 11, 1936.**]

Sewers and Drains—Natural watercourse—Discharge of sewage—Illegal discharge—Conversion of watercourse into sewer—Public Health Act, 1875 (c. 55), s. 4—Rivers Pollution Prevention Act, 1876 (c. 75), s. 3.

A channel, for the greater part of its length in a covered culvert, ran through the plaintiffs' land. Originally the channel was a natural stream or watercourse, but at various times since 1876 sewage had been discharged into it. It was admitted that for at least 23 years before the pleadings in this action (i.e., from 1909) some 20 houses had been drained into the channel and it was contended that such houses had acquired prescriptive rights of so discharging sewage into it. A further 44 houses had commenced discharging sewage into the channel at times subsequent to 1925. It was contended that the discharge of sewage into what was admittedly a natural stream at the time of the passing of the Rivers Pollution Prevention Act, 1876, being an offence under that Act, could not convert the stream or channel into a sewer within the meaning of the Public Health Act, 1875:—

HELD: since the passing of the Rivers Pollution Prevention Act, 1876, a natural watercourse cannot in law be turned into a sewer by the discharge of sewage into it.

[EDITORIAL NOTE.] In the court of first instance it was thought that a stream was not necessarily prevented from becoming a sewer by reason of the fact that the discharge of sewage into a stream was made illegal by statute. The Court of Appeal have felt themselves bound by authority (namely, the case of *Airdrie Magistrates v. Lanark County Council* (1)) to hold the contrary view that a natural stream cannot now be converted into a sewer by the discharge of sewage into it.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 25, Sewers and Drains, p. 724, para. 1237; and FOR CASES, see DIGEST, Vol. 41, pp. 7-9, Nos. 45-59.]

Cases referred to:

- (1) *Airdrie Magistrates v. Lanark County Council, Coatbridge Magistrates v. Lanark County Council*, [1910] A.C. 286; 41 Digest 8, 52.
- (2) *West Riding of Yorkshire Rivers Board v. Reuben Gaunt & Sons, Ltd.* (1902), 67 J.P. 183; 41 Digest 9, 57.
- (3) *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo, Scarlet & Colour Dyers, Ltd.* (1902), 67 J.P. 80; 41 Digest 9, 58.
- (4) *A.-G. v. Lewes Corpn.*, [1911] 2 Ch. 495; 41 Digest 9, 55.
- (5) *Midlothian County Council v. Pumpherston Oil Co. & Oakbank Oil Co.* (1903), 41 Sc. L.R. 181; 19 Digest 156, 1074 vi.
- (6) *Hulley v. Silversprings Bleaching Co.*, [1922] 2 Ch. 268; 19 Digest 63, 361.
- (7) *Green v. Matthews*, [1930] W.N. 35; Digest Supp.
- (8) *Falconar v. South Shields Corpn.* (1895), 11 T.L.R. 223; 41 Digest 9, 56.
- (9) *St. Matthew, Bethnal Green, Vestry v. London School Board*, [1898] A.C. 190; 41 Digest 14, 100.
- (10) *Kershaw v. Taylor*, [1895] 2 Q.B. 471; 41 Digest 14, 107.
- (11) *Holland v. Lazarus* (1897), 61 J.P. 262; 41 Digest 14, 98.
- (12) *Stollmeyer v. Trinidad Lake Petroleum Co.*, [1918] A.C. 485; 44 Digest 19, 106.

- (13) *Newcastle-upon-Tyne Corpn. v. Houseman* (1898), 63 J.P. 85; 41 Digest 8, 48.
- (14) *Wilkinson v. Llandaff & Dinas Powis Rural Council*, [1903] 2 Ch. 695; 41 Digest 7, 40.
- (15) *Geen v. St. Mary, Newington, Vestry*, [1898] 2 Q.B. 1; 14 Digest 14, 99.

APPEAL from a judgment given by CROSSMAN, J., on July 31, 1936. and reported in [1936] 2 All E.R. 1367.

The plaintiffs were owners of land in Madeley, in the borough of Wenlock. Through that land ran a channel from Madeley to the River Severn, for most of its length in a covered culvert 60 ft. below the ground. The plaintiffs sought a declaration that this channel was a sewer vested in and repairable by the defendants. They said that the channel was originally a natural stream or watercourse, but that, by reason of the discharge of sewage into it, it had changed its status and become a sewer and that this had happened since the covered culvert was constructed, that being since the passing of the Rivers Pollution Prevention Act, 1876. The local authority contended in their defence that the channel was a natural stream or watercourse; that certain storm-water drains, which had existed for at least 23 years, discharged into the channel; that sewage from about 20 houses had been discharged into these drains for upwards of 23 years, that the owners had prescriptive rights to discharge it and the local authority could not prevent them from doing so; that certain new houses also discharged sewage through surface drains into the channel, but that this discharge was not such as would affect or deteriorate the purity or quality of the water or substantially increase its flow. The local authority further said that in 1930 the culvert had become blocked and caused an overflow which did certain damage, this, it was alleged, being due to the default of the plaintiffs in not keeping the culvert in repair, and they counterclaimed £965 10s. 3d. for work done in repairs.

In the plaintiffs' reply and defence to counterclaim, para. 5 (c), they said that at the time when the culvert was covered it was a natural stream or watercourse and that the amount of sewage discharged into it at that time was not sufficient to change its status to that of a sewer; that this change of status by discharge of sewage took place subsequently, at a time difficult to estimate with exactness, but during the 23 years referred to in the defence; and that upon that change taking place the liability to repair the culvert and inspection shafts fell upon the corporation under the Public Health Act, 1875, s. 13.

At the hearing of the action before CROSSMAN, J., counsel for the defendant authority submitted that in law, since the passing of the Rivers Pollution Prevention Act, 1876, a stream or watercourse could not, by reason of the discharge of sewage into it, become a sewer within the meaning of the Public Health Act, 1875. As the establish-

ment of this proposition would have destroyed the plaintiffs' claim, the learned judge, with the consent of both parties, made an order under R.S.C., Ord. 34, r. 2, to have the following question of law argued before hearing more evidence :

Whether the change of status from a natural stream to a sewer within the meaning of the Public Health Act, 1875, claimed in para. 5 (c) of the reply and defence to counter-claim to have taken place, is in law possible ?

This question CROSSMAN, J., answered in the affirmative.

The relevant sections of the Public Health Act, 1875, provide as follows :

(13) All existing and future sewers within the district of a local authority . . shall vest in and be under the control of such local authority.

(15) Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.

(17) Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake.

(4) "Sewer" includes sewers and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

The "aforesaid" interpretation of "drain" is in effect a drain which drains one building only.

The Rivers Pollution Prevention Act, 1876, ss. 3, 20, read as follow :

3. Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act.

20. "Stream" includes the sea to such extent, and tidal waters to such point, as may . . . be determined by the Local Government Board. . . . Save as aforesaid, it includes rivers streams canals lakes and watercourses, other than watercourses at the passing of this Act mainly used as sewers, and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid.

Tyldesley Jones, K.C., Charles Harman, K.C., and Wilfrid Hunt for the appellants.

Alexander Grant, K.C., Trustram Eve, K.C., and G. D. Squibb for the respondents.

Tyldesley Jones, K.C. : The 1876 Act imposes an absolute prohibition against the discharge of sewage matter into a stream. Since that year no discharge of sewage in violation of this Act can convert a natural stream into a sewer. "Stream" and "sewer" are mutually exclusive : a watercourse cannot at the same time be a sewer within the meaning of the 1875 Act and a stream within the meaning of the Act of 1876.

The provisions of the 1876 Act may be enforced by the sanitary authority of the district or of any other district through which the polluted river flows, or by the county council, or by any person aggrieved.

The right to pollute a stream cannot be acquired by prescription : *Midlothian County Council v. Pumpherson Oil Co.* (5). In the present case the question presupposes the discharge of sewage after 1876, and therefore there can be no prescriptive right dating from before 1876. No rights can be acquired since 1876 in face of the statutory prohibition.

A lost grant cannot be presumed where such a grant would have been in contravention of a statute, and as title by prescription is founded on the presumption of a grant, if no grant could lawfully have been made, no presumption of the kind can arise : *Hulley v. Silversprings Bleaching Co.* (6), *Green v. Matthews* (7). A natural stream cannot be converted into a sewer by the mere discharge into it of sewage, no matter in how great a quantity. The discharge of sewage which is here relied upon as having converted a stream into a sewer was illegal and could have been stopped at any moment. In *Airdrie Magistrates v. Lanark County Council* (1), the appellants, relying on *West Riding of Yorkshire Rivers Board v. Gaunt & Sons* (2), alleged that the burns and streams there in question were not "streams" within the Act, in respect that at the passing of the Act they were mainly used as sewers. It was held by the House of Lords that they were "streams" and not "water-courses mainly used as sewers" within the meaning of the Act.

The EARL OF HALSBURY stated that *Gaunt's* case (2) appeared to have been perfectly rightly decided and that the argument founded upon it was founded upon an entire misapprehension of what it decided.

Gaunt's case (2) contains an express statement by LORD ALVERSTONE, L.C.J., that after 1861 a stream cannot be converted into a sewer by discharge of sewage. That case was an appeal from a prosecution before quarter sessions under the West Riding of Yorkshire Rivers Act, 1894, s. 14 (2), the provisions of which are similar to those of the 1876 general Act. The respondents, who had discharged a manufacturing effluent into a watercourse, contended that it had become a channel for the conveyance of sewage. The King's Bench Divisional Court held that, though a stream of which the original supply of water has been cut off may become a "sewer" into which certain persons may acquire a right of drainage, the mere fact that sewage has been discharged for a number of years into a watercourse so that the watercourse has been polluted is not of itself sufficient to turn the watercourse into a sewer. The statement of LORD ALVERSTONE, L.C.J., at p. 184, is not a mere *dictum*, as the learned judge says, but a most important part of the case. The divisional court sent the case back to quarter sessions with a direction to consider, among other things, the material dates, which

could only have been relevant if the statement was a necessary part of the judgment: that since 1861 a stream cannot be made a sewer by the discharge of sewage.

In *Falconar v. South Shields Corporation* (8) the sole question at issue, whether the Dean Burn was or was not a sewer, was treated as a question of fact. A stream under the Act of 1876 and a sewer under the Act of 1875 are mutually exclusive: *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo, Scarlet & Colour Dyers, Ltd.* (3). SWINFEN EADY, J., decided in *A.-G. v. Lewes Corporation* (4) that the discharge of sewage into the channel of an intermittent stream may have the effect of converting it into a sewer, although the flow of pure water is not cut off.

[Counsel distinguished *St. Mathew, Bethnal Green, Vestry v. London School Board* (9), *Kershaw v. Taylor* (10) and *Holland v. Lazarus* (11), which illustrate circumstances in which a drain may become a sewer within the meaning of the Metropolis Management Act, 1855, by reason of unlawful acts.]

Harman, K.C., following for the appellants: The channel cannot be made to vest in the local authority through illegal acts done by the local authority, for it cannot obtain a prescriptive right to do them. The only way in which a wrongful act against another can become a legal act is for the doer to do it long enough to acquire a prescriptive right. No such right can be acquired over a stream. Nothing short of a prescriptive right will pass the property; the degree to which the act is done is immaterial. The learned judge decided this case on the view that this channel was both a stream and a sewer. Since 1876 it cannot be both, for if it could, then one riparian owner could sue the local authority for putting sewage into it and another riparian owner could sue the authority for not allowing him to put sewage into it. The learned judge gave as the only reason for his judgment that the question was concerned with a sewer within the meaning of the Public Health Act, 1875, and that he could see no sufficient reason for excluding from the meaning of "sewers" in that Act a channel which had in fact become a sewer in the ordinary sense of the term by reason of the discharge of sewage into it. The Act of 1876 was intended to supplement and strengthen the Act of 1875, and not to be construed separately from it, as the learned judge, at least in part, has done. Even if the relevant passages in *Gaunt's* case (2) and the *Airdrie* case (1) were *dicta*, they were *dicta* of very experienced judges and the learned judge ought to have attached more weight to them. They were, on the contrary, statements necessary for the decision of those cases. In the *Airdrie* case (1) it was sought to persuade the court that *Gaunt's* case (2) decided that a stream could become a sewer by discharge of sewage. LORD LOREBURN, L.C., said that if *Gaunt's* case (2) decided that, it was wrong,

but he did not think it did. That was the only question on which *Gaunt's* case (2) was relevant to his decision. That conclusion of LORD LOREBURN, L.C., that a stream cannot become a sewer under the Public Health Act, 1875, by discharge of sewage into it, is the law. A stream can only cease to be a stream by becoming a sewer, and the only relevant fact is whether it has ceased to be a stream. The courts have held that it must be either a stream or a sewer. The object of the Act of 1876 was to rescue from the filthy state into which they had fallen streams mainly used as sewers which did not discharge into the sea.

Grant, K.C. : This is a natural stream : *Stollmeyer v. Trinidad Lake Petroleum Co.* (12). In the Act of 1875 "drain" has the narrowest but "sewer" has the widest possible meaning. The court should consider the question from the point of view merely of what sewers vest in the local authority and what do not. This channel, previously a natural stream, became to all intents and purposes during the last 26 years nothing but a sewer, carrying at certain times of the year no water except the liquid which came with the sewage, and at time carrying large volumes of storm water. A channel can become a sewer not only by the unlawful discharge into it of polluting matter, but also by the lawful discharge into it of storm water, drainage from land, and the like. For a channel to be a sewer it is not necessary for it ever to carry polluting matter. All drains, except one-house drains, are sewers, and all the water which flows in them is sewage. If the plaintiffs can show that the water which for 23 years came down this channel was sewage in this wide sense—the drain water of the district—then the stream has become a sewer. Even if it carried no polluting matter, the stream would become a sewer if the liquid which ran in it changed almost entirely from fresh water to liquid supplied by sources falling within the definition of a sewer. It is a question of degree. If a stream has no supply except liquid which has passed through houses or over roadways, then it is a sewer within the meaning of the Act. It is possible in law for a stream to be changed, by the passage of non-polluting water, into a sewer without contravening the Act of 1876. The relevant Act here is the 1875 Act, which gives sewers a legal definition. "It is impossible to form a 'sewer' without the construction of any artificial work" : per BYRNE, J., in *Newcastle-upon-Tyne Corporation v. Houseman* (13) at p. 87.

In *Wilkinson v. Llandaff, etc., Council* (14) an open channel by the side of a road, vested in the local authority, and made for the purpose of carrying off the surface water from the road and into which sewage from one house escaped, was held that the channel was a sewer within the meaning of the Public Health Act, 1875, s. 4.

ROMER, L.J. : Is there any case which decides that a river or natural stream which at one time is not a sewer becomes a sewer by the artificial discharge into it of surface water ?

Grant, K.C. : I do not know of any, but a channel can be a sewer when the water put into it is partly innocuous and partly polluting sewage.

SLESSER, L.J. : The pleader was using, in para. 5 (c) of the reply, the word "sewage" in its ordinary modern sense, to mean the discharge of foul matter.

Grant, K.C. : In the *Llandaff* case (14), ROMER, L.J., said of the channel in question that it did not follow that, because the channel was a sewer, any inhabitants of the district could use it for sewage or fæcal matter. The Public Health Act, 1875, s. 17, merely repeats the prohibition which had already existed at common law against the pollution of a stream. A stream may be polluted with matter harmless to health, such as chalk or lime. In all the cases which have been cited, except one, evidence was allowed to be called for the purpose of showing that a stream had been converted into a sewer. In *Gaunt's* case (2), LORD ALVERSTONE, L.C.J., said as much at p. 184, in the passage cited by the appellants. The plaintiffs should be allowed to call evidence to prove that this water-course has for 23 years been treated by the sanitary authorities as a sewer and that persons have been allowed as of right to connect their drains with it, and therefore it has become a sewer.

ROMER, L.J. : Then the question of law ought to have been framed as follows : whether a sanitary authority can be estopped from denying that a natural stream may be changed into a sewer by the discharge into it of sewage.

Grant, K.C. : This channel is *de facto* a sewer, owing to the acts of the local authority, but the authority desires to escape from the consequences. This contention is supported by *Falconar's* case (8), which decided that a channel, being a sewer, vested in the local authority, who were entitled to do what they pleased with it ; but that case did not decide that, when the authority put sewage into a channel so that it was carried into a stream, they could not be stopped from doing so. It was held that no one could interfere to say that the channel was not a sewer. The Court of Appeal decided that case on evidence similar to that which the plaintiffs seek to bring, and it was not there suggested that evidence could not be called to show what had happened since 1876. [Counsel also referred to *Geen v. St. Mary, Newington, Vestry* (15), the *Bethnal Green* case (9), and *Kershaw v. Taylor* (10).]

SLESSER, L.J. : This case, which has been argued at some length, appears to me to fall within a very small compass, and there is no discourtesy to Mr. Grant or to Mr. Tyldesley Jones intended if I do not deal with all the difficult aspects of the interpretation of the Public Health Act, 1875, and the Rivers Pollution Prevention Act, 1876, which they have canvassed. The court was asked one specific question which

was to this effect : Whether the change of status from a natural stream to a sewer within the meaning of the Public Health Act, 1875, claimed in para. 5 (c) of the reply and defence to counterclaim to have taken place is in law possible? That question refers us to para. 5 (c) of the reply and defence to counterclaim, and it is there that we find the facts which are to be assumed in connection with the question which has to be considered ; and those material facts are as follows :

Before the year 1882 the channel referred to in para. 3 of the defence was a natural stream or watercourse not vested in or repairable by the then local authority, the Madeley Local Board. The amount of sewage discharged into it at that time was not sufficient to change its status to that of a sewer. That change of status by discharge of sewage took place subsequently at a time difficult to estimate with exactness, but during the 23 years referred to in para. 7 of the defence.

It appears clear at the outset that the facts of the case are these : that in the year 1875 and the year 1876, and for a considerable time thereafter, this stream was a natural stream or watercourse, and that during the last 23 years there has been discharged into it sewage ; and the question which has to be considered is whether this stream, having been a natural stream at the time of the passing of the Public Health Act, 1875, and the year 1876, can subsequently in law have become a sewer merely by the discharge into that natural stream or watercourse of sewage. The question seems therefore, as founded, to exclude a number of problems which were put before us by Mr. Grant. For example, Mr. Grant asked us to consider the fascinating problem whether a " sewer " in the wide sense of the word in which doubtless one is entitled to understand it under the definition of a " sewer " in the Public Health Act, 1875, s. 4, which is to the effect that it includes sewers and drains of every description except a specified excepted class of drain, was not wide enough to cover the case of mere surface water which would contain no noxious or polluting matter—storm water and the like—which may be washed down from the pipes during rain storms and be unpolluted, or the case of such rain water mixed, it may be, with noxious matter. In my view, the word " sewage " as used in the pleadings, and as used in the question to which the pleading is applied, refers to sewage or filthy water as appears in para. 5 of the statement of claim, where it is alleged that sewage or filthy water had been discharged, and in the sense in which I think it is used in the Rivers Pollution Act itself. I do not think, therefore, that this question of change of status was ever contemplated to have been a change of status caused by the discharge of clean drain water, but was dealing with what is commonly called " sewage " ; and I think the judgment of the learned judge proceeds entirely on that assumption. So that we may exclude from any question here asked the case which Mr. Grant says may in fact have been the case, that in large measure or possibly entirely this discharge into the natural stream was

sewage in that wide sense of being clean water brought by drains or pipes which according to the old definition of a "sewer" might be included as a "sewer." I think, as I say, that "sewer" there means noxious water as covered by the legislation of 1875 and 1876.

I propose to give a short judgment on this point, because I think it is directly covered by authority. In my view, as I understand the authorities, you cannot in law, after the passing of the Act of 1876, or possibly after the passing of the Act of 1861, which finds expression in the Act of 1875, dealing with the prohibition of polluted water being passed into watercourses, any longer say, however it might have been before that time, that a running stream of water can be turned into a sewer by the discharge of sewage into it. The authority for that proposition, and the principal authority which is binding upon us, and which I think concludes the question here in favour of the appellants is the case of the *Airdrie Magistrates v. Lanark County Council* (1). In that case there were a number of small streams which are called, I think, "burns," and they were watercourses or streams of a pure kind up to a certain time. It was complained that two public authorities were committing an offence under the Rivers Pollution Prevention Act, 1876, s. 3, because they had allowed sewage matter from their system of drains to go into the set of small streams. It was a complaint under that section to which I shall have to refer. Now, it appears that when the matter was before the Court of Session a number of defences were taken by the local authorities which were not persevered in when the case came to the House of Lords. It was contended, for example, that this sewage was not being discharged into a stream because the alleged stream was covered up and made a drain of, and so had ceased to be a stream. Then it was also argued that there was a prescriptive right to put sewage into the stream. With those matters I am not, however, here concerned, except to say that it was not possible to argue successfully that the mere fact that the stream was covered up and made a drain of ceased to make it a stream, and the Court of Session came to the conclusion that it still retained its character as a stream; and they finally concluded that "as the result of the inquiry"—I quote from the language of the LORD PRESIDENT after the matter had been sent back to the sheriff—"it left no doubt on my mind whatever that these streams are polluted by solid and liquid sewage matter." So the case stood when it was brought before the House of Lords, when Sir Alfred Cripps, appearing for the appellants, seems to have argued for the first time that no offence had been committed because the burns alleged to have been polluted are not streams but sewers, and there is no law against the pollution of sewers. The real point, therefore, is that the appellants contended that they did not pass polluted water into streams in the sense of the Act, but into sewers. The issue now is were the burns in question streams or sewers?

That is a matter to which their Lordships directed their attention, and LORD LOREBURN, L.C., is not very kind, perhaps, to that contention. He describes it as one of the most hopeless arguments he has heard for a considerable time. I think he also described it as ingenious. But he goes on to say this at p. 290 :

The Rivers Pollution Prevention Act of 1876 prohibits the pouring of sewage into streams. It defines "streams" so as to include all watercourses except "watercourses at the passing of this Act" (namely, 1876) "mainly used as sewers emptying directly into the sea or tidal waters." The obvious policy and the obvious effect of the Act is to stop the pouring of foul water into a stream, but it excuses this being done in certain circumstances, as for example if it was being done as long ago as 1876, and the best practicable means are now used to render it harmless.

He goes on to consider the argument I have mentioned, and he speaks of it thus, at p. 291 :

But what the appellants say is this : Permit us to prove that these burns are sewers, and if we can prove that they are sewers, surely it cannot be an offence to pour sewage matter into the sewers. My Lords, that is merely asking leave to prove that they have with or without the contribution of others committed in an aggravated degree the very offence with which they are charged.

Then follow these very important words :

The object of the Act is to prevent streams being turned into sewers, and this is what they propose to do and have done. My Lords, it is very likely indeed that these burns have been made so dirty that they are in fact such as commonly would be called sewers. I really do not know whether that be so or not.

Now, on that it seems to me that the declaration of the object of that Act being as is there said to prevent streams being turned into sewers, to hold that this stream which we have here to consider would be turned into a sewer by the discharge into it of noxious sewage matter, would be to do that which would defeat the object of the Rivers Pollution Prevention Act. I fully recognise that Mr. Grant points out that here we are not considering a complaint under the Rivers Pollution Prevention Act as such, but we are called upon by the question to consider whether by discharging sewage into a natural stream you can turn it into a sewer ; and I find it impossible to think that when it would be contrary to the Act dealing with rivers pollution to do that very thing, that that expression of opinion is not general enough to apply to the present case. To put it in the inverse way. If the answer to this question were that this stream had become a sewer through the discharge of polluted matter into it, then it would follow in my opinion that whenever sufficient polluted matter was passed into the stream, the person so passing it could avoid complaint or prosecution by urging that that natural water had become a sewer. Mr. Grant says it is a matter of degree, by which I suppose he means that if a little sewage matter was passed into a natural stream,

it would be possible to defend that action by pleading that it had become a sewer when it was in fact found not to be a sewer but still a natural stream ; but that if sufficient sewage were passed into that natural stream, then it became a sewer. That seems to me the very argument, although arising in a different manner, which was placed before the House of Lords and was rejected by LORD LOREBURN, L.C., and the EARL OF HALSBURY. Reference is made by LORD LOREBURN, L.C., in that case to *Gaunt's* case (2), which Sir Alfred Cripps appears to have cited as an authority in his favour. Speaking for myself, I think that *Gaunt's* case (2) is entirely consistent with the view expressed in the House of Lords in the *Airdrie* case (1). In *Gaunt's* case (2) the position was different in this sense, that it was found upon the facts that the original supply of water had been cut off, and that the stream, or part of it, had become a mere dry channel, thus differing from the facts stated in the present case, where at all material times there was a flowing stream ; and dealing with the case where there was a flowing, natural stream, LORD ALVERSTONE, L.C.J., uses these words in expressing a judgment on behalf of the whole court. He says, at p. 185 :

On the other hand, the mere fact that sewage has been discharged for a number of years into a watercourse, so that the watercourse has been polluted, is not of itself sufficient to turn the watercourse into a sewer. . . . Further, we think that after the passing of the Acts of 1861, 1875, and 1876, the local authority could not merely by the illegal act of discharging sewage into a watercourse make that watercourse a sewer.

Then in another case, the case of the *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo Scarlet & Colour Dyers, Ltd.* (3), LORD ALVERSTONE, L.C.J., says this at p. 81 :

I think he [counsel] is right if he means thereby that a stream does not become a sewer because sewage is put into it. If he says, I think it is a sewer because it consists solely of sewage, then I could have understood your point, but I understand him to say, I cannot find it to be a sewer because I think it is a stream.

Now, those remarks, " I think he is right, that a stream does not become a sewer because sewage is put into it," seems to me entirely consistent, with the greatest respect, with what his Lordship said in *Gaunt's* case (2).

Another case to which I would draw attention is the case of the *A.-G. v. Lewes Corpn.* (4). SWINFEN EADY, J., at p. 508, says :

The mere pollution of a natural stream or watercourse by turning sewage into it does not convert it into a sewer.

He deals then with the case of the river in that case which, he says :

From May to October it is certainly a sewer in the ordinary sense, receiving the sewage to which I have referred, and in my opinion receiving substantially nothing but sewage—

and he adds it is quite different from the case of sewage being led into a natural stream always flowing.

Those authorities all establish to my satisfaction that it is not possible now to say that a watercourse with water constantly flowing—not the case of a dry bed—can become a sewer by the discharge into it of sewage matter. That seems to me to conclude the case which we have here to consider. The consequences of such a decision—the fact that if this be not a sewer it does not vest in the local authority—is a matter which does not arise here. We are asked one specific question : Given a stream flowing since 1876 until 23 years ago without discharge of sewage, does the discharge of sewage into that stream possibly in law make it a sewer ? I think the learned judge was mistaken in his view when he said that in law there could be such a possibility ; but finally, with respect to the learned judge with whom I have the misfortune to differ, I think that the root of our difference is that he appears to have treated the observations of the court in *Gaunt's* case (2) and in *Airdrie's* case (1) from the point of view which we have here to consider them as mere *dicta*, and not essential to the decision of the case, and he comes to the conclusion that the matter is one *res integra*, and on the whole he says :

I think the question I have to answer is not covered by authority, and I have to consider it as such.

With every respect to him, I differ. I think this case is covered by authority, and that the authority compels me to give judgment in this case in favour of the appellants.

ROMER, L.J. : I agree, and although we are differing from the learned judge below, I shall not be thought wanting in respect to him if I say that for the reasons which SLESSER, L.J., has just given this case is, in my opinion, covered by the decision of the House of Lords in the *Airdrie* case (1), and that case constrains us to answer the question of law propounded to us in the negative.

GREENE, L.J. : I agree.

Appeal allowed with costs of appeal. Leave to appeal to the House of Lords.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *F. W. Derry*, Town Clerk, Wenlock (for the appellants) ; *Ford, Harris & Co.*, agents for *Leonard Gocher*, Birmingham (for the respondents).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

Re BULMER, *Ex parte* GREAVES *v.* COMMISSIONERS OF
INLAND REVENUE.

[CHANCERY DIVISION (Clauson and Farwell, JJ.), **November 2, 12, 1936.**]

Bankruptcy—Committee of inspection—Members—Limited company—Proxy—Fiduciary position.

G. had attended the meetings of a bankrupt's committee of inspection as the holder of a general proxy from a limited company, one of the bankrupt's creditors, which had been appointed a member of the committee. At the time of the receiving order, the bankrupt was entitled to certain shares which were pledged with a bank as security for a loan. G. purchased these shares from the bank and some of them he resold. It was sought to recover for the benefit of the bankrupt's estate such of the shares as G. retained and the proceeds of sale of such shares as G. had sold, on the terms of repaying to G. the price he had paid to the bank for the shares :—

HELD : (i) G. was under the duties and obligations of a member of a committee of inspection, and was therefore in a fiduciary position in relation to the bankrupt's estate and to those interested in the estate.

(ii) even though G. did not appreciate that there was any reason why he was not free to buy as an ordinary purchaser or that in fact the shares were shares which belonged to the estate, the shares retained by G. and the proceeds of the shares resold could be recovered for the benefit of the bankrupt's estate, upon the terms of repaying to G. the price he had to pay the bank for the shares.¶

[EDITORIAL NOTE.] The fiduciary relationship of a member of the committee of inspection has long been settled, but the facts of the present case are a little peculiar in that the member of the committee was such as a representative of a limited company. The decision in this case proceeds upon the footing that the representative of the company had deliberately placed himself in the position of a member of the committee and must therefore be treated as such. It may be that the questions how far a limited company can be a member of the committee of inspection and the rights and remedies as between a delegate-member and the company he represents are still to some extent open. They are not fully discussed in the present case.

AS TO THE POSITION OF MEMBERS OF THE COMMITTEE OF INSPECTION, see HALSBURY, Hailsham Edn., Vol. 2, p. 161, para. 214; and FOR CASES, see DIGEST, Vol. 4, pp. 241, 242, Nos. 2287-2299.]

Cases referred to :

- (1) *Re Geiger*, [1915] 1 K.B. 439; 4 Digest 229, 2146.
- (2) *Aberdeen Ry. Co. v. Blaikie Brothers* (1854), 2 Eq. Rep. 1281; 10 Digest 1176, 8339.
- (3) *Costa Rica Ry. Co., Ltd. v. Forwood*, [1901] 1 Ch. 746; 43 Digest 865, 3113.
- (4) *Bray v. Ford*, [1896] A.C. 44; 43 Digest 865, 3112.

APPEAL from Bradford County Court. The appellant, Mr. Greaves, had attended the meetings of the committee of inspection of Sir James Richard Bulmer as a holder of a general proxy from a limited company called Smith, Bulmer & Co., Ltd. Mr. Greaves had bought certain shares from the National Provincial Bank, Ltd., who were the legal owners

of the shares. The shares which the bank sold to Mr. Greaves were shares of which they had become possessed as creditors of Sir James Richard Bulmer. The respondents—the commissioners of inland revenue who were preferential creditors—had obtained an order in the county court requiring the appellant to account for the profit which he had made on the shares.

The receiving order against Sir James Richard Bulmer was made on Feb. 1, 1932, and he obtained his discharge on July 11, 1933.

W. N. Stable, K.C., and *C. N. Tindale Davis* for the appellant : To apply the ordinary rule in this case would be to penalise a man who did not know the particular facts. Mr. Greaves was not a member of the committee of inspection but he attended the meetings as the representative of a member. Even had he been a member, he did not purchase the equity of redemption which had been destroyed by the action of the bank. The bank was the legal owner of the shares when Mr. Greaves bought them and it never crossed his mind at the time that they were connected with the bankruptcy in any way, shape or kind. He had been ordered to account for the profit he had made but he must know, in order to be liable, the facts by which his duty and his interest are in conflict. [Counsel referred to *Costa Rica Ry. Co., Ltd. v. Forwood* (3); *Bray v. Ford* (4).]

Sir Gerald Hurst, K.C., and *Gerald Upjohn* for the respondents : The point is whether Mr. Greaves was, in Feb., 1934, in a fiduciary position. He was in such a position and owed a duty to the trustee and to the respondents. The learned county court judge's judgment ought to be upheld. [Counsel referred to *Bray v. Ford* (4); *Re Geiger* (1).]

Stable, K.C., in reply : There is a great deal of evidence that Mr. Greaves did not know the facts. There is no evidence that he knew anything about the charges which were given in Feb., 1924. Mr. Greaves had nothing to do with Sir William Bulmer's private financial matters in any way, shape or form.

CLAUSON, J. : This is the judgment of the court. This is an appeal from an order of the county court at Bradford made on the motion of the commissioners of inland revenue in the bankruptcy of Sir James William Bulmer, a bankruptcy which dates from 1932. The commissioners of inland revenue are admittedly creditors in the bankruptcy. At the date of the receiving order the bankrupt was entitled to 16,750 preference shares of 10s. each and 521,144 ordinary shares of 1s. each, all fully paid up, in the capital of a private company, Smith, Bulmer & Co., Ltd. The shares, together with certain policies of assurance belonging to the bankrupt, were all pledged to the National Provincial Bank, Ltd., as security for the sum of about £56,000 and stood at the commencement of the bankruptcy in the name of Branch Nominees, Ltd., as nominees

of the National Provincial Bank, Ltd. In due course the bank realised about £8,000 on the policies. In Jan., 1934, the bank sold 12,500 of the preference shares together with 150,000 of the ordinary shares to Alfred Greaves, the present appellant. The appellant has since resold part of the shares. By the motion upon which the county court judge made the order under appeal, it was sought to recover from the appellant for the benefit of the bankrupt's estate (a) such of the shares as the appellant still retains, (b) the proceeds of sale of such shares as the appellant has sold, on the terms of repaying to the appellant the price he paid to the bank for the shares which he bought from them. The county court judge has found this claim to be established and has made an order under which the appellant is to transfer to the trustee in the bankruptcy the shares which he still retains, and has to account for the proceeds of the shares sold, receiving back the price which he paid to the bank. No question arises either on the figures or on the exact terms of the county court judge's order, and it is not necessary to burden this judgment with any further details.

The question before this court is whether the county court judge was right in holding that the sale by the bank to the appellant is, as between the trustee and the appellant, a sale in respect of which the appellant must, on equitable principles, surrender for the benefit of the bankrupt's estate any advantage he has obtained. The bank is not before the court, and it is not now suggested that the efficacy of the sale can be questioned as between the bank and the appellant.

Early in the history of the bankruptcy a committee of inspection was appointed. The company, Smith, Bulmer & Co., Ltd., whose shares are in question, was a very large creditor of the bankrupt, and was ostensibly appointed a member of the committee, and has throughout acted as such through the appellant, who is chairman of the board of the company, and who holds the company's general proxy. It is unnecessary for the purposes of this case to consider whether on the true construction of the Act a limited company can be properly appointed a member of a committee of inspection; the company accepted the office and acted in regard thereto through the appellant. It was somewhat faintly suggested, both before the county court judge and in this court, that, in those circumstances, the appellant was not under the duties and obligations which by law attach to membership of the committee of inspection, but the county court judge, in our view quite properly, dealt with the matter on the footing that in the circumstances the appellant was under those duties and obligations. The appellant placed himself quite deliberately in the position of a member of the committee, and it is too late for him now to claim to be absolved from the duties and obligations attaching to that position.

That the members of a committee of inspection are in a fiduciary

position in relation to the bankrupt's estate and to those interested in the estate was emphatically stated by LORD COZENS-HARDY, M.R., some 22 years ago in *Re Geiger* (1), and must now be taken to be well settled, and it is scarcely necessary to refer in support of the proposition to sect. 20 of the Act of 1914, and to the rules, 347 and 348, which develop in plain terms the consequences flowing from membership of the committee of inspection. The fiduciary position which the appellant must thus be taken to have occupied at the time when he purchased the shares in question from the bank, shares which (subject only to the bank's rights as chargees) formed part of the bankrupt's estate, must, as it appears to us, necessarily result in this, that unless there is full disclosure to all concerned, or possibly the court's leave obtained on proper disclosure under some statutory provision, the appellant is precluded from entering into a transaction (such as the purchase now in question) in which he has a personal interest conflicting or capable of conflicting with the interest of those (in this case the persons interested in the bankrupt's estate) whom he is bound by fiduciary duty to protect. (See *Aberdeen Ry. Co. v. Blaikie Brothers* (2). That in the matter of the purchase the appellant's personal interest conflicted with the interest of the bankrupt's estate is obvious. The purchase put an end to the equity of redemption in the shares so purchased. It was the purchaser's interest to get the shares as cheaply as possible. It was to the interest of the estate that the best possible price should be secured towards diminution of the bank's claim against the estate.

There is one point made by the appellant on which comment is necessary. It was said that the purchase was in fact made, and was found by the county court judge to have been made, in innocence, and without the appellant appreciating either, first, that there was any reason why he was not as free to buy as any ordinary purchaser, or, secondly, that in fact the shares were shares which (subject to the bank's rights) belonged to the estate. His failure (which we are quite prepared to accept as established) to appreciate the peculiar position in which he stood in regard to the matter, while it absolves him from any suspicion or moral obliquity is, as it appears to us, irrelevant. A person whom the court finds to be in a fiduciary position must suffer the disabilities of that position whether he does or does not know the consequences of his position in the eyes of the law. But the question whether he in fact knew that the purchased shares formed part of the estate is not necessarily immaterial. If he knew the fact the court would, in our judgment (though it is not necessary for the purposes of the present case so to decide), treat him as a trustee of the shares as from the date of purchase, and (subject only to his lien for the price paid) would call upon him to hand over any shares which he had not realised and to replace any shares which he had realised. If he did not know that the shares formed part

of the estate, the court while requiring him (subject to his lien for the price paid) to hand over shares retained, would not call upon him to replace the shares realised while he was in this state of ignorance ; it would be content to require him to account for the purchase money actually received for the shares which he resold. His ignorance would absolve him from blame for reselling the shares, and would protect him from the full measure of relief which the court would have exacted had he throughout known the facts. But as soon as the facts are drawn to his attention it is against conscience for him to retain the benefits which he has acquired by an act which, on ascertaining the facts, he must be taken to know to be unconscientious, and the court purges his conscience by taking from him the profits actually made.

In the present case such relief only is claimed against the appellant as the trustee in bankruptcy is entitled to if the appellant at the time of purchase did not know that the shares formed part of the estate ; and it is not necessary to examine whether the appellant in fact so knew. The county court judge seems to have found that the state of the appellant's knowledge at the time of the purchase was such that if he had given his mind seriously to the matter he would have appreciated that the shares did in fact form part of the estate ; and the judge seems to have drawn the conclusion that the appellant's duty towards the estate was in the circumstances the same as if his mind had been alive to the facts. It is unnecessary for this court to reach a conclusion on either of these points, since the appellant undoubtedly knows the facts now, and therefore cannot conscientiously retain the advantages which he has obtained by the purchase and by reason of the county court judge's order must surrender.

In our judgment the order against which this appeal is brought was correct and the appeal must be dismissed with costs. The appellant may have leave to appeal if he so desires.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Greaves & Greaves*, Bradford (for the appellant) ; *Helliwell & Co.*, agents for *John R. Farrar*, Halifax (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

NEWCASTLE-UPON-TYNE CORPORATION AND OTHERS v. RAILWAY ASSESSMENT AUTHORITY AND OTHERS.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Russell of Killowen and Lord Maugham), **November 13, 16, 17, 1936.**]

Rates—Railway—Railway hereditament—Bridge constructed under statutory authority—Two decks—Upper deck carrying railway—Lower deck carrying roadway—Railways (Valuation for Rating) Act, 1930 (c. 24), s. 1 (3).

A railway company, in pursuance of a statute, constructed over a river a bridge consisting of an upper deck carrying a railway and a lower deck carrying a roadway for use by the public for vehicular and pedestrian traffic on payment of tolls. The construction of the roadway was a condition imposed on the company by the statute empowering the company to construct the bridge. The question raised was whether the roadway formed a "railway hereditament" or part of a "railway hereditament" within the meaning of the Railways (Valuation for Rating) Act, 1930, s. 1 (3):—

HELD: (i) as the railway company was given statutory authority to construct the bridge only on condition that the company also constructed and maintained the toll-bearing road deck, it followed that the maintenance and the carrying on of the road deck was either an incidental and necessary part of the company's principal undertaking, or was an undertaking subsidiary or ancillary to its principal undertaking.

(ii) on either view, therefore, the road deck was a hereditament occupied for the purpose of the company's undertaking and was thus a railway hereditament within the meaning of sect. 1 (3) of the Act of 1930.

[EDITORIAL NOTE.] The question here is the meaning and extent of the term "railway hereditament" in the recent legislation as to the rating of railways. It would appear that wherever a railway company is required by statute to construct a work not necessary for its undertaking as a condition upon which the right to construct a work necessary for its undertaking is granted, then the first work is within the definition of a railway hereditament.

FOR THE RATING OF RAILWAYS, see HALSBURY, Supp., Rates and Rating, paras. 50-58; and FOR THE RAILWAYS (VALUATION FOR RATING) ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 455. The section was considered in another connection in *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E.R. 322.]

APPEALS direct from an order of the Railway and Canal Commission Court on questions of law by virtue of the Railway and Canal Traffic Act, 1888 (as amended) and the Railways (Valuation for Rating) Act, 1930, s. 9 (4).

The Railway Assessment Authority had entered the lower or road deck of the bridge in the valuation roll as a hereditament "other than industrial and freight transport hereditaments," and the upper or railway deck as a "freight transport hereditament." The appellants thereupon appealed to the Railway and Canal Commissioners, contending that the lower or road deck, although properly treated by the Railway Assessment Authority as a separate hereditament in itself and not part of the hereditament consisting of the upper or railway deck, was

not a railway hereditament within the meaning of the Act of 1930 and ought to be excluded altogether from the valuation roll. The Railway and Canal Commissioners dismissed the appeal on the ground that the lower deck of the bridge was occupied by the railway company as part of their statutory undertaking and was therefore occupied for the purposes of their undertaking of a railway company. Thereupon these appeals were brought. The facts are fully set out in the judgment of LORD BLANESBURGH.

F. J. Wrottesley, K.C., and J. Charlesworth for the appellants.

Erskine Simes for the respondents, the Railway Assessment Authority.

Walter Monckton, K.C., A. M. Trustram Eve, K.C., and Alfred Tylor for the respondents, the London & North Eastern Railway Company.

LORD BLANESBURGH: My Lords, the question which upon this appeal your Lordships are called upon to determine is whether the lower deck of the high level bridge spanning the River Tyne between Newcastle and Gateshead, and consisting of a roadway, for the use of which tolls are chargeable and are charged by the respondents, the London & North Eastern Railway Company, to whom the whole bridge belongs, is or forms together with the toll houses thereon a railway hereditament or part of a railway hereditament within the meaning of the Railways (Valuation for Rating) Act, 1930, s. 1.

The respondents, the Railway Assessment Authority—I will refer to them in what follows as the authority—are the body charged by that Act with the duty (amongst other things) of apportioning amongst all the railway hereditaments in England occupied by a railway company to which, like the respondent company, the Act applies, the net annual value of the company's undertaking as a whole in so far as it is carried on in England; and it is necessary for the authority in performing that duty to determine whether any hereditament is a railway hereditament as defined in the section referred to. And in the case of the lower deck of the high level bridge referred to, the authority has determined that it is such a hereditament. That determination, however, was challenged by the appellants, the Corporation of Newcastle and the Corporation of Gateshead, the respective rating authorities in the rating areas in which the high level bridge is situate, and these corporations, aggrieved by the finding of the authority, duly appealed against it to the Court of the Railway and Canal Commission. The commissioners, agreeing with the authority, dismissed the appeal, and against their order of dismissal the present appeal is brought.

It will be convenient before adverting to the section of the Act of 1930, upon which the question at issue ultimately depends, to make some inquiry into the origin of the bridge in question. It was constructed by the Newcastle & Berwick Railway Company in pursuance of the

Newcastle-upon-Tyne and Berwick Railway Act, 1845. That company was the predecessor of the respondent company, the London & North Eastern Railway Company. Sundry provisions of the Act of 1845 invite attention. It may be useful, for example, to note the sense in which the words "the undertaking," are used in the Act to which the bridge owes its origin. This appears from sect. 1 of the Act, which incorporates the Companies Clauses Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. These incorporated Acts contain the following definitions of the expression "the undertaking." The Companies Clauses Act, 1845, s. 2, provides that :

the expression "the undertaking" shall mean the undertaking or works, of whatever nature, which shall by the special Act be authorised to be executed.

The Lands Clauses Consolidation Act, 1845, s. 2, provides that :

the expression "the works" or "the undertaking" shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorised to be executed.

The Railways Clauses Consolidation Act, 1845, s. 2, provides that :

the expression "the undertaking" shall mean the railway and works, of whatever description, by the special Act authorised to be executed.

The bridge itself is first referred to in sect. 20 of the Act ; by that section the Newcastle & Berwick Railway Company were authorised to make certain railways, including a railway passing across the River Tyne by means of a bridge. Sect. 23, so far as it is material, provides :

That for the purpose of carrying the said railway across the River Tyne it shall be lawful for the said company and they are hereby required to construct and maintain a bridge across the River Tyne, with such piers, abutments, approaches, and other works as may be necessary for the purposes thereof—

and then, after some intervening words which are not for this purpose material, the section goes on :

and the said company shall so construct the said bridge as that the same shall be available not only for the purpose of carrying the said railway across the said river, but also for providing a roadway for the passage of passengers, horses, cattle, and carriages across the said river.

Then sect. 26 of the Act—again so far as is material—provides :

That the company hereby incorporated shall commence the works of the said bridge by this Act authorised to be made within 9 months after the passing of this Act and shall proceed with such works with all reasonable despatch, . . . and in case the said bridge and roadway shall not be completed and open for the passage, not only of the said railway, but also of passengers, horses, cattle, and carriages, within 4 years after the passing of this Act, it shall be lawful for the mayor, aldermen, and burgesses of the borough of Newcastle-upon-Tyne, and for the mayor,

aldermen, and burgesses of the borough of Gateshead, in case they shall see fit, to complete the said bridge, and to recover from time to time against the said company in a summary way . . . all and every such sum and sums of money as they shall expend in the completion of the said bridge.

Then by sect. 37 of the same Act the company were authorised to demand and take in respect of all passengers, animals and carriages which should pass along or across such part of the bridge as might be appropriated for a roadway any tolls or sums not exceeding those in sect. 37 specified.

Now, whatever may be said about the Act of 1930 as applied to the bridge now in question, there can, I think, be no doubt that under that Act of 1845 the roadway which the company thereby incorporated was required to construct, with the tolls the company was authorised to levy, was an integral part of the railway undertaking thereby authorised. The railway bridge was by the Act authorised only on the terms that a roadway for the public benefit was constructed as part of it. The tolls which the company was authorised to levy in respect of that roadway, while a return for the public service rendered, went to increase the general revenue of the company's whole undertaking. The company was left at liberty under that Act to incorporate the roadway in the railway bridge as it thought fit, and the roadway which it ultimately constructed, being always, along with the railway, known as the high level bridge, is thus described in their case by the appellants :

The bridge consists of an upper deck which is exclusively used for carrying a railway across the River Tyne and a lower deck which is exclusively used for carrying a roadway, consisting of a carriageway in the centre and two footpaths, one on each side of the carriageway. At each end of the lower or road deck is a toll house to enable the railway company, in exercise of their statutory powers in that behalf, to collect tolls from persons and vehicles crossing the said river by the lower or road deck. . . . the bridge is as to its northern half in Newcastle-upon-Tyne and as to its southern half in Gateshead. In Newcastle-upon-Tyne, from 1850 onwards, the halves of the upper and lower decks situate in Newcastle-upon-Tyne have been assessed as separate hereditaments. In Gateshead, until 1925, the half of the bridge situate in Gateshead was assessed as one hereditament, but from 1925 onwards the upper and lower decks were separately assessed. As from Oct. 1, 1929, . . . in both Newcastle-upon-Tyne and Gateshead the upper deck (which carried the railway) was inserted in the special list as a freight transport hereditament. In both Newcastle-upon-Tyne and Gateshead the assessment of the lower deck (which carried the roadway) remained unaltered.

With this preface, we may now come to the Act of 1930. With regard to it, I need not detain your Lordships by any description of the somewhat elaborate procedure, which here in the result ended in the published pronouncement of the authority already indicated, namely, that while regarding the upper and lower decks of the bridge as separate hereditaments they treated both as a railway hereditament or hereditaments or as a part or parts thereof ; each deck, in other words, and not the

upper deck only, being a hereditament within the purview of the Act of 1930. Against this, pursuant to sect. 9 (2) of that Act, the two corporations filed applications by way of appeal to the commissioners on the ground (amongst other things) that the lower deck of the bridge had been incorrectly treated by the authority as a railway hereditament or part of one. And that is the one question for your Lordships' decision. It turns upon the true effect of sect. 1 (3) of the Act of 1930, to which we now proceed. That subsection is as follows :

For the purposes of this Act—"railway company" means (except in the first schedule to this Act) a railway company to which this Act for the time being applies; "undertaking" in relation to a railway company includes, in addition to the principal undertaking of the company—(a) any canal, dock or harbour undertaking carried on by the company; (b) any subsidiary or ancillary undertaking carried on by the company, not being a road-transport, sea-transport or air-transport undertaking; and (c) the share of the company in any joint undertaking carried on by, or on behalf of, two or more railway companies not being a road-transport, sea-transport or air-transport undertaking; but, save as aforesaid, does not include the share of the company in any joint undertaking; "railway hereditament" means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company: provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament.

Now, my Lords, I agree with MACKINNON, J., who has analysed this definition clause with great fulness, that the expression "railway hereditament," no less than the word "undertaking" in connection with which it has to be read, is in this section an expression of the widest content. In its application to what I may call the roadway it is, I think, difficult, with the Act of 1845 in mind, to reach any conclusion other than that the roadway is part of the "principal undertaking" of the company and is a hereditament occupied for the purpose of that undertaking in the fullest sense of that word. And if objection be taken to that construction which seems to me best to accord with the provisions of the section as a whole, then I am prepared to hold that the roadway undertaking is an undertaking "subsidiary or ancillary" to the "principal" or railway undertaking of the respondent company. The provisions of the Act of 1845 again, as I think, point to that conclusion. But it may be reached without assistance from that statute. It was indeed suggested for the appellants that this roadway undertaking was in the nature of a competitive rather than an ancillary or subsidiary undertaking, and a neighbouring toll bridge over the Tyne was instanced as being competitive. And so may such a bridge well be when in other hands, as your Lordships were told the neighbouring bridge was. But if you find that such a bridge in other hands is competitive, you go, I think, a long way towards showing that in the same hands it might become either ancillary or subsidiary.

My Lords, I do not further explore the case, although there was much in Mr. Wrottesley's argument that invites further comment. In my judgment, however the problem be regarded, the concurrent solution of the authority and the commissioners is correct, and this appeal should, I think, be dismissed with costs. And I move your Lordships accordingly.

LORD RUSSELL OF KILLOWEN: My Lords, I agree. If, as was the case here in regard to the predecessor in title of the London & North Eastern Railway Company, a company is given statutory authority to carry on a railway undertaking on condition that it shall make, maintain and carry on a toll-bearing road deck as part of a bridge which is to carry its railway across a river, then in my opinion it maintains and carries on that road deck either as an incidental and necessary part of its principal undertaking or as an undertaking subsidiary to its principal undertaking. On either view, the road deck now in question is a hereditament occupied for the purpose of the undertaking of the London & North Eastern Railway Company within the meaning of the word "undertaking" as stated in the Railways (Valuation for Rating) Act, 1930. The road deck is therefore a railway hereditament within the definition contained in sect. 1 of that Act. The road deck was accordingly properly included in the valuation roll, and this appeal must fail.

LORD MAUGHAM: My Lords, I am of the same opinion. The question depends upon the true construction of the Railways (Valuation for Rating) Act, 1930, s. 1. The question is whether the word "undertaking" in relation to the London & North Eastern Railway Company includes the whole of the high level bridge which spans the River Tyne. Along the upper deck of the bridge the railway is carried. Does the undertaking of the company include the lower deck along which there is a roadway for the use of foot passengers and carriages, and for which tolls are charged? There are, I think, two factors in the case which must lead us to this conclusion. First, the railway company not only was empowered but was required so to construct the bridge:

as that the same shall be available not only for the purpose of carrying the said railway across the said river, but also for providing a roadway for the passage of passengers, horses, cattle, and carriages across the said river.

Those are the final words of the Newcastle and Berwick Railway Act, 1845, s. 23, the section by which the railway company was authorised and required to construct the bridge across the Tyne. The second factor is that the lower deck is structurally so connected with the upper deck that no physical separation is possible. In London an illustration of a bridge holding the same position is the case of Hungerford Bridge. Would any ordinary person who was acquainted with and who

used that bridge have any doubt that it formed part of the railway undertaking of the present Southern Railway?

My Lords, that is sufficient to dispose of the present appeal, but I think it right to add that if I were in doubt on that point I should be of opinion that the road bridge was a "subsidiary undertaking" within the meaning of the section under consideration. The main argument against that view presented by Mr. Wrottesley in his ingenious address was that if so the legislature might have used the word "other" instead of using the words "subsidiary or ancillary." My Lords, the fact that two long words are used by the legislature where one shorter word would do is a very unsafe guide to the construction of the statute. The contention certainly does not constrain us to hold that the word "subsidiary" has precisely the same meaning as the word "ancillary." For my part, I see no reason for thinking that the word is used in any special or limited sense. Its ordinary meaning, in the context which we have here, is "subordinate or secondary to the main or principal undertaking," and in my opinion it has that signification in sect. 1.

My Lords, I agree with the motion that has been proposed and with the reasons which your Lordships have given in support of it.

Appeal dismissed with costs.

Solicitors: *Collyer-Bristow & Co.*, agents for *Sir Arthur M. Oliver*, Town Clerk, Newcastle-upon-Tyne (for the appellants); *Torr & Co.* (for the respondents, the Railway Assessment Authority); *I. B. Pritchard* (for the respondents, the London & North Eastern Railway Company).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

Re KNOX, FLEMING *v.* CARMICHAEL.[CHANCERY DIVISION (Luxmoore, J.), **October 21, 1936.**]*Charities—Charitable trust—Will—Gift to institution which never existed—Charitable intention—Cy præs.*

By her will a testatrix gave the residue of her personal estate in equal shares to four named beneficiaries. Three of the beneficiaries were charitable institutions within the strict meaning of the term. The fourth, a "nursing home," did not exist and never had existed. The receipt of the "treasurer" for the time being of the "aforesaid institutions" was to be a sufficient discharge to the executor of the will. A summons was taken out to determine whether the gift of the quarter share of the residuary personal estate should be applied *cy præs* or whether it devolved as upon an intestacy:—

HELD: although the fourth named beneficiary might or might not have been a charity, upon the facts and a construction of the whole will the testatrix had a general charitable intention in mind, and the gift ought to be applied *cy præs*.

[EDITORIAL NOTE.] The court here finds a general charitable intention in the fact that the properly named institutions are in fact charities and that the institution intended to be benefited by the uncertain gift was one having "a treasurer for the time being" and therefore carried on in the manner and for the purposes customary in the case of institutions which are charitable in the legal sense.

AS TO THE *CY PRÆS* DOCTRINE, see HALSBURY, Hailsham Edn., Vol. 4, pp. 221-229, paras. 323-338; and FOR CASES, see DIGEST, Vol. 8, pp. 344-351, Nos. 1365-1460.]

Cases referred to :

- (1) *Re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876; 8 Digest 310, 908.
- (2) *Re Clergy Society* (1856), 2 K. & J. 615; 8 Digest 305, 844.
- (3) *Re Maguire* (1870), L.R. 9 Eq. 632; 8 Digest 307, 869.
- (4) *Re White, White v. White*, [1893] 2 Ch. 41; 8 Digest 249, 89.

ADJOURNED SUMMONS for the determination of questions arising on the will dated July 21, 1920, of Dorothy Knox, who died on Feb. 24, 1931. The testatrix appointed as her sole executor the plaintiff herein and directed him to pay her just debts and funeral and testamentary expenses. After giving certain pecuniary legacies, the testatrix gave and bequeathed all the residue of her personal estate to the Berwick-upon-Tweed Infirmary, the Newcastle-upon-Tyne Infirmary, the Newcastle-upon-Tyne Nursing Home and Dr. Barnardo's Homes, London, in equal shares, and she directed that the receipt of the treasurer for the time being of the aforesaid institutions should be a sufficient discharge to her executor for the payment of the aforesaid legacies. It appeared that there was no society or body known as the Newcastle-upon-Tyne Nursing Home, and the executor being in doubt as to whether the gift of the share of residue to a body or society so described was a valid charitable gift took out the present summons, which asked whether the defendants the Northumberland County Nursing Association or the

Newcastle Private Hospital and Nurses' Home or the Cathedral Nursing Society for the Sick Poor of Newcastle-upon-Tyne or any other body, society or institution was entitled to the share of the residuary personal estate of the testatrix given to the Newcastle-upon-Tyne Nursing Home, or whether such share devolved as upon an intestacy.

F. H. L. Errington for the plaintiff, the executor of the will, stated the facts.

L. F. Potts for the defendant *J. W. Carmichael*, treasurer of the Berwick-upon-Tweed Infirmary.

C. Montgomery White for the defendant *F. C. Clayton*, treasurer of the Newcastle-upon-Tyne Infirmary and also treasurer of the Cathedral Nursing Society for the Sick Poor of Newcastle-upon-Tyne.

F. Baden Fuller for Dr. Barnardo's Homes National Incorporated Association.

Fergus Morton, K.C., and *J. A. Brightman* for the defendants *Miss A. M. Flick* and *Miss S. L. Peart*, proprietors of the Newcastle Private Hospital and Nurses' Home.

H. B. Vaisey, K.C., and *W. Stuart Norwood* for the Northumberland County Nursing Association.

C. R. R. Romer for the next of kin of the testatrix.

A. Andrewes Uthwatt for the Attorney-General.

Romer: The very name of the Newcastle-upon-Tyne Nursing Home shows that it is not a charitable institution. The only question therefore is whether the way in which that name is included in the will shows a general charitable intention: see *Re Davis, Hannen v. Hillyer* (1), at p. 884. In *Re Clergy Society* (2) it was clear that the object of the testatrix was to benefit religion. The name "Clergy Society" would be more likely to convey the impression of charity than the "Newcastle-upon-Tyne Nursing Home," and that impression was strengthened in that case because the gift was included amongst other gifts to charity. The same observations apply to *Re Maguire* (3). The burden upon the Attorney-General is to satisfy the court that when a testator uses an expression which has no relation to charity whatever, the court will apply the *cy près* doctrine, because such a gift is adjoined to a gift to charity. *BUCKLEY, J.*, in *Re Davis* (1) extended the principle laid down in *Re Clergy Society* (2) and *Re Maguire* (3) far beyond those cases. He said that all that was necessary to prove was an intention to benefit charity, whereas the previous cases said that that was not sufficient, and that it was necessary to find out what the testator's object was. In both *Re Clergy Society* (2) and *Re Maguire* (3) the fact that the other gifts were to religious societies, showed that the object of the contested gift was religious. For the principles underlying these cases see *Re Davis* (1) at pp. 881, 2, neither of which is to be found in this case. In this will you do not find a gift to a charitable institution which never

existed, since a nursing home is not necessarily charitable, and it is plain that the testatrix had in mind a particular institution and not a purpose. As on the evidence the named institution never existed, it would be stretching the law too far to say that a charitable effect is to be given to this gift by assuming that the testatrix intended to benefit a purpose and not an institution.

Andrewes Uthwatt : I agree as to the general principles which have to be applied. It is a question of the intention of the testatrix, and I say that in this will there is shown an intention to benefit charity. The description of a society as a nursing home does not necessarily connote charity, but the question is whether, as a matter of construction, the society to which the testatrix intended to refer was in fact a charitable society, and there is in this will a reference to the "treasurers" of the "aforesaid institutions" whose receipt of the legacies is to be a good discharge to the executor. Commercial bodies are "undertakings," not "institutions," and they do not have "treasurers." So as a matter of construction it is fair to assume that the particular society which the testatrix had in mind, when she referred to the Newcastle-upon-Tyne Nursing Home, was in fact a charitable society : see *Re White, White v. White* (4), at p. 53, where LINDLEY, L.J., gives reasons which, when applied to this will, show that this gift is charitable.

LUXMOORE, J. : The question which I have to determine is whether, the quarter share of residue given to the Newcastle-upon-Tyne Nursing Home having failed, by reason of the fact that there is no legatee or society that is able to satisfy the court that it is the person or society which the testatrix meant and intended by the expression, the testatrix has shown by her will a sufficiently charitable intention to enable the share to be administered *cy près*. The question whether there is a charitable intention or not, in cases where there is a gift to some body or institution which has never existed, is, I think, always a matter of construction of the particular will which has to be considered. It is quite true that in the present case the Newcastle-upon-Tyne Nursing Home by itself is not a title which necessarily denotes charity or anything of that kind, but it is very important, in considering on the construction of the will whether there is a general charitable intention to be found or not, to consider the actual collocation in which the named institution is to be found. The will in this case is a very short one. It starts with the appointment of an executor. There are a number of pecuniary legacies which are directed to be paid free of duty, and then there is a bequest, of "all the rest, residue and remainder of my personal estate" to named beneficiaries, who are the Berwick-upon-Tweed Infirmary, the Newcastle-upon-Tyne Infirmary, the Newcastle-upon-Tyne Nursing Home and Dr. Barnardo's Homes, London, in equal shares. Pausing

there for a moment, there is no question whatever but that the Berwick-upon-Tweed Infirmary, the Newcastle-upon-Tyne Infirmary and Dr. Barnardo's Homes are charitable within the strict meaning of the term. The institution which the testatrix may have intended when she referred to the Newcastle-upon-Tyne Nursing Home may or may not be a charity so far as its name is concerned. But when you find that the gift is a gift of residue, that the object of each of the other charities is a kindred object to that which is to be inferred from the name of the other residuary legatee, I think you get considerable assistance with regard to what the intention of the testatrix really was. Moreover, the gift of residue is followed by a direction that the receipt of the treasurer for the time being of the aforesaid institutions shall be a sufficient discharge to the executor for the payment of the aforesaid legacies.

Accordingly, although a nursing home may or may not be a charity, I think it appears fairly plain from this will that the sort of nursing home that the testatrix had in mind is one which would be carried on as an institution with a treasurer, and in the same sort of manner, and for the same sort of purposes, as the other named legatees carry on their institutions. Two of the other institutions are the Berwick-upon-Tweed Infirmary, and the Newcastle-upon-Tyne Infirmary, and I think it is not very difficult to say that the Newcastle-upon-Tyne Nursing Home which the testatrix is intending to benefit is an institution which carries on a similar kind of work to that carried on by the first two named charities. As I said, the testatrix is dealing with the residue of her property, three of the named beneficiaries are undoubtedly charities, and the fourth is in the circumstances something which does not exist, but which in the mind of the testatrix is an institution which carries on similar work to the work carried on by the other named beneficiaries. I think the facts that this is a gift of residue, that the whole of residue is given, apart from this gift, to what are admittedly charitable institutions, that the testatrix directs the money to be received by the treasurers of the institutions, are of themselves sufficient to establish, as a matter of construction of this will, that the testatrix, in disposing of her residue, had a general charitable intention in mind, and was not thinking only of particular institutions or persons. I think there is sufficient therefore to prevent there being a lapse of the quarter share of residue given to the Newcastle-upon-Tyne Nursing Home, and I think in all the circumstances of the case, having regard to the construction of the whole will, that there is a general charitable intention, and that it will be necessary to direct a scheme to be approved for dealing with this particular share of residue. There is no intestacy.

I direct by way of scheme that the one quarter share directed to be given to the Newcastle-upon-Tyne Nursing Home shall be administered *cy près* and divided into two moieties, and that one of such moieties shall be

paid to the Northumberland County Association and that the other shall be paid to the Cathedral Nursing Society for the Sick Poor of Newcastle-upon-Tyne.

Solicitors : *Collyer-Bristow & Co.*, agents for *James Gray*, Berwick-upon-Tweed (for the plaintiff, the first defendant and sixth defendant) ; *King, Wigg & Brightman*, agents for *Clayton & Gibson*, Newcastle-upon-Tyne (for the second defendant) ; *H. B. Nisbet & Co.* (for the third defendants) ; *King, Wigg & Brightman*, agents for *Keenlyside & Forster*, Newcastle-upon-Tyne (for the fourth defendants) ; *Grundy, Izod & Co.*, agents for *Wm. Webb & Son*, Morpeth (for the fifth defendants) ; *Solicitor to the Treasury* (for the Attorney-General).

[Reported by C. M. YOUNG, Barrister-at-Law.]

RUSSELL v. CRITERION FILM PRODUCTIONS, LTD.,
AND ANOTHER.

[KING'S BENCH DIVISION (Porter, J.), October 21, 22, 23, 26, 27, 28, 29,
November 6, 1936.]

Negligence—Film production—Excessive lighting—Injury to artistes—Liability of cameraman—Common employment.

A crowd artiste in a film production was injured by the intensity of the lighting in a ballroom scene. The lighting was not abnormal for a scene of this kind, but its effect was increased by the high polish of the floor. The film company pleaded that they themselves were not responsible for the lighting and the plaintiff joined the second defendant who, the plaintiff alleged, was in charge of the lighting. The defendants then added a defence of common employment :—

HELD : (i) lighting of the intensity used was not frequently used in the production of films and there was a duty upon the film company to warn the artistes or to take precautions against injury to them.

(ii) it was the system of lighting that was at fault and there was no question of common employment.

(iii) the second defendant took no responsibility for the effect of the lighting upon the performers. He was there to provide the lighting the company required, and the likelihood of damage to the performers was known to the film company, and was a risk which they took upon themselves. His employment afforded them no protection against their negligence in using such brilliant lights without proper precautions.

[EDITORIAL NOTE.] There is considered in this case the position in law of a cameraman. In the production of a film this expert controls the lighting of the set for photographic purposes. The points raised are two : (i) whether his position is such that he is a fellow employee with the actors and actresses, and (ii) whether he is so far an independent contractor that he is responsible for the safety of the artistes and undertakes that the lighting shall be such that no injury is likely to happen to their eyes or their skin. It is held that in the circumstances of the present case the film company took that responsibility and that the cameraman was only acting in an advisory capacity, his duty being to advise what lighting would give a good picture and produce the desired effects. The case also considers

the duty of the film company in this respect and in particular their duty to warn crowd artistes of the danger to them in the case of exceptionally lighted scenes.

AS TO NECESSITY FOR WARNING, see HALSBURY, 1st Edn., Vol. 21, Negligence, pp. 370-375, paras. 638-644; and FOR CASES, see DIGEST, Vol. 36, pp. 18, 19, Nos. 80-86.]

Cases referred to:

- (1) *Smith v. Baker & Sons*, [1891] A.C. 325; 36 Digest 95, 633.
- (2) *Monaghan v. Rhodes (W. H.) & Son*, [1920] 1 K.B. 487; 34 Digest 205, 1682.
- (3) *Howells v. Landore Steel Co.* (1874), L.R. 10 Q.B. 62; 34 Digest 214, 1767.
- (4) *Rudd v. Elder Dempster & Co., Ltd.*, [1933] 1 K.B. 566; Digest Supp.
- (5) *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K.B. 191; Digest Supp.
- (6) *Fanton v. Denville*, [1932] 2 K.B. 309; Digest Supp.
- (7) *Dryden v. Surrey County Council and Stewart*, [1936] 2 All E.R. 535; Digest Supp.
- (8) *Clayards v. Dethick & Davis* (1848), 12 Q.B. 439; 36 Digest 95, 630.
- (9) *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; 36 Digest 8, 10.
- (10) *Olsen v. Corry*, [1936] 3 All E.R. 241; Digest Supp.
- (11) *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 41 Digest 418, 2616.
- (12) *Matania v. National Provincial Bank., Ltd.*, [1936] 2 All E.R. 633; Digest Supp.
- (13) *Cole v. De Trafford (No. 2)*, [1918] 2 K.B. 523; 34 Digest 198, 1621.
- (14) *Priestley v. Fowler* (1837), 3 M. & W. 1; 34 Digest 202, 1647.
- (15) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205; Digest Supp.
- (16) *Trim Joint District School Board of Management v. Kelly*, [1914] A.C. 667; 34 Digest 270, 2300.
- (17) *Griffiths v. London & St. Katharine Docks Co.* (1884), 13 Q.B.D. 259; 36 Digest 94, 623.
- (18) *Clarke v. Holmes* (1862), 7 H. & N. 937; 36 Digest 97, 650.
- (19) *Woodley v. Metropolitan District Ry. Co.* (1877), 2 Ex. D. 384; 36 Digest 92, 610.

ACTION for damages for personal injuries.

The plaintiff, who was an actress, was engaged from day to day by the defendant company, who were producing a cinematograph play entitled "The Amateur Gentleman." She was required to perform as one of the crowd in a ballroom scene, which required to be particularly well lighted. The defendant Krampf was what is known in the trade as a cameraman, and was an expert in lighting cinematograph productions. He was employed by the company. The plaintiff alleged that her eyesight, arms and shoulders were injured in consequence of the super-normal power of the lights employed and their arrangement for photographing the scene in question. She complained that the defendant did not take the necessary precautions to avoid injury to the performers or warn them of the danger of injury to their eyes. The facts and arguments are fully set out in the judgment.

D. Rowland Thomas, K.C., and *R. J. White* for the plaintiff, referred to *Clayards v. Dethick & Davis* (8); *Thomas v. Quartermaine* (9); *Monaghan*

v. *Rhodes (W. H.) & Son* (2); *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers)* (5); *Olsen v. Corry* (10); *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (11); *Matania v. National Provincial Bank, Ltd.* (12).

Edgar Dale, for the defendant company, referred to *Smith v. Baker & Sons* (1); *Cole v. De Trafford* (No. 2) (13); *Priestley v. Fowler* (14); *Howells v. Landore Steel Co.* (3).

Paul Springman, for the defendant Krampf, referred to *Fanton v. Denville* (6); *Hall v. Brooklands Auto-Racing Club* (15); *Trim Joint District School Board of Management v. Kelly* (16); *Griffiths v. London & St. Katharine Docks Co.* (17); *Clarke v. Holmes* (18); *Woodley v. Metropolitan District Ry. Co.* (19); BEVAN ON NEGLIGENCE, p. 789; SALMOND ON TORTS, 7th Edn., p. 126.

PORTER, J.: The plaintiff in this action, Mrs. Florence Amelia Russell, is a film artiste, her part being to act as one of a crowd. For the purposes of this judgment one may call her a crowd artiste. Before the incidents giving rise to the present action she had so performed for about a year. The defendant company are a film producing company who, at the end of last year, were engaged on a film called "The Amateur Gentleman" as their first production. For the purpose of this production they hired one of the B.I.P. studios at Elstree and engaged the services of the second defendant as cameraman. Amongst other scenes "The Amateur Gentleman" contained a ballroom scene, for which the first defendants required dancers and guests to look on at the dancing. Amongst others, the plaintiff was engaged at £1 ls. a day to act as one of the guests, and was requested to attend on Oct. 29, 30, 1935. She alleges that her eyes were injured during this period by the fault of the defendants, and brings an action for damages against both of them.

Originally the action was commenced against the company only, the plaintiff alleging by her statement of claim that those defendants used lighting of super-normal power and intensity and (as they knew or ought to have known) giving off rays liable to cause injury to persons exposed thereto. The defendants, in addition to denying the plaintiff's allegations, relied upon the pleas *volenti non fit injuria* and contributory negligence, and further pleaded that they did not themselves undertake the regulation of the lighting; that its management was in the hands of the second defendant; that they had fulfilled their duty by relying on his skill, and that any negligence in lighting was his, and not theirs. The plaintiff thereupon amended her writ and statement of claim, joining the defendant Krampf, and alleging negligence against him, either as servant or agent of the defendant company or on his own behalf. Meanwhile, the plaintiff had delivered a reply to the defendant company's defence, stating that even if the plaintiff knew of the risk

she was incurring (which she denied) she did not know of it until after she had undertaken the contract, and that she was then obliged to carry out those defendants' instructions. To this those defendants rejoined that the plaintiff and Krampf were fellow servants, and therefore they were not answerable for his negligence.

The history of the case is as follows : The plaintiff was engaged through a Mr. De Leon as one of the crowd artistes for the film in question. She was required to attend on Oct. 29, 30, 1935, and would probably have been required for some days longer but for the trouble which she experienced with her eyes. The scene in which her services were required was, as I have said, a ballroom scene, and therefore, though not more brightly lighted than some ballroom scenes, was at any rate very brightly lighted, and more so since in order to give as much brilliance as possible, the floor of the ballroom was highly polished so as to reflect the light. The plaintiff, and at any rate some of the crowd artistes, had not performed under such brilliant lighting before, and the plaintiff had not herself previously suffered from her eyes during her year's experience before Oct., 1935.

There was a good deal of dispute as to the lights which were used on this occasion, partly, I think, because Sir Duncan Watson, who gave evidence on behalf of the plaintiff, paid a visit to the studio at Elstree, thinking that he would be shown the actual lamps used and their position on the two days on which the plaintiff performed, whereas the B.I.P. who were themselves in occupation of the studio on the occasion of his visit, showed him only the type and method of lighting, but gave and could give no indication of the position or brightness of the lamps used by the defendants. One of the plaintiff's witnesses—a Mr. Taylor—produced a rough drawing indicating where, in his recollection, the lamps were placed, and gave evidence as to their power and type. I accept his *bona fides* but not his accuracy. Substantially I accept the evidence of the defendant Krampf as to the lighting used, its position and type, but I do not accept his inference as to the artistes whose eyes would be affected by the arrangement.

The lighting was not, as I have said, either of super-normal power or intensity, but was of great brilliance, a brilliance only required for scenes of this kind, and was intensified by the reflection from the highly polished floor. It was further said on behalf of the plaintiff that many of the lights were arc lights, and had no glass screens in front of them. I do not accept this evidence. Conceivably a screen may have been taken off for a time in order to replace the carbon of the lamp, but I do not think that this had any substantial bearing on the case. The plaintiff does not herself purport to remember what the lighting was, except that it was very bright. According to her story, she was at work on the first day by 9.30 until about 7.30, with a break of an hour

for lunch, and on the second day from about the same hour until even later. In the box she stated that her eyes did not suffer on the first day except that they felt tired and burning when she reached home, but that on the second day her eyes felt as though they were burning by the luncheon interval, and she bathed them then. According to her evidence, they were worse later in the afternoon, in spite of the bathing, so that she could hardly open them, and she had pains in the top and back of her head. Moreover, she felt a terrible irritation in her arms and shoulders, which were bare, because she had to wear a costume suitable to the scene. She said that she asked leave from Mr. Wilson, the assistant director, to leave the set, as she felt ill, but was told to go back to her work. She did, however, get off the set without being seen, and visited the first aid man supplied by the B.I.P., who put drops in her eyes without any beneficial result. Eventually she went home at the end of the day feeling very ill and being almost unable to see.

This account is to some extent inconsistent with that given in a letter from her solicitors, admittedly based on information furnished by her husband and obtained from her. The letter is dated Nov. 1, 1935, a day or so after the events in question, and undoubtedly attributes to the first day a good part of the suffering which she stated in the box she endured on the second day only. I was asked to say that her account was both exaggerated and untrue, for this and other reasons, and I deal with this aspect of the case later.

A further dispute arose between the plaintiff and the defendants as to the length of time the bright lights were kept burning during the two days. I do not find that the lights were kept on unreasonably long, or that either of the defendants or their servants were negligent in this respect. Undoubtedly, when the plaintiff reached home on the evening of the second day she was suffering from severe burning, which increased until it caused her intense pain, and to all intents rendered her blind.

Whatever else might be said of the case, there is no doubt that the plaintiff suffered, at any rate, temporarily, from a severe burning of the eyes. For some time, from the evidence before me, it seemed difficult to understand how that burning had taken place. Sir Duncan Watson, in spite of his great experience in the manufacture of electric lighting appliances for the cinema, has no material knowledge of the effect of light on eyes. Moreover, unfortunately, he was inaccurately informed as to the lights used and their position. Consequently, except for the general proposition that power, proximity and length of exposure are all important elements to be considered when the effect of light on the eyes is in question, I can get little assistance from his evidence.

If I accepted in full the evidence of Mr. Collier Summers and Mr. Levy, who were called for the defence, no injury to the plaintiff's eyes was possible, since, in their view, violet rays could not penetrate a glass screen

to any appreciable extent. In fact, however, as I find, injury plainly was caused to her and to others. The truth is that, experienced ophthalmic surgeons though these gentlemen are, expert knowledge of the method by which ultra-violet and infra-red rays affect the eyes, and of the results following, is not widely spread.

In these circumstances the defendants very properly called Professor Harris, whose evidence I rely upon and accept. He made it plain that, contrary to the earlier contentions of the defendants, glass, whether at the back or the front of an arc lamp, will not shut out by any means the whole of the ultra-violet or infra-red rays, but will leave a considerable quantity free to work upon the eyes. Indeed, I gathered from him that if the effect of what he described as the "tremendous lighting" used in the scene had not been mitigated by passing through glass, a very few minutes would have sufficed to make practically the whole company temporarily blind. Ultra-violet rays produce a delayed superficial burning of the whites of the eyes, intensely painful while it lasts, but likely to clear up in a short period, generally in two or three days, but sometimes extending to a week or so. Infra-red rays, on the other hand, produce an immediate burning which may penetrate to the retina and, owing to the depth of the penetration has a longer effect than that caused by ultra-violet rays. Dr. Dunlop says that he found damage to the retina. I find that the plaintiff suffered from burning caused by both ultra-violet and infra-red rays, that that burning was due to the ordinary effect of extremely bright lighting such as is used from time to time in ballroom scenes, that the direct physical effect lasted for over a month and that she quite reasonably avoided working in the bright light of a film production until the end of the year lest she should suffer from a recurrence of the trouble.

I have been asked to find that the plaintiff grossly exaggerated her injury, that the letter written by her husband on Nov. 1 represented the case which she then desired to put forward, that the reason why she changed her evidence at the trial was because the defendants had pleaded that she had caused or contributed to her own injury by not leaving the set as soon as she found her eyes affected. She was, so they contended, desirous of establishing that the injury came on quickly and that she could not have been expected to realise its danger in one day though she might in two. I have seen the plaintiff and her witnesses and do not accept that suggestion. I think that neither she nor her husband were very careful to describe the exact sequence of events correctly. I think that both she and her husband exaggerated to some extent the intensity and duration of the pain she suffered and I think that she attributed to the injury of the month of October symptoms which were not attributable to that injury, but substantially I believe her story, exaggerated though it may be.

In the circumstances is she entitled to recover against the first defendants? Her action is founded on negligence, and first of all it is said that there was no negligence. The defendants' contention is that her evidence is grossly exaggerated; that she suffered for not more than two days; that a burning of the eyes by ultra-violet rays for two days or so is a commonplace of the profession and known to every performer; that the defendants merely carried out the shooting of the picture in the ordinary way with the ordinary lighting and a not unusual result followed. I accept the defendants' evidence that the lighting though brilliant was not brighter than that at times used in ballroom scenes, and notwithstanding Mr. Krampf's evidence that the defendants specially stipulated for brilliant lighting, I find that it was not of super-normal power or intensity and was produced by the usual equipment for that class of scene.

But lighting of that intensity is not very frequently used; the defendants knew its dangers and its possible effects on the eyes; their object was to make a good picture and they were prepared to risk temporary damage to the eyes of the performers in order to obtain a good result. Indeed, it was their case that what they called "Kleig" eye was a well known risk of the profession which all performers took, because they either knew or should have known of its possibility. I find, however, that the danger of "Kleig" eye is not generally known to the performers in film production, and in particular is not generally known to the "crowd" performers. "Kleig" eye, whatever may be the cause, seems to have been more common in the earlier stages of production than it is to-day. Some of the plaintiff's witnesses, particularly those with any technical knowledge, no doubt had heard of and even experienced it, but many had not, and though some tiredness and some slight irritation of the eye may have been not unusual, I do not accept the view that the generality of the performers or, indeed, more than a few knew that they were exposing themselves to the risk of agonising pain and temporary blindness. In particular I find that the plaintiff did not know that any such risk existed, but on the contrary for about a week genuinely feared that she was going blind. No doubt the defendants through Mr. Wilson did warn the performers to keep their eyes down and not to look at the lights, but this was not a warning that they might suffer seriously if they did not look down. It was rather an assurance that if they did refrain from looking at the lights (which I find the plaintiff did to the best of her ability) they would escape any severe injury.

In my view these findings are conclusive against the first defendants, because the injury to the plaintiff was due to the system adopted by them, a system adopted in order to obtain a good picture though they recognised its risk. Such findings make it unnecessary to determine

where the line between "*volenti*" and "*scienti*" is to be drawn and to what bounds the doctrine exemplified in *Smith v. Baker* (1), and *Monaghan v. Rhodes* (2), is to be extended. Moreover they negative any defence of common employment, since it is the system itself which is at fault and not the negligent act of any fellow servant in carrying out his duties. It also renders it unnecessary to consider whether the producer or director, or indeed Mr. Krampf are fellow servants of the plaintiff as in *Howells v. Landore Steel Co.* (3), or are the "*alter ego*" of the company. (See *Rudd v. Elder Dempster & Co., Ltd.* (4).) Further, whatever the position of the defendant Krampf may have been, the defendants, as I find, did not employ him to regulate or control the lighting so as to ensure the safety of the performers. That risk they took upon themselves and merely left him to make a good picture. References of the kind raised in *Honeywill v. Larkin* (5), *Fanton v. Denville* (6), and *Dryden v. Surrey County Council* (7), are therefore not applicable.

Finally, I do not think that the plaintiff was the cause of her own hurt by neglecting to ask permission to leave or failing to leave the set when the trouble to her eyes began. Whether she asked permission to go home or not, I do not think she made it plain that she had any serious reason for doing so. But I do not think that there was any reason why she should or that she did suspect more than some slight temporary inconvenience. She had never experienced any affection of the eyes before, and had no reason to think it serious. As to the damages recoverable, I award her £75 as damages for pain and suffering and special damages of £51 19s., a total sum of £126 19s.

The defendant Krampf was not originally a party to the action; he was only joined because the defendant company pleaded that the control of the lighting was and must be left in skilled hands, and that they had engaged him as an expert for that purpose. But I do not find that the control was left in his hands. He was merely asked to advise as an artist what lighting would be effective to make a good picture, and not as to its consequences otherwise. Everything was done in consultation with the director, producer and electrician, and the director and producer had the last say in the matter. It is true that the defendant company had asked for brilliant lighting, and Mr. Krampf had acceded to their request, but he took no responsibility for its effect upon the performers, nor was he asked to decide as to its safety. That decision was left to the company making the film, which could take any precautions thought necessary. They, as I have found, knew of and took the risk, and in no way left to Mr. Krampf the duty of safeguarding the eyes of the performers. No doubt the making of a good picture requires special knowledge and skill as to the lighting required, but except to the extent that the defendant company consulted him in that matter, the defendant

Krampf in no way regulated, managed, or controlled the lighting. Neither his knowledge or skill nor that of the Gaumont British Picture Corporation was relied upon for the safety of the performers. I find no duty in this respect imposed upon the defendant Krampf or any negligence on his part, nor do I find that his employment affords any protection to the defendants against the negligence of which I have found them guilty. In the circumstances I give judgment against the first-named defendants for £126 19s., and for the defendant Krampf.

Judgment for the defendant Krampf against the plaintiff with costs, and judgment against the defendant company for £126 19s. and costs, such costs to include all costs incurred against the defendant Krampf by reason of there being two defendants and further all costs that the plaintiff may have to pay to that defendant.

Solicitors: Syrett & Sons (for the plaintiff); L. Bingham & Co. (for the defendant company); F. M. Guedella & Co. (for the defendant Krampf).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

FULKER *v.* FULKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Langton, J.), **November 3, 1936.**]

Husband and Wife—Maintenance—Summons—Finding of neglect—Adjournment and interim order—Second hearing—Court differently constituted—Evidence not heard de novo—Purported confirmation of interim order.

At the hearing of a wife's summons for maintenance the justices adjourned the summons for 3 months and made an interim order on the ground of neglect to maintain. Three months later the matter came up before the same court, but of the four justices two, including the chairman, had not been present at the earlier hearing. The notes of the evidence of the witnesses taken on the previous hearing were read over to the court and the form was gone through of swearing the witnesses and then reading their evidence out, but there was no further examination or cross-examination. The justices then "confirmed" the earlier order. The husband appealed:—

HELD: (i) as the order was based on evidence which had never been heard *viva voce* by two of the justices, it could not be upheld.

(ii) if the original hearing terminated in a finding the original order was wrong, as an interim order cannot be made upon a finding, and if the original order was bad, it could not be confirmed at the second hearing.

(iii) if the original hearing terminated in an adjournment and not in any finding, there was no order which the justices at the second hearing could confirm.

[EDITORIAL NOTE.] The point in this matter though of much importance is purely a question of practice. In proceedings before justices it is necessary that all the justices who are parties to a decision should hear all the evidence. In the present case two of the justices only heard a note of the evidence, which the witnesses swore was a correct note of what they said on the first occasion on which the matter was before the court. There is all the difference in the world between hearing a note of evidence read over and hearing the witness giving his evidence and hearing and seeing him cross-examined, and the latter is necessary for a proper adjudication of the matter in dispute. The other point in the matter is really a technicality. Where the court has a special statutory power to make an interim order which may be in force for 3 months, it is clear that the order cannot after the expiration of the 3 months be confirmed, but a new substantive order must be made if there is jurisdiction to do so.

AS TO THE NECESSITY FOR THE SAME JUSTICES TO ACT THROUGHOUT, see HALSBURY, Hailsham Edn., Vol. 21, p. 615, para. 1070; and FOR CASES, see DIGEST, Vol. 33, pp. 333, 334, Nos. 455-462.]

Case referred to:

(1) *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776; Digest Supp.

APPEAL by the husband from an order of the Bromley (Kent) justices, dated Sept. 9, 1936, directing payment to the wife of maintenance for herself and her two children at the rate of 25s. per week. The wife's summons was heard on June 10, 1936, but was adjourned for 3 months on

an interim order being made for 25s. per week. That order automatically expired 3 months from the date on which it was made. On Sept. 9, 1936, the matter came on again before a differently constituted bench. The original chairman was not present, his place being taken by a chairman who had not heard any of the previous evidence, and another of the four justices sitting had not been present at the previous hearing. The notes of the evidence of the witnesses taken at the previous hearing were read over to the court and the form was gone through of swearing the witnesses and then reading their evidence out, but there was no fresh examination or cross-examination. This course was objected to on behalf of the husband. The justices proceeded to "confirm" their order of June 10, 1936, involving a finding that the husband had been guilty of wilful neglect to maintain.

The husband appealed on the ground *inter alia* that the decision had been arrived at without the bench having considered the evidence of the parties.

K. J. P. Barraclough for the appellant.

D. M. Wachter for the respondent.

SIR BOYD MERRIMAN, P. : This appeal from the justices of Bromley sitting at Bromley raises a curious point. The wife applied for maintenance on the ground of desertion or wilful neglect to maintain. The case came before the justices on June 10, and the court was composed of four justices, of whom the chairman was a Mr. Waring. Now that court could have done either of two things : they could have found the facts proved or disproved as the case may be and made an order, or dismissed the case according to their decision, or, on the other hand, they could have adjourned the case and made an interim order for maintenance not exceeding 3 months in duration pending the resumption of the hearing. That power is given them by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 6, which provides that where, on the hearing of an application for an order of maintenance, the application is adjourned for any period exceeding one week, the court may order the husband to pay interim maintenance for a period not exceeding 3 months. In fact they did neither of those things nor both, whichever way one chooses to look at it. In my view they did neither. What they said was that the case had caused considerable concern and there ought to be a way out of these difficulties as two homes were being run and money was being wasted. They came to the conclusion that they should adjourn the case for 3 months and made an interim order on the ground of neglect to maintain. They purported to adjourn the case while at the same time purporting to find that there had been neglect to maintain which again only meant, once that finding had been made, not an interim

order but a final order was made. In fact the formal order was drawn up in these words :

Upon hearing the said complaint, it is adjudged that the same is true and it is hereby ordered that the defendant do pay a certain sum—

with a final clause showing that the interim order was to remain in force until Sept. 9, 1936.

Now it is quite clear—and on consideration Mr. Wachter very wisely has not attempted to argue the contrary—that that is a complete confusion of the two functions which the magistrates were able to perform on that day and all that there is to say about it is that the time has already expired and that it is useless to appeal that order. It remains therefore to consider what has happened since. The matter came before the court at Bromley on Sept. 9. On that occasion the court was composed again of four justices, but only two of them were the same justices as had been sitting before, the chairman was not the same chairman, another justice being in the chair ; in other words there were two justices who had never heard about that case until that moment. I am going to say nothing whatever to prevent justices from doing what I think any of us would feel that we were entitled to do, if we had really and truly adjourned the case for a definite period and then resumed the hearing at the end of that period, namely, read our notes and refresh our minds as to what had happened on the previous occasion, without going through the form of having all the evidence again. It would be intolerable to put such a burden upon the justices any more than it would be to put it upon any other judicial tribunal. That is one thing. What happened is another, for, in spite of the objection of the advocate appearing for the husband, this course was taken : the notes of the evidence of the witnesses taken on the previous hearing were read over to the court newly constituted on Sept. 9. It is added that the form was gone through of swearing the witnesses and then reading their evidence out, but there was no new examination or cross-examination of the witnesses in the ordinary sense of the word and at the end of it all the justices came to a new determination. They said :

The justices have considered the matter. The case was adjourned 3 months ago in the hope that the parties would come together. They have not come together and the order will be confirmed.

It will be observed that there is still some confusion of thought as to whether the original order was for an adjournment or was a substantive finding of fact which in turn was to be confirmed.

Now I am quite clearly of opinion that, whatever may be said as to the propriety—about which I have no doubt, as I have already said—of the same tribunal on a real adjournment reading over its notes to refresh its memory and then coming to a determination for the first time, it is

impossible to uphold an order based, as this was, on evidence which had never been heard at all *viva voce* by two of the justices, but based upon a mere reading of a note of the witnesses' evidence heard by two members of the court in that form for the first time. If there were nothing else in the case I should feel myself obliged to set aside a decision thus arrived at. I do not think it necessary to cite authority, but it happened to come into my mind, as I was in the case myself, that the Court of Appeal had expressed themselves very strongly as to the impropriety of any such court adopting such a course in a case in which a judge and jury were trying the case—the jury of course being the judges of the fact—and the judge died after 3 witnesses had been heard. The case is the case of *Coleshill v. Manchester Corporation* (1), and the remarks of SCRUTTON, L.J., are on p. 785. While they did not think it necessary to set aside what had been done, having regard to the consents which had been given, the strongest view was expressed as to the impropriety of a judge taking up the trial where it had been left, by reading the shorthand notes of the evidence which had already been given, and that, notwithstanding the judges of fact were hearing the whole of the evidence again upon oath in the ordinary way. Apart altogether from that, apart from the way in which the second hearing was dealt with, the matter came before them in the irregular way which has already been described, and the irregularity is perpetuated in the final order which I have just read, because they treat it in that one sentence as having been an adjournment, in which case, of course, clearly the whole evidence ought to have been heard again, while at the same time, they talk about the order being confirmed, which assumes that an order has already been made. In other words they have not adjudicated at all upon the merits of the case. It does not matter which way the dilemma is put, the result must be wrong either way it is looked at. In my opinion, therefore, this order cannot stand and I am sorry to say that the matter must be remitted to the justices for a further hearing. Mr. Barraclough has asked us, or was inclined at first to ask us, to deal with the matter on the merits, but when this point on which we have given our judgment emerged he admitted that we were right and that the matter could not be dealt with on the merits.

LANGTON, J. : I agree, and since I think the matter is of no small importance I will add a few words. The appeal in the case is against a final order made by the justices at Bromley on Sept. 9, 1936. When the terms that were employed by the justices in communicating that order are considered, it seems to me to be unarguable that that order is hopelessly wrong. The terms were these :

The justices have considered the matter. The case was adjourned 3 months

ago in the hope that the parties would come together. They have not come together and the order will be confirmed.

It is important I think to notice those final words : " order will be confirmed." It is quite clear to me from the terms that they employed that this was not intended as a finding on the evidence which had been adduced or rather read over in that way, but it was an order founded upon the original order made on June 10 and treating that original order as a finding. As my Lord has pointed out if the original hearing terminated in a finding the original order was wrong because an interim order cannot be made upon finding. If the original order was bad it certainly cannot be confirmed as the chairman on Sept. 9 purported to do. If, on the other hand, the original hearing terminated in an adjournment and not in any finding at all, there was no order at all upon which the magistrates at the second hearing could proceed, because there was nothing to confirm ; a fresh finding was necessary. It was most important that all the justices adjudicating upon the evidence on which they were to make their findings should hear that evidence and not have it communicated to them through the medium of the justices' clerk's note.

For those reasons it appears to me to be clear that this final order cannot stand and we therefore will not have an opportunity of considering Mr. Barraclough's point that the evidence would in any way not have supported the finding.

Solicitors : *Ernest Bevir & Son* for *Dale & Newbery*, Feltham (for the appellant) ; *W. G. Weller* (for the respondent).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

**Re A DEBTOR (No. 231 OF 1936), THE DEBTOR
v. THE PETITIONING CREDITORS AND THE
OFFICIAL RECEIVER.**

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **November 13, 1936.**]

Bankruptcy—Moneylenders' petition—Tender by debtor of principal, interest at 5 per cent., and costs, but not postponed interest—Discretion of registrar to make receiving order—Moneylenders Act, 1927 (c. 21), s. 9 (1).

A firm of moneylenders claimed in their petition against a debtor the balance of the principal of certain loans with interest at 5 per cent. and stated that they also had a claim for postponed interest on the loans. The debtor's counsel tendered the balance of the principal, interest at 5 per cent. and costs, but not the postponed interest, and contended that this was sufficient cause for the dismissal of the petition. The registrar, however, made a receiving order, and the debtor appealed:—

HELD: there was not sufficient cause for the dismissal of the petition, because the postponed interest was in law owing by the debtor and recoverable in bankruptcy proceedings after all other debts were paid in full.

Quære, whether if the whole amount of the petitioning creditors' debt had been tendered there would have been sufficient cause for the dismissal of the petition.

[EDITORIAL NOTE.] Here for the first time is considered the question of postponed interest in the case of moneylenders' debts, where it is sought to enforce the latter in bankruptcy. It is often sought to avoid the making of a receiving order by a tender of the full amount due to the petitioning creditor, the money not being part of the debtor's estate. The point raised in the present case is whether the interest on a moneylender's debt beyond 5 per cent.—the postponed interest—is "due" to the petitioning creditor, and, if "due," whether the refusal of the tender of the principal with 5 per cent. interest added is extortion. The court has decided that the registrar might properly disregard such a tender and the refusal of such a tender is not extortion. The moneylender is not to be deprived of his right to prove at the proper time for his postponed interest; but the registrar may, of course, exercise his discretion in view of all the facts of the case. In the present case, it would appear that the interest in the case of the first transaction (in which both principal and interest had been paid) was about 120 per cent., but that in the later transactions was only about 30 per cent.

AS TO TENDER OF PAYMENT, see HALSBURY, Hailsham Edn., Vol. 2, p. 55, para. 67; and FOR CASES, see DIGEST, Vol. 5, pp. 701, 702, Nos. 6159-6162.]

Cases referred to:

- (1) *Re Rogers, Ex p. Holland & Hannen* (1891), 7 T.L.R. 746; 5 Digest 702, 6160.
- (2) *Re Drucker, Ex p. Basden*, [1902] 2 K.B. 237; 5 Digest 702, 6161.
- (3) *Re Hooley, Ex p. Trustee* (1915), 84 L.J.K.B. 1415; 5 Digest 702, 6162.
- (4) *Re Gentry*, [1910] 1 K.B. 825; 4 Digest 118, 1072.
- (5) *Re A Debtor, Ex p. Petitioning Creditor*, [1917] 2 K.B. 60; 4 Digest 144, 1345.
- (6) *Re A Debtor (No. 1151 of 1934)*, Unreported.
- (7) *Mills' Conduit Investments, Ltd. v. Leslie*, [1932] 1 K.B. 233; Digest Supp.

APPEAL from a receiving order made by MR. REGISTRAR PARTON, on July 27, 1936.

On Oct. 11, 1935, the debtor borrowed £300 from the petitioning

creditors (who are licensed moneylenders) and agreed to repay that sum with £50 interest on Nov. 30, 1935. He gave a cheque for £350 to the petitioning creditor and this cheque was duly paid. On Oct. 22, 1935, he borrowed a further £250 and agreed to pay £32 11s. interest thereon and gave a cheque dated Nov. 30, 1935, for £282 11s. This cheque was not paid ; but the debtor paid £20 by way of interest to carry the transaction over to Jan. 30, 1936. On Jan. 7, 1936, the debtor borrowed a further £300 and agreed to pay £350 on Apr. 2, 1936. Nothing has been paid in respect of the last two transactions except the £20 additional interest. In respect of the second transaction a writ was issued by the petitioning creditors on Feb. 4, 1936, and the action was defended on the ground that the interest was excessive and both the first and second transactions were sought to be re-opened. An order was made for the payment of £180 and leave given to defend the action as to the remainder. The debtor failed to comply with the order for payment of £180 and a bankruptcy notice and the present petition followed in due course.

The petitioning creditors' claim was restricted to the balance of the principal remaining due and interest at 5 per cent., and they added a claim for postponed interest under the Moneylenders Act, 1927, s. 9 (1). The debtor tendered such balance and interest at 5 per cent. and costs of the petition, the money being found by a friend and not being part of the debtor's estate. This tender was refused. The submission on the debtor's behalf was that this tender ought to be accepted and the petition dismissed under the Bankruptcy Act, 1914, s. 5 (3). This contention was argued before MR. REGISTRAR PARTON, who reviewed the cases upon the matter, referring to *Re Rogers* (1), *Re Drucker* (2), *Re Hooley* (3), *Re Gentry* (4), *Re A Debtor* (5), *Re A Debtor* (No. 1151 of 1934) (6). These cases did not in the registrar's view support the contention that in every case in which a tender of the full amount which a petitioning creditor could recover in bankruptcy was made, and the money tendered was not the debtor's money, the debtor can either accept it or take a receiving order at his option. The refusal of such a tender may well be, and in the absence of special circumstances would be held to be, sufficient cause within the Bankruptcy Act, 1914, s. 5 (3). There was, however, no case in which a question of postponed interest had arisen and in his (the registrar's) view the tender in the present case was not a tender of what was due or of all that the petitioning creditors might ultimately receive if a receiving order were made. The tender was therefore one which the petitioning creditors might properly refuse, and it could not be said that by such refusal they were attempting to obtain from some source other than the debtor's estate a sum more than that to which the law entitled them, or in other words to have been guilty of extortion. The registrar for these reasons made a receiving order.

The debtor appealed.

C. N. Tindale Davis for the appellant debtor.

H. J. Wallington, K.C., and *Cyril Salmon* for the respondent petitioning creditors.

Davis : It was only necessary for a person on behalf of the debtor to tender the amount of the principal, interest at 5 per cent., and all proper costs, such moneys not being the debtor's money. He need not tender any postponed interest. Here he included in his tender the amount of a promissory note, and interest, which in the ordinary way was not due, and was only a debt by reason of the act of bankruptcy. By the Moneylenders Act, 1927, s. 9, the creditor can only claim 5 per cent. for the purposes of the petition. This section re-enacts sect. 66 (1) of the 1914 Act, enlarging the provision dealing with a debt due to a moneylender. It prohibits a moneylender from claiming more than 5 per cent. in bankruptcy proceedings but keeps alive his right to receive postponed interest after all other creditors have been paid in full. Once a receiving order is made, not only present but also future debts and contingent liabilities are provable.

SLESSER, L.J. : Is not this postponed interest a present debt ?

Davis : Under the Moneylenders Act, 1927, if the interest is more than 48 per cent. it makes the bargain harsh and unconscionable. It follows that, until the court has declared what is a proper rate of interest, anything over 48 per cent. cannot be said to be a "debt payable." In *Mills Conduit Investments, Ltd. v. Leslie* (7), it was decided that even though a borrower consent to judgment under a moneylenders' claim, that consent is not binding on the court, because it is the duty of the court to discover whether or not the bargain is harsh and unconscionable.

SLESSER, L.J. : When sect. 5 (3) says that the court may dismiss the petition, should "may" be construed as "must" ?

Davis : It is a matter of discretion, but the registrar exercised his discretion wrongly. None of the cases cited by the registrar applies to a petitioner ; they were cited only to establish the proposition that if moneys were paid by the debtor under such conditions that they could not be recovered by a trustee in bankruptcy, the persons to whom they were paid could retain them. One of the promissory notes in the present case was not even due for payment, and only became a debt because of the act of bankruptcy. The *ratio* of the decision in *Re A Debtor (No. 1151 of 1934)* (6) was that the money was the debtor's money.

SLESSER, L.J. : For what purpose did the legislature enact that interest, in relation to the presentation of a bankruptcy petition, is to be calculated at 5 per cent. ?

Davis : It is to be calculated for the purposes of the petition, of voting and meetings, and the other matters set out in the subsection.

ROMER, L.J. : If the debtor tenders the whole amount claimed in the

petition, can the creditor refuse, alleging another debt not stated in the petition?

Davis: No, for that is not a debt "for the petition." The legislature intended to limit the petition to a fixed sum with interest. As the postponed interest could not, by sect. 4 (1) (a), have been included to bring the amount of the petition over £50, it cannot be included for any other purpose and ought not therefore to be treated as part of the debt. The decision in *Re A Debtor (No. 1151 of 1934)* (6), ought to be followed, as it is completely appropriate to the present case. There the debtor offered 10 per cent., and here he is offering more than the creditor would get in bankruptcy for he is allowing him to retain £50 paid while the proceedings were pending.

Wallington, K.C., was not called upon.

SLESSER, L.J.: This case, which has been argued by Mr. Tindale Davis with his usual fairness and lucidity, raises a question of some importance with regard to the right of moneylenders in bankruptcy proceedings against their debtors acting under the Moneylenders Act, 1927. The facts of the case, so far as they are material, are these. There was admittedly owing at the time of the bankruptcy petition to the moneylender certain sums the amount of which I need not state, including interest at 5 per cent. per annum, and in addition certain further interest was due beyond the 5 per cent. claim. When the petition was presented it first set out the sums due under a certain promissory note together with interest at 5 per cent., and then added another sum due under another promissory note, which had not actually fallen due at the date of the petition, with interest; and then followed these words:

And we also have a claim for interest on the said two promissory notes which is postponed interest under the Moneylenders Act, 1927, s. 9 (1)—
for a certain sum together with certain interest.

When the matter came before the learned registrar, Mr. Tindale Davis, on behalf of his client, tendered all the moneys due which could properly be claimed on the petition under the Moneylenders Act, 1927, s. 9 (1), that is, the sums due together with interest at a rate not exceeding 5 per cent. per annum; but Mr. Davis concedes that, altogether apart from the Moneylenders Act and the Bankruptcy Act, there was under the promissory notes further interest due which may or may not have been all recoverable. Some of it might have been ultimately decided to be more than was recoverable as being more than 48 per cent.; but still, he does concede that there was something due beyond the sum which he tendered.

The learned registrar, in accordance with the Bankruptcy Act, 1914, s. 5 (3), duly considered whether for sufficient cause he ought to dismiss

the petition, and he came to the conclusion that he would not dismiss the petition. In coming to that conclusion he had regard, as I read his judgment, among other things to the fact that there was a sum of money due for interest over and above the amount of the principal and the interest at 5 per cent. which Mr. Tindale Davis had tendered in discharge of his liability.

The question which we have to consider is whether the Moneylenders Act, 1927, s. 9 (1), is such that in the circumstances it can be said that Mr. Tindale Davis has tendered all that is due, and that therefore there was sufficient cause for dismissing the petition. In my view it is impossible to arrive at that conclusion. It will be observed in the first place that the Moneylenders Act, 1927, s. 9 (1) provides that :

Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provision of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition—

and certain other matters which are not here material—

be calculated at a rate not exceeding 5 per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled.

That is to say that, for the purposes relating to the presentation of a bankruptcy petition, the amount in question must not be more than the amount owing and 5 per cent., but that there is still preserved to the moneylender in the circumstances stated in the subsection—namely, after all the debts proved in the estate have been paid in full—the right to receive in the bankruptcy proceedings any higher rate of interest to which he may be entitled.

In my view that section, dealing with the presentation of the bankruptcy petition, is dealing with the provision of the Bankruptcy Act, 1914, s. 4 (1), which states, among other matters, that :

A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (a) the debt owing by the debtor to the petitioning creditor—

or the aggregate amount of the debts when there are two or more creditors—

amounts to £50.

In computing that £50 I think sect. 9 (1) would have the effect that it would not be possible to arrive at the figure of £50 by utilising by way of interest more than the 5 per cent. per annum. I think that sect. 9 (1), so far as it relates to the presentation of a bankruptcy petition, has that effect, and that, if it had any other effect, it would be an effect which might operate upon other conditions under sect. 4, being conditions on which a creditor may petition.

When, however, we come to sect. 5, which deals with the proceedings on the creditor's petition, then I think that we are dealing with a different subject matter. That is to say, the petition being properly before the court, the position is just the same as it would have been apart from the Moneylenders Act, 1927, s. 9 (1), and, among other things, the court has preserved to it the discretion which it has to dismiss the petition on sufficient cause. In this case I think that the learned registrar was entitled to come to the conclusion that there was not sufficient cause for the dismissal of the petition, because there was a sum of money admittedly owing from the debtor to the moneylenders over and above the sum which was stated; that is to say, that the sum which is stated in this petition but need not have been so stated—the sum of postponed interest—was in law owing by the debtor to the moneylenders, and in the event of the debts proved in the estate having been paid in full they would have been entitled in the bankruptcy proceedings to that sum. The mere fact that they could not include it in the quantum which would enable them to bring a petition does not seem to me to prevent it being said that it was part of the debt owing to them recoverable in bankruptcy proceedings, as in any other proceedings, so far as it was possible to recover it under sect. 9. Therefore I come to the conclusion that the learned registrar was entitled to refuse to dismiss the petition on the ground that the sum tendered was not the whole of the sum recoverable in the bankruptcy matter. Whether, if it had been the whole sum, he could or could not have exercised his discretion in this case does not seem to me here to arise. The authorities seem to indicate that even when the whole sum is tendered there is no obligation necessarily on the registrar to dismiss the petition. It is a matter for him whether there is sufficient cause, but that question does not seem to me here to arise. It is sufficient to say that whatever rights he had in dealing with the matter are not affected by the Moneylenders Act, 1927, s. 9.

ROMER, L.J.: I agree. For the purposes of this case you must assume that there is nothing in the rest of the Moneylenders Act—by the rest I mean in the sections other than sect. 9—which would in any way interfere with the right of the petitioning creditors to recover from the debtor the full amount of the interest which they claim to be due to them in excess of the 5 per cent. That being so, it is to be observed that sect. 9 in no way affects the amount of the petitioning creditor's debt—that is to say, the amount of the indebtedness to the petitioning creditor of the debtor. All that sect. 9 does is to say that for certain purposes in bankruptcy—namely, the presentation of a petition, voting at meetings, compositions, and schemes of arrangement, and dividend—that indebtedness shall be treated as being less

than it in fact is. Indeed, it expressly recognises a right of the petitioning creditor to treat the balance of his indebtedness as a debt due to him out of the estate in the event of that estate having been proved sufficient to pay all the debts, including the petitioning creditor's debt with 5 per cent. interest, in full. I therefore think that the learned registrar is quite justified in coming to the conclusion to which he did come in this case: that the debtor had not shown any sufficient cause why the receiving order should not be made.

I only want to add this: that the case (6) which came before MR. REGISTRAR MELLOR, and which is referred to in the registrar's judgment, was an entirely different one. There the position was that if bankruptcy supervened and the estate proved insolvent, the petitioning creditor would get nothing more than a dividend on the amount of his principal, and the 5 per cent. interest. If the estate proved solvent, he would then receive the whole or part of the interest in excess of the 5 per cent. The alternative to proceeding in bankruptcy was that he should accept what had been offered to him by the father of the deceased debtor, which was the principal of the debt together with interest at 10 per cent., leaving the petitioning creditor the full liberty to exercise his rights against the estate of the deceased debtor, which as the registrar pointed out, was being administered by the executors, so that there was every prospect of the petitioning creditor, if the petition were dismissed, shortly receiving the interest above the 10 per cent., assuming that the estate was sufficient to pay it. In the present case what has been offered is merely the principal sum with 5 per cent. interest, without any assurance being given that the petitioning creditor is likely in the near or even distant future to be paid the balance of his interest. The case appears to me to have been very different from the one with which we are dealing here.

So far as regards the position of a debtor who tenders to the petitioning creditor the whole of what is due to the petitioning creditor—the costs of the petition and so forth—I desire to express no opinion at all. We have not been into the authorities, and I do not know in the least whether, in such a case as that, the learned registrar really has any discretion to refuse to dismiss the petition. Like SLESSER, L.J., I express no opinion about that.

GREENE, L.J.: I agree. The argument presented to us by Mr. Tindale Davis really involves this: that the registrar, when considering whether he shall exercise his discretion under the Bankruptcy Act, 1914, s. 5 (3), and dismiss the petition, must regard only the principal with 5 per cent. interest on a moneylender's debt as the real effective debt, and that he ought to disregard any excess interest over the 5 per cent. That, in my judgment, is not what is the effect of the Money-

lenders Act, 1927, s. 9 (1). That subsection does not destroy the excess interest for the purpose of the bankruptcy law ; it leaves it as a real debt provable in bankruptcy and payable in bankruptcy, but, for certain limited and specific purposes, that debt is to be ignored or postponed. It is to be ignored, for instance, in computing the £50 which is the minimum on which the petition can be based. It is to be postponed in the matter of payment until all the other debts have been paid in full. It is not postponed in the matter of proof, and in the end it will get paid if there are sufficient assets. Therefore it seems to me that, on the face of the subsection, the legislature is quite clearly preserving to the moneylender the right by means of the bankruptcy procedure to obtain the payment of that excess interest in addition to the payment of the principal and interest at the rate of 5 per cent.

The effect of Mr. Tindale Davis's argument, if it were right, would be to deprive the petitioning creditor of that right whenever the debtor chose to tender to him the principal, the 5 per cent. and the costs, and that the registrar in such a case should dismiss the petition, leaving the moneylender in this position : that as regards his excess interest he never could obtain the benefit of the Bankruptcy Act, 1914, to recover payment of it, unless it happened that some other petition were presented, in which case he could prove, and would be paid if the assets were sufficient. It appears to me that to accept that argument would be to go right against the language of sect. 9 (1), which quite clearly preserves to the moneylender the right to obtain payment by the bankruptcy machinery ; and it appears to me that, this being so, it is quite impossible to accept the argument that the tender has been a tender of the whole debt, because the answer is that it has not ; it has been a tender of part of the debt only, and part of the debt only in respect of which bankruptcy proceedings could be made effective. In my opinion the learned registrar did not exercise his discretion on any wrong principle, and I agree that the appeal should be dismissed.

Appeal dismissed with costs. Order made for payment out of the security, and the usual order with regard to the balance.

Solicitors : *Alec Woolf & Turk* (for the appellant) ; *Woolfe & Woolfe* (for the respondents).

[Reported by DEREK H. KITCHIN, Esq., Barrister-at-Law.]

Re THOMSETT (An Infant), THOMSETT v. THOMSETT.[CHANCERY DIVISION (Crossman, J.), **November 13, 1936.**]*Infants—Guardianship—Custody—Husband's appeal—Security for wife's costs—Guardianship of Infants Act, 1925 (c. 45), s. 7—R.S.C., Ord. 55A., r. 6.*

A wife obtained from the justices an order under the Guardianship of Infants Act, 1925, s. 7, giving her the custody of the child of the marriage. The husband appealed against the order to a judge of the Chancery Division and the wife applied for an order for security for her costs in the appeal, on the ground that she was not in a financial position to resist the appeal without some assistance or security. There was no evidence that the husband would not be able to pay the wife's costs if he were unsuccessful in his appeal:—

HELD: there were no special circumstances to justify the court in making the order asked for. The application must be dealt with in accordance with the usual practice of courts of appeal in ordering security for costs of an appeal and not in accordance with the practice of the Divorce Court in ordering security for a wife's costs.

[EDITORIAL NOTE.] An order for the custody of children under the Guardianship of Infants Act, 1925, is here sought to be treated as a matrimonial cause, in that the wife should have an order for security for costs. It has been the practice of the Divorce Court to secure by this means that a wife shall be in a position to carry on proceedings against her husband. It is here decided, however, that the procedure in the Divorce Division is not to be followed, but the usual procedure in a court of appeal is applicable.

AS TO ORDERS FOR SECURITY FOR COSTS, see DIGEST, Practice, pp. 808-812, Nos. 3704-3748, and YEARLY SUPREME COURT PRACTICE, 1937, pp. 1285-1288.]

Cases referred to:

- (1) *Fletcher v. Fletcher*, [1928] P. 20; Digest Supp.
- (2) *Shufflebotham v. Shufflebotham* (1923), 128 L.T. 642; 27 Digest 488, 5197.
- (3) *Sirrell v. Sirrell*, [1911] P. 38; 27 Digest 571, 6300.
- (4) *L— v. L—*. (1911), 55 Sol. Jo. 330; 27 Digest 571, 6299.

MOTION by Mrs. Mary Winifred Thomsett, the respondent to an appeal under the Guardianship of Infants Act, 1925, asking for an order for security for her costs in the appeal by Albert Ernest Thomsett, her husband.

On Sept. 3, 1936, the wife took out a summons, under the Guardianship of Infants Act, 1925, before the court of summary jurisdiction in Brighton, to which her husband was respondent, asking that the legal custody of the infant child of the marriage should be committed to the wife and that the husband should be ordered under the provision of the Criminal Justice Administration Act, 1914, s. 30 (1), to pay to the wife such weekly sum in respect of the said infant as the court should think reasonable. On Oct. 1, 1936, the court of summary jurisdiction made an order on the summons committing the legal custody of the infant to the wife and ordering the husband to pay the sum of 10s. weekly for the maintenance of the infant whilst under the age of 16. From

that order the husband appealed by notice of appeal dated Oct. 22, 1936. On Nov. 6, 1936, the wife served notice of motion before CROSSMAN, J., asking that the appellant be ordered within 14 days from the date of the order to be made therein to give security for the costs of and occasioned by his appeal, and until such security be given the appeal to be stayed.

Geoffrey Lawrence for the wife.

Andrew Clark for the husband.

CROSSMAN, J. : This is an application by the wife, in connection with an appeal under the Guardianship of Infants Act, 1925, s. 7, the wife being the respondent to the appeal and asking for an order for security for her costs in the appeal by her husband. An order has been made by the justices, under the jurisdiction conferred on them by sect. 7 of the Act of 1925. That order was made in favour of the wife, giving the custody of the child to her, as I understand it. The husband appeals against that order, and the question is whether I can, and, if I can, whether I should, order security for the wife's costs of the appeal to be given by the husband.

Sect. 7 of the Act of 1925 extended the jurisdiction which was originally conferred, by the Guardianship of Infants Act, 1886, s. 5, on the High Court and county courts, to courts of summary jurisdiction and provides for an appeal to the High Court. R.S.C., Ord. 55A, is headed "Guardianship of Infants Acts, 1886 and 1925," and it sets out the rules which are made applicable to questions arising under the Act of 1886 and the Act of 1925. Rule 4 of that order provides that all matters relating to appeals from courts of summary jurisdiction in respect of which jurisdiction is given to the High Court by the Act of 1925 shall be disposed of by any judge of the Chancery Division named for that purpose by the Lord Chancellor. I have been named for that purpose by the Lord Chancellor. R.S.C., Ord. 55A, r. 6 (1), says :

Subject to the rules of this order, rules 7, 8, 10, 11, 12, 16, and 17 of Ord. 59 shall apply to appeals to the Chancery Division of the High Court from county courts and courts of summary jurisdiction under either the Act of 1886 or the Act of 1925, the words "the Chancery Registrars' Office" being deemed to be substituted for the words "Crown Office Department of the Central Office" in rule 11.

R.S.C., Ord. 59, r. 17, says :

Subject to these rules, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals to the High Court from inferior courts of record of civil jurisdiction, except county courts.

I felt a little difficulty at first, owing to the fact that rule 17 applies in terms only to appeals from inferior courts of record of civil jurisdiction,

except county courts, but I do not think there is any real difficulty occasioned by that because the terms of R.S.C., Ord. 55A, r. 6, perfectly plainly make rule 17 applicable to the particular appeal in question. The question whether the justices are a court of record of civil jurisdiction or not does not seem to me to be material. The result, I think, clearly is that rule 17 is applicable to this appeal. That rule says that the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern (as I hold) this appeal. I find that the rules for the time being in force with respect to appeals from the High Court are contained in R.S.C., Ord. 58, and the rule relating to applications for security for costs is rule 15 of that order. The only part which is material says :

Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

That rule, then, is applicable, and Mr. Andrew Clark says that, in interpreting that rule, I am bound to follow the lines on which the Court of Appeal has decided that security for costs ought to be given. It seems to me that the rule gives me a discretion to order security for costs under special circumstances, though in ordering security I should feel it my duty to follow the lines on which the Court of Appeal orders security. I find, in fact, that a fairly regular practice is laid down as to the special circumstances in which the Court of Appeal orders security for costs to be given. Those circumstances are, I think, substantially limited to cases : (i) where an appellant is in a financial position in which he would probably not be able to pay the costs of the appeal if he were unsuccessful ; (ii) where there is some abuse of the process of the court on the part of the appellant which justifies the court in ordering security ; and (iii) where the appellant is out of the jurisdiction and therefore an order could not be enforced against him if he were unsuccessful. Those are circumstances in which I think the Court of Appeal would, in ordinary cases, order security for costs. I ought, I think, to follow those lines. This particular case does not come within any of those cases. I have no evidence to suggest that the appellant, on this appeal, would not be able to pay the respondent's costs if he were unsuccessful and were ordered to pay them. That is the first alternative condition which the Court of Appeal requires. It is certainly not a case out of the jurisdiction, and I have nothing to show me that it is a case in which there has been any abuse of the process of the court. So that I could not, in ordinary circumstances, find anything in the practice of the Court of Appeal which would justify me in making an order in this case.

Mr. Lawrence, who has dealt with the case very fully and very carefully, has suggested that this is a case where I might properly, or ought

properly, to follow what might be said to be the analogy of the practice of the Divorce Division of the court in dealing with appeals from justices under the Act of 1895, which empowers justices to make separation orders. He referred me to several cases and suggested that those cases would make it proper for me in this case to order security to be given for the wife's costs simply on the ground that the wife was not herself in a financial position to defend or to resist the appeal without some further assistance or security. The difficulty I feel with regard to that is that the Divorce Division practice is admittedly a thing by itself. The usual practice is that the wife is entitled to have security from her husband for the costs of the proceedings which she is beginning against him. That seems to me to put the Divorce Division practice on a different basis altogether from the practice in these cases. In *Fletcher v. Fletcher* (1), LORD MERRIVALE, P., after referring to the case of *Shufflebotham v. Shufflebotham* (2), said at p. 24 :

It is a matter of common knowledge that where a wife has been a litigant in this court [the Divorce Division] and has appealed, although her costs here have been provided for under the general jurisdiction of the court, if the case goes to the Court of Appeal, the procedure of the Court of Appeal operates. The matter has ceased to be a proceeding in this jurisdiction, to which the old rules of divorce jurisdiction apply.

In giving judgment, he said, at pp. 22 and 23 :

In the ordinary jurisdiction of this Division [the Divorce Division] as between husband and wife, there is an inveterate practice of ancient origin whereby the common law presumption is acted upon that a wife has, *prima facie*, no means of her own for providing for her necessities. Out of that common law presumption there arose a practice whereby in this court, if the wife was a suitor, or if she was a respondent, and if there were no grounds in the relative means of the parties for refusing the order, she obtained an order almost as of course that provision should be made for the conduct on her part of the litigation on which she had embarked.

He then referred to the case to which Mr. Lawrence has referred, of *Sirrell v. Sirrell* (3), where, he said :

It was held that where a wife has been successful in the court below, if the husband appeals to this Division, the practice of the Division applies to direct him to give security for her proper costs.

That seems to be a matter of the practice in the Divorce Division ; and even in the case of *Sirrell v. Sirrell* (3), it has been pointed out by Mr. Clark that there was evidence which was the basis of a proper order for the security for costs. The only case where there was no such evidence is *L— v. L—* (4), where an order was made in chambers without, apparently, any evidence of any ground for ordering security which the Court of Appeal would regard as a good ground. Although it was argued that there was no such ground and that the power of the court to grant security under the Divorce Act did not extend to appeals under

the former Act, the learned President at that time ordered a sum to be paid into court. It seems to me that the decisions in the Divorce Division are not applicable to the present case at all. They arise entirely out of this so-called inveterate practice which has grown up in the Divorce Division. It seems to me that here the wife's position is that she can resist or oppose this appeal as a poor person, if she is unable to do so otherwise; there is nothing to prevent her doing that, and, in the circumstances, I think I should be going far beyond anything that has ever been done in the Court of Appeal and doing something which I should not be justified in doing here if I were to order the husband to give security for costs. In the circumstances, I can only refuse the application.

Application refused.

Solicitors: *John C. Bosley & Legg*, Brighton (for the wife); *Gordon Gardiner, Carpenter & Co.*, agents for *F. H. Carpenter & Veale*, Brighton (for the husband).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

PARKES OR KESWICK AND OTHERS *v.* PARKES OR
KESWICK AND OTHERS.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Maugham), **May 7, 21, 22, November 12, 1936.**]

Will—Vesting—Bequest of residue and remainder—Gift over in certain events—Interests to vest at date due and payable.

A testator who died in 1914 domiciled in Scotland and was survived by his widow, two sons and three daughters, directed his trustees by his will (1) to settle certain capital sums on each of his five children; (2) to give the life-rent of the remainder of his estate to his widow; and (3) on her death, after increasing the amount of the children's provisions, (a) to convey the heritable or real estate in Scotland to his elder son, whom failing to his younger son, and (b) to divide the whole residue of the estate equally between the elder and the younger son; and in the event of the elder son dying before attaining the age of 26 and leaving lawful issue, such issue were to take his half, but failing such issue his half was to go to the younger son or his issue. There was a vesting clause in the will which declared that the bequests and provisions "shall vest at the dates when the same are due and payable and fall to be made over." The elder son, who died at the age of 41, predeceased the widow and left no issue. The questions raised in the appeal were (a) whether one half of the residue primarily destined to the elder son vested in him *a morte testatoris*, and (b) if it did not so vest whether it passed to the younger son and his issue, or was the subject of an intestacy and was thus available as a fund out of which the testator's widow and children could benefit:—

HELD: the vesting clause could reasonably be construed to mean that the one half of the residue destined to the elder son vested in him

a morte testatoris, at which date he had already attained the age of 26, regardless of whether the widow was then alive or not.

Per LORD MAUGHAM : In both Scotland and England, where a testator's intention could be gathered with reasonable certainty from the entire will, supplemented by extrinsic evidence if admissible, that intention was effective even against the literal meaning of the particular non-technical words used by the testator in the will.

[EDITORIAL NOTE.] *Prima facie* an express provision as to vesting must be given effect to according to its terms, but it is always subject to be varied by a consideration of the other dispositions or terms of the will. If it is clear that the intention of the testator as shown by the will read as a whole is against the word "vest" in the will not receiving its literal meaning, effect must be given to it, even against the literal sense of the particular expression.

AS TO EXPRESS VESTING CLAUSES, see HALSBURY, 1st Edn., Vol. 28, pp. 799, 800, para. 1448 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1034-1035, Nos. 8916-8929.]

Case referred to :

(1) *McKay's Trustees v. Gray* (1903), 5 F. (Ct. of Sess.) 1086.

APPEAL from an interlocutor of the First Division of the Court of Session.

The appellants were the widow, daughters, and trustees of the elder son of the late James Johnstone Keswick, who died on Dec. 26, 1914. His testamentary trustees under his trust disposition and settlement and his younger son were the respondents. A special case was presented by the parties to the First Division of the Court of Session to obtain a judicial interpretation of the said trust disposition and settlement in so far as it related to the residue of the testator's estate. The First Division (the LORD PRESIDENT (LORD CLYDE), LORD BLACKBURN and LORD MORISON) decided that the one half of the residue which would have gone to the elder son, not having vested in him *a morte testatoris*, did not fall into intestacy, but passed to the younger son and his issue. Thereupon this appeal was brought. The arguments are set out in the judgments.

James Stevenson, K.C., and *J. F. Gordon Thomson* for the appellants, the widow and daughters.

T. P. McDonald for the appellants, the trustees of the elder son.

R. Candlish Henderson, K.C., and *J. Frederick Strachan* for the respondents.

LORD BLANESBURGH : My Lords, the main, indeed the only question now calling for actual decision on this appeal was not, in the first instance, even within its scope. How the question came to be raised at all will be explained as we proceed. It is concerned with the true effect of a general clause in the elaborate will of a Scots testator. Stated summarily the clause provides that the bequests and provisions made by the will are to vest at the dates when they are due and payable and it

goes on to direct how the intermediate income of each several bequest or provision is to be applied for the benefit of the individual beneficiary prior to the time fixed for payment. Is the clause effective to make contingent and in the result to destroy a gift in reversion of a moiety of the testator's residuary estate made to his elder son, vested in the son as from his own death by an earlier purpose of the will and with no intermediate income whatever available for the son? That question has arisen by reason of the death some years ago of that elder son while the testator's widow, the tenant for life of residue, as such in enjoyment of the entire income thereof and now one of the appellants, still lived.

Their Lordships of the First Division of the Court of Session on a special case stated for the opinion of the court, considering the clause in question to be applicable to every bequest or provision of the will, whether thereby vested or not elsewhere have held as a result of the clause so construed that the gift to the son remained contingent at his death and that, thereupon, it failed. Further, in answer to a second question propounded by the special case their Lordships held that the testator had not, as was contended, died intestate with reference to the gift which had so failed, but that in the events which have happened the interest passed by the will to the testator's second son, the respondent James Douglas Johnstone Keswick and his issue. The interest in question is of great value. It is worth some £150,000 and against this second answer the widow and the three daughters of the testator as four of his heirs *in mobilibus* appealed to this House. The trustees of the deceased elder son, Harry Gordon Keswick—I will refer to him in what follows as Harry—accepting at this stage the court's answer against them to the first question, intimated to the other parties concerned that in Harry's right whether individual or as an heir *in mobilibus* they did not desire to be served with notice of any appeal by those supporting an intestacy as the answer to the second question.

Accordingly, to the appeal of the widow and the daughters of the testator, his younger son James—I will now so describe him—was in the first instance the only opposing respondent, the issue with the appellants being confined to the question whether or not Harry's interest in residue had, as contended by them, been left undisposed of by the will. Upon that issue each side accepted and asked the House to assume without further consideration or discussion the correctness of the answer of the division as to the effect of the general clause—an answer no longer contested by Harry's trustees who alone were immediately concerned to dispute its correctness.

But very early in the discussion it became manifest that the appeal was proceeding on an assumption which, upon consideration, might be found to be untenable and further, and only less clearly, that the answer

to the second question, justified largely as it was because intestacy would, as was supposed, thereby be avoided, might not in the result have that effect at all. Intestacy it appeared could only be avoided with certainty if it could be held that notwithstanding the general clause Harry's interest in residue remained vested in him at his death.

Your Lordships accordingly thought it right, that before the House proceeded further with the hearing of the appeal, an opportunity should be given to Harry's trustees to reconsider their attitude towards the division's answer to the first question.

Of this opportunity the trustees at once availed themselves, lodging a printed case and supporting at an adjourned hearing of the appeal their contention therein set forth that the gift of a moiety of residue which, apart from the clause referred to, was admittedly vested in Harry *a morte testatoris* remained vested in him at his death unaffected by that clause which properly understood had no application to the gift.

Thus it has been brought about that all parties have been represented here, as they were below; the cause from every standpoint has been fully canvassed and your Lordships are in a position to treat the whole interlocutor of the First Division as being now under review.

My Lords, the questions so in issue can only be adequately answered after a critical examination has been made of the scheme and provisions of a very elaborate will, the work of a draftsman for whom complete accuracy of expression cannot be claimed. I must therefore call your Lordships' attention, in some detail I fear, to these provisions. But, before doing so I would allude to some of the facts in relation to the testator's family at the date of his will so far as these can be gathered—sufficiently perhaps, but not quite completely—from the terms of the special case and of the will itself. No true view of that instrument as a whole can be obtained unless these surrounding facts are remembered.

The will was made on Oct. 3, 1908, and Mr. Keswick died on Feb. 26, 1914. His widow and five children survived him—two sons and three daughters. All his children were, as appears from the will itself, living at its date, and one of his daughters, the respondent, Mrs. McEwen, as also there appears, was then married.

In the special case nothing is said as to the ages of the daughters, and it is impossible therefrom to ascertain the age of any daughter at the date of the will. As the respondent Mrs. McEwen is first mentioned there she is presumably the eldest of the three, but on this subject nothing more is disclosed. Fortunately the ages of both sons are ascertainable and this as an aid to construction should suffice. It appears by the special case, albeit only indirectly, that at the date of the will the elder son Harry was 20, and his younger son James 9 or 10. The will must be read with at least these facts in mind.

By the testator's death in 1914 Harry had attained the age of 26.

James was still a boy of 15 or 16. Harry died on Jan. 16, 1928, at the age of 41 married but without issue. The three daughters and James are, as has been seen, still alive. All the daughters are now married. James, still a bachelor, was 35 at the date of the special case.

We may now proceed to an examination of the will as a whole—citing textually such portions as call for interpretation. In this way will best be disclosed the true place in its scheme, and the true function therein assigned to the general clause which, as has been seen, lies at the root of the present disputation.

The testator is by his will “desirous to regulate the succession to my means and estate after my death.” As the LORD PRESIDENT, LORD CLYDE, observes, “It is very clear that the last thing contemplated by the testator was an intestacy.” Your Lordships will be at one with their Lordships of the First Division in seeking to find an escape from so untoward a result.

The first five purposes of the will need not detain the House. They are concerned with the payment of the testator’s debts and with legacies to relatives and friends.

The sixth purpose is the first which has a bearing on the present difficulty. Thereby a sum of £10,000 is to be made over to Harry on his attaining the age of 26 (here is the first reference to an age clearly regarded by the testator as decisive) with a declaration that if he dies before attaining that age leaving a child or children who being sons shall attain the age of 26 or being daughters attain that age or marry, such children in equal shares if more than one, are to take “the share to which his her or their parent would have been entitled”—the first instance in the will of a certain confusion on the part of its draftsman between a gift to children only and one comprising remoter issue as well.

By the seventh purpose the testator sets apart a like sum of £10,000 for James. But this sum, unlike Harry’s, is settled: it is called James’s “settled sum.” The income is to be paid to him during his life; and after his death the capital is to be paid to his children or remoter issue as he may by will or codicil appoint and in default of appointment is to be held in trust for payment to his “issue” who being:

male shall attain the age of 26 and being female shall attain or have attained that age or marry or have married in equal shares *per stirpes*.

Let a characteristic of the will here be noted. James’s life interest in his settled sum does not, as does Harry’s interest in his £10,000, await the attainment of the age of 26. It commences at the testator’s death, although at the date of the will James was as has been seen only 10, and at the death no more than 16.

The final sentence of this seventh purpose I quote both because it is a good example of characteristic draftsmanship and also because the

provision is incorporated by reference in later purposes of the will now immediately relevant :

And in case no issue of my said son shall take a vested share in his settled sum, then his settled sum shall upon the failure of such issue . . . be held for or made over to my other children or their issue who being males attain or have attained the age of 26 or being *daughters* [note this word] attain or have attained that age or marry or have married in equal shares *per stirpes* : and so that any share accruing to any daughter of mine under this purpose shall be subject to the trusts herein-after declared concerning such daughter's original settled sum under these presents.

The eighth purpose makes provision for that original settled sum of a daughter. It is of £10,000 for each of the three "who may be alive at my death." The trusts vary only in detail from those by the seventh purpose declared with reference to James's settled sum. It is, however, fortunate that no daughter died in the testator's lifetime leaving issue who survived him, for it would appear if the words only are to be regarded that had that event happened her issue would have been left entirely unprovided for. In this purpose, as in the seventh, it is only upon the children or issue who take in default of appointment that the condition is imposed that being male they shall respectively attain the age of 26 years or being "female"—here that word and not the word "daughters" as in the seventh purpose is correctly used—shall attain that age or marry. The last words of the seventh purpose just quoted relating to accruing shares here again employed, are made applicable to the share accruing to James as well as to the share accruing to any daughter. Let it again be noted that each daughter's life interest commences irrespective of age or marriage.

By the tenth purpose the testator directs an estate of his in the Transvaal to be made over at his death to Harry immediately and unconditionally. By the eleventh purpose what may be described as the first residue is to be held for the testator's widow during her life. After her death, by the twelfth and thirteenth purposes four several sums of £5,000 out of first residue are in effect each to be added to the "settled sum" of £10,000 bequeathed to James and to each of the three daughters by the seventh and eighth purposes respectively. By the fourteenth purpose the testator directs his trustees after his widow's death to dispose and convey the family estates in Scotland to Harry unconditionally so far as he is concerned ; but so far as the substitutionary devise to his eldest son is concerned only on his attaining the age of 26. I need not further allude to other provisions of this devise which now that Harry has died in the widow's lifetime without issue may raise questions at her death. The "last" purpose of the will containing the disposition of what may be termed the ultimate residue including the gift with reference to which the present question arises is in the terms following :

Upon the death of my said wife or upon my death if she shall predecease me I

direct my trustees to hold the whole residue and remainder of my estate and to pay and make over one half thereof to the said Harry Gordon Keswick on his attaining the age of 26 and if he shall die before attaining that age leaving lawful issue such issue shall be entitled to the share or shares original or accruing as hereinafter provided which their father would have taken by survivorship equally among them *per stirpes* and the same shall be payable to them on their respectively attaining the age of 26 if males or on attaining that age or being married if females and failing such issue the said share shall fall to be held for or paid over to the said James Douglas Johnstone Keswick or his issue equally among them *per stirpes* in like manner as is provided by the seventh purpose hereof in regard to his original settled sum : and my trustees shall hold the other half of said residue for the said James Douglas Johnstone Keswick in trust for payment of the income thereof to him during his life, and after his death for payment of the capital thereof to his issue and that in like manner and subject to the same conditions as provided by the seventh purpose hereof in regard to his original settled sum : and failing such issue for payment of the income thereof . . . and of any accrued share of residue to his surviving wife until her death or remarriage, and thereafter the capital of the said James Douglas Johnstone's share shall fall to his surviving brother or to his issue equally among them *per stirpes*.

Here again it will be noted that James's receipt of income is independent of his age.

For the rest the will so far is a most elaborate settlement with the clearest distinction drawn between gifts which are vested and gifts which are contingent. Most noticeable is it, in relation to the present question, that the condition of attainment of 26, or in the case of females of marriage, is never imposed in the case of a life interest, an income gift, but only in relation to a gift of corpus. In the latter case it is always imposed except in relation to appointees, and in relation also to the devises made by the tenth and fourteenth purposes so far as Harry is concerned. In the result a life interest is never contingent : the right to the income of the "settled sums" of each daughter and James is not postponed, young as James certainly was at the date of the will, and unmarried and probably young also as two of the daughters then were. It would presumably correspond with that income scheme that the income of a gift of corpus, before it vested as corpus, should also be receivable by the beneficiary during suspense of vesting. But this is not so provided and would not so far have effect. It is in this will a matter for express provision if it is so to result. Is not such express provision actually found in the general clause to which we are now coming ? That will be the real question on this appeal.

In this connection and before proceeding to the clause itself let it further be noted that these contingent gifts of corpus are in this will of two classes : the first, a gift which has opened at the date of the testator's death : the second, a gift which is reversionary or substitutional and opens only upon the death of some previous holder. The distinction is of major significance in relation to the general clause with which we are now concerned. It is well illustrated by the difference in the sixth

purpose between the contingent interest in the £10,000 of Harry as contrasted with that of his issue, or as contrasted again with his own interest in residue under the last purpose of the will. There are many possible instances in which under the scheme so far disclosed gifts in reversion originally contingent on attaining 26 or marriage will while still reversionary become vested. Had the testator died within five years after he made his will, an excellent example of this would have been supplied by Harry's moiety of residue now in question. It is agreed on all hands that that interest, in that event contingent at the testator's death, would have been vested at his own unless contingency is prolonged by the general clause now to be stated.

That clause is as follows :

And I hereby declare that the bequests and provisions under these presents shall vest at the dates when the same are due and payable and fall to be made over and that until the period of vesting my trustees shall be entitled to pay to any beneficiary prospectively entitled to any share or bequest or to apply for his or her behoof the whole or any portion of the income of such share or bequest : and any accumulation of surplus income during a suspense of vesting shall be treated as capital and attaching to the share or bequest from which it is derived.

Now, on the facts above narrated, and with special reference to that clause although it is not in terms referred to the questions of law asked by the special case—I have already stated their purport—were textually as follows :

1. Did a one half share of the residue of the testator's estate under clause (lastly) of the said trust disposition and settlement vest *a morte testatoris* in the said Harry Gordon Keswick ?

2. In the event of the foregoing question being answered in the negative—

(a) does the capital of the said share fall to be treated as intestate movable estate of the testator and is the second party [the widow] now entitled to payment of one third thereof, or

(b) does it fall to be held by the first parties [the trustees] for the purposes of the said trust disposition and settlement ?

By its interlocutor of Feb. 5, 1935, the First Division of the Court of Session answered the first and branch (a) of the second question of law in the negative and branch (b) of the second question in the affirmative.

Now, if the first of these questions be now answered in the affirmative the second will not arise and, in my judgment, as will be seen presently, the first should be so answered. Still it is convenient to begin by saying a word on that second answer, because of the reason which prompted it, namely, to avoid an intestacy. To that end their Lordships of the First Division adopted a construction of the last purpose of the will, forced though they felt it was, which permitted Harry's moiety to pass to James under the gift over. But their Lordships have not explained

how such a construction certainly strained is possible. And, for myself, I cannot see how it is. The gift over only has effect under that last purpose of the will if, *inter alia*, Harry dies before attaining the age of 26. The issue of Harry do not take at all if he survives the age of 26. But he was 41 at the date of his death and the truth is that the events did not happen on which alone the gift over was to have effect. The will does not say, and no court of construction can properly imply a provision to the effect, that the gift over is to have effect on Harry's death in the lifetime of the widow without issue and at any age. If, therefore, the first question be answered in the negative, as it has been answered by the First Division, then it is I think inevitable that it is the second question (a) and not the second question (b) that must be answered in the affirmative. There is no escape from intestacy and this, I believe, is the opinion of all your Lordships. But, my Lords, it was, I feel sure, a mistake to suppose, as their Lordships of the First Division did, that intestacy would have been avoided by their answer to the second question. James is still a bachelor. If he so remains or marrying dies without issue to take, intestacy at the best is thereby only postponed. From intestacy, accordingly, so far as Harry's moiety is concerned there is, as has been already said, no certain escape except by an affirmative answer to the first question.

And is not that the correct answer? My Lords, I think it is. Their Lordships of the First Division read the general clause on which the answer depends as if no limitation on its scope or operation were imposed by its later provision with reference to the application of intermediate income. They read the clause as if it stopped at the words "fall to be made over," and as if the later words are applicable only when there chances to be intermediate income not otherwise appropriated by the will. Taking, therefore, no account of these later words:

there can [said the LORD PRESIDENT] in these circumstances be no doubt with regard to the vesting of the elder son's half of the residue for he predeceased his mother and his half of the residue never became payable to him. Therefore it never vested in him.

LORD BLACKBURN is even more decided. He said:

The case is a very clear one and there can be no doubt that the first question must be answered in the negative.

My Lords, I am myself unable to accept that view of the clause. It may be agreed that the "bequests and provisions" to which it is stated to apply are introduced in terms of apparently complete generality. Even so, and even if the clause had ended with the words "fall to be made over" I would have hesitated long before attaching to it the universal effect so easily attributed by the First Division. Hesitation must have followed the survey just made of the will as a whole, disclosing

in so many parts of the structure the dislocation which must follow a construction of this clause that sets no limits to its scope—a complete intestacy on the widow's death as to a half of the ultimate residue with the possibility of indefinite future intestacies in relation to otherwise vested dispositions of the “settled sums.” Nor could I have overlooked in the case of this will the quality of the drafting—or the want of it—this surely is not a will which everywhere clearly says what it means. Beyond all, however, I must have remembered the fact that this is no more than a subordinate clause, one not lightly to be construed in a sense repugnant to substantive unambiguous words of vesting elsewhere found in the will. But, if the clause be read with due regard to its concluding words, then even disregarding these considerations in aid—but with compelling force if they be borne in mind—an alternative construction emerges disclosing the clause to be merely complementary of what has gone before, destructive of nothing for which provision has already been made. The “bequests and provisions” remain, it is true, in terms unqualified. But equally unqualified is seen to be the assumption of the later words that all the income produced by every such bequest-or provision is and will be available either to be paid over to or to be applied for behoof of the prospective beneficiary or to be treated as capital to be added to the bequest or provision from which as income it has proceeded. No bequest or provision is being dealt with other than one with reference to which that assumption is correct. But then there are bequests and provisions of this will—reversionary bequests—to which this statement as to their income cannot be made to apply. Here, in other words, we have a complete antinomy between the words of the first part of the clause literally read and those of the second. Here again, the draftsman is in evidence. How are his apparently inconsistent words to be reconciled? In one way only, I respectfully suggest, and that is by confining the introductory words of the clause, wide as they may appear to be, to those bequests and provisions of the will the income of which during suspense of vesting is available to be dealt with as thereby directed. In this view of it, the clause can have no reference at all to such an interest as Harry's moiety of residue. For him it could produce no income during the widow's life, during the same period, it could produce nothing to be added as capital to the provision in his favour. And if this restricted effect can, on its words, properly be attributed to the clause, then its whole and necessary purpose already foreshadowed is disclosed. Its work is to deal with the intermediate income of contingent gifts of corpus on the same principle as the testator has already dealt with gifts of income which throughout their duration continue so to be.

May I, by an example, illustrate the effect of the clause as I venture to construe it. James, as has been seen, remains a bachelor, but he may

marry and have a son who on attaining 26 will have a vested remainder in his father's share of residue. If having attained that age the son dies in his father's lifetime the general clause will not affect his interest in residue any more than it has affected Harry's. But if on the death of a survivor of his father and his grandmother, the testator's widow, he, still living, is under the age of 26, then until his interest becomes vested by his attaining that age the general clause will apply to him and necessarily so, if he is to receive or have applied for his benefit the intermediate income now by the deaths of the two tenants for life available for him.

My Lords, I have already indicated the extent of the testamentary disaster out of which this construction extricates a testator from whose mind the idea of intestacy was so remote. The immediate result of the construction adopted by the First Division is, as your Lordships agree, an intestacy as to Harry's moiety of residue. But what follows from the alternative construction reached, as I venture to suggest, without doing any real violence to the language of this will? That construction discloses the clause to be the coping stone of a consistent scheme of distribution amongst the widow, children and remoter issue of a testator who believed that, except as to income, the age of discretion and consequential vesting was normally not reached until the age of 26 or, in the case of females, until marriage under that age, but who did believe, and, by his will, supported his belief, that it was at least reached then. It may be that hereafter it will be found that in some respects the testator's dispositions have not been complete. But no intestacy, if to any extent it does supervene, will result as I venture to think from this special clause properly understood. In my judgment, therefore, the answer to the first question propounded by the special case should be answered in the affirmative and the interlocutor appealed from should, except as to expenses, be recalled.

As to the costs of this appeal, if they be not already agreed between the parties, your Lordships will, I apprehend, be of the opinion that taxed as between solicitor and client they should be paid out of the corpus of the residue of the testator's estate.

And I move your Lordships accordingly.

LORD MACMILLAN : My Lords, by the last purpose of his will the testator, who died on Dec. 26, 1914, directed his trustees, upon the death of his wife or upon his own death if she should predecease him, to hold the whole residue of his estate and to pay and make over one half thereof to his eldest son Harry on his attaining the age of 26. Provision is then made for the disposal of this half share of residue in the event of Harry dying before attaining the age of 26 but in no other event. The testator was survived by his widow and by his son Harry who at the date of the testator's death had attained 26 years of

age. Harry subsequently died in 1928 survived by the testator's widow. As the widow enjoyed under the will a life-rent of the whole residue of the estate and Harry predeceased her, he died without having his one half share of the residue paid and made over to him. The question is whether Harry had at his death a vested interest in this half share of residue.

Under the testamentary provisions which I have so far summarised there can be no doubt that Harry would on the death of the testator have acquired a vested interest in one half of the residue, having at the testator's death attained 26 years of age. The postponement of the paying and making over of his share to the death of the widow in order that she might enjoy the life-rent of the residue would not affect the vesting of his share in him. But the testator has included in his will a general vesting clause in which he declares that the bequests and provisions which he has made "shall vest at the dates when the same are due and payable and fall to be made over." As it is upon the death of the testator's widow that the trustees are directed to pay and make over to Harry one half of the residue (subject to his attaining 26 years of age) it is maintained that the effect of the vesting clause is to postpone the date of vesting of Harry's share of residue until the widow's death and that as he predeceased her he died without having acquired a vested interest in the bequest in his favour.

There is thus a conflict to be settled between, on the one hand, the effect of the bequest in favour of Harry which, as the law interprets it, gives him a vested right in one half of the residue on his survivance of the testator, and on the other hand, the general clause declaring that all the testator's bequests are to vest at the date when they are due and payable and fall to be made over, which would appear to postpone the vesting of Harry's bequest until the death of his mother. Such inconsistencies have presented themselves not infrequently in the past where a general clause declaratory of the date of vesting of the testator's bequests has contradicted the effect of the terms of a particular bequest, and the reports contain a number of instances in which the difficulty has been surmounted by a process of interpretation.

Now, in the present case there are several considerations which assist your Lordships in so reading the general vesting clause as to prevent what I have no hesitation in saying would be the defeat of the testator's manifest intention as regards the vesting of Harry's share of residue. I say "manifest intention" because I think that it clearly appears from the terms of the bequest to Harry that the testator intended the attainment of 26 years of age and that alone to be the condition of Harry acquiring a right to his bequest. There is no destination-over of the bequest in the event of Harry attaining 26 years of age but predeceasing his mother and so not receiving in his lifetime payment of

the bequest. It is only in the event of his not attaining 26 years of age that there is a destination-over. Intestacy therefore must be the result of holding that vesting was postponed till the widow's death, and intestacy was certainly not what this testator contemplated. I agree with your Lordships that the interpretation of the terms of the bequest by which the learned judges of the First Division sought to escape intestacy will not do. It is too violent and it is also unsatisfactory. The more legitimate solution in my opinion is to be found in an interpretation of the clause of vesting.

It will be observed that the vesting clause is expressed not negatively but positively. It directs that the bequests are to vest "at the dates when the same are due and payable and fall to be made over." I think this may legitimately be read as referring to the dates at which the respective bequests are specifically directed to be paid and made over. In Harry's case one half of the residue is directed to be paid and made over to him on his attaining the age of 26. The date of his attainment of the age of 26 is in my opinion the date when his bequest is due and payable and falls to be made over to him within the meaning of the general vesting clause. The testator's use of the plural "dates" suggests that he had in mind the dates applicable to the cases of his beneficiaries respectively and personally and not the date of his widow's death. Moreover, there is no destination-over in the event of a legatee predeceasing the date when his bequest is due and payable and falls to be made over. That contingency is already provided for if the date when Harry's bequest is due and payable and falls to be made over to him is read as meaning the date of his attaining 26 years of age; otherwise it is not provided for. The clue to the interpretation of the vesting clause is to be found in the purpose which clearly it is designed to serve. It is intended to provide for cases under the will where the income of a bequest is available before the beneficiary has acquired a vested right in it. For example, if the testator's wife had predeceased him and Harry had not attained 26 years of age at the testator's death, the vesting clause would have authorised the trustees to pay the income of the bequest in whole or in part to him until the arrival of the time when his bequest became due and payable and fell to be made over to him, namely his attainment of 26 years of age.

The present case is not unlike that of *McKay's Trustees v. Gray* (1). There a testator directed his trustees, on the remarriage or death of his wife in the event of her surviving him, to pay and make over the residue of his estate to and among his children who should survive him equally among them and :

that in the case of sons as they respectively attain majority and in the case of daughters as they respectively attain majority or are married whichever of these

events shall first happen but the said shares of said residue shall not vest until the respective terms of payment.

Provision was made for the case of a child dying without having acquired a vested interest ; in such a case his share was to go to his issue or if he had no issue to the other surviving children and their issue. The widow, who was given a life-rent of the whole residue, survived the testator. One of the sons who had attained majority predeceased the widow without issue. The Second Division of the Court of Session held that vesting was not postponed till the death of the widow and that the share of each son vested in him on his attaining majority although he could not obtain payment while the life-rent subsisted. This conclusion was reached on a construction of the vesting clause, the court holding that "the respective terms of payment" referred to the majority or marriage of the legatees and did not refer to the remarriage or death of the widow. Similarly in the present case I think that the reference to the dates when the bequests "are due and payable and fall to be made over" may be read as referring in the case of Harry to the date of his attaining the age of 26 irrespective of whether the widow should then be alive or not.

I accordingly agree with your Lordships that the decision of the First Division should be reversed and the first question in the special case answered in the affirmative.

LORD MAUGHAM : My Lords, agreeing as I do on nearly all substantial points with the opinion just delivered by the noble Lord on the woolsack, I shall not detain your Lordships for more than a few minutes in expressing the reasons which have led me to the same conclusion. The trust disposition and settlement of the testator was plainly designed to make provision for his widow, his two sons and his three daughters and in certain events for their issue and the persons whom they might marry. At the date of the document the testator's elder son Harry was aged 20, his younger son James was 9 or 10. The widow and all these children except the elder son are still alive. He, however, died on Jan. 16, 1928, at the age of 41, married, but without issue. The general scheme of the trust disposition is clear enough. As the LORD PRESIDENT pointed out it was : first, to settle certain capital provisions on each of the five children ; secondly, to give the widow the life-rent of the remainder of the estate heritable and movable ; thirdly, after the death of the widow and subject to certain increases in the amount of the children's provisions, (1) to make over the Scottish heritage to the elder son whom failing to the younger son, and (2) to divide the ultimate residue of the estate then remaining between Harry and James in the terms of the last purpose of the trust disposition. I need not repeat in

full the words of this clause (which I shall call "the residue clause"), beginning thus :

lastly, upon the death of my said wife or upon my death if she shall predecease me I direct my trustees to hold the whole residue and remainder of my estate, etc.

The substance of the clause (apart from the possible effect of the subsequent general clause as to vesting) is not in doubt. First, Harry is to have one half the residue on his attaining 26. Secondly, if he fails to attain that age leaving lawful issue, such issue shall be entitled to "the share or shares original or accruing" which their father "would have taken by survivorship" equally on their attaining the age of 26 if males, or attaining that age or being married if females. Thirdly, failing such issue, the said share is to be held for James or his issue as therein provided. Fourthly, the other half is settled upon trust for James for life and after his death in trust for his issue as therein stated and failing such issue in trust to pay the income to James' surviving wife until her death or remarriage and thereafter the capital shall fall "to his surviving brother or to his issue equally among them *per stirpes*."

Confining our attention to the provisions for Harry and his issue, it is of course obvious that he must either attain the age of 26 or fail to do so. In the first alternative he becomes (so far as this clause is concerned), and whether or not his mother is alive, an absolute owner. He can provide for his widow and his issue as he may think fit. In the second alternative his issue take that which he would have taken "by survivorship." True it is—and it has indeed so happened—that the testator's widow might survive Harry even if he attained the age of 26 and she might survive one or more of his children even if he or she attained 26 or married ; but the rule is clear that a bequest or provision in the form of a direction to pay at a future period rests immediately (subject of course to any condition personal to the donee), if the payment is postponed in order to provide for some other interest such as a life-rent or is postponed merely for the convenience of the estate.

The question which emerged for decision in this House in the circumstances which my Lord has detailed is simply this—does the general clause as to vesting and as to payment of interest pending a vesting have the effect of postponing the vesting of interests under the residue clause until (amongst other events) the death of the testator's widow ? The clause is in these terms :

And I hereby declare that the bequests and provisions under these presents shall rest at the dates when the same are due and payable and fall to be made over and that until the period of vesting my trustees shall be entitled to pay to any beneficiary prospectively entitled to any share or bequest or to apply for his or her behoof the whole or any portion of the income of such share or bequest ; and any accumulations of surplus income during a suspense of vesting shall be treated as capital and attaching to the share or bequest from which it is derived.

It is plain that if this clause is treated as making the bequest to Harry under the residue clause contingent on his surviving the widow (as well as attaining 26) the scheme of the will so far as the residue is concerned is defeated. If he attains 26, marries and has children he cannot provide out of his share of the residue for either his wife or his issue if his mother should survive him. If he dies under 26 his children (attaining 26 or being females on marriage) are to have the share or shares which he would have taken "by survivorship"; but if whilst his mother is alive he survives 26 by one day his children according to the natural language of the words get no interest whatever under this part of the residue clause. It is true that the learned judges of the First Division have seen their way to avoid this last result by disregarding or at least by paying little attention to the fact that as a matter of ordinary grammatical construction the conditional institution of Harry's issue is governed by the words "if he shall die before attaining that age (26) leaving lawful issue"; and it is easy to understand the desire to avoid an unintended intestacy which has led them to this conclusion. My Lords, for my part and with great respect to the learned judges I am of opinion that it is much easier and therefore more legitimate so to construe the vesting clause as to avoid an intestacy than to construe the phrase in the residue clause as though the words "if he shall die before attaining that age" were in effect equivalent to the words "if he shall die before that age or after attaining that age if my said wife shall survive him," yet this is in effect what the learned judges have done. Moreover it is to be observed that their conclusion may lead to a very unsatisfactory position; for a son of Harry may attain 26 or a daughter may marry under that age during the lifetime of the testator's widow. If that should happen upon the construction which the First Division has placed upon the vesting clause the interests of the son and the daughter remain conditional during the widow's life and neither of them can make any provision for a spouse or for his or her children.

My Lords, I share the desire of the Lords of Session so to construe the trust disposition if possible as to make it lead in the words of LORD BLACKBURN:

to a reasonable result and to one which would appear to be entirely consistent with the apparent intentions and wishes of the testator—

rather than to one:

which leads to a most extravagant result which would apparently be quite inconsistent with what he desired.

If I may now turn to the vesting clause, I think it important to note that it is in an affirmative form, the bequests . . . "shall vest at the dates when the same are due and payable." There is no suggestion in these words that the bequests under the residue clause are being cut down,

or so qualified that the bequest to Harry, and I would add, the conditional institution of his children, though he has or they have attained the age of discretion pointed out by the testator, must be dependent on the accident of the widow's longevity. If so strange a result had been intended I should certainly have expected the draftsman to have framed either the residue clause or the vesting clause in terms other than those which he in fact used. The second consideration of moment is that the sentence in the clause runs on without a pause to say that until the period of vesting the trustees :

shall be entitled to pay to any beneficiary prospectively entitled to any share or bequest . . . the whole or any portion of the income of such share or bequest.

This, in my opinion, gives the clue to the clause as a whole, and tends strongly to indicate that its real purpose, a purpose it must be admitted not very accurately expressed, is to make provision out of income for beneficiaries who on attaining 26 or (if females) on marriage before that age will become absolutely entitled to the bequest in their favour.

My Lords, these two considerations taken in conjunction with the whole scheme of the trust disposition, and the manifest absurdity resulting from another view, lead me to the conclusion that the vesting clause must be treated as a declaration dealing with vesting by reason of events personal to the beneficiary (i.e., the attaining of the age of 26 or marriage) and the payment of the income of the share or bequest to the beneficiary "prospectively" entitled to the same on his or her fulfilling the condition. I cannot entertain the view that in this trust disposition a subordinate and general clause, mainly directed as I think to the matter of the income to be paid to prospective beneficiaries ought to be treated as upsetting so important a part of the scheme as expressed in the unambiguous language of the residue clause. My conclusion, therefore, is that the clause is intended to have the limited operation above suggested. In other words it will take effect as if there were a statement in it that the declaration as to vesting is not to postpone the vesting of any interest under the residue clause merely because the payment is postponed during the lifetime of the testator's wife in order to provide her with an income.

My Lords, the case as I view it is one of some difficulty, for a court of construction must be careful in departing from the literal sense of the words used in a testamentary instrument. There are here, however, no technical words in question, and I think it is true in Scotland as in England that where in such a case the intention of the testator can be collected with reasonable certainty from the entire trust disposition or will, with the aid of extrinsic evidence of a kind properly admissible, that intention "must have effect given to it, beyond and even against, the literal sense of particular expressions." I am here in effect quoting from a proposition as to general principles of construction to be found in

HAWKINS ON WILLS, derived by that learned author from a consideration of a number of decisions of great weight including two decisions of this House. My Lords, on these grounds I concur with the motion proposed by my noble and learned friend.

LORD ATKIN and LORD THANKERTON concurred.

Appeal allowed and interlocutor of the First Division of the Court of Session reversed.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Scott, Moncrieff & Trail*, W. S., Edinburgh (for the first appellants); *Grahames & Co.*, agents for *Dundas & Wilson*, C. S., Edinburgh (for the second appellants); *Royds, Rawstorne & Co.*, agents for *J. C. & A. Stewart*, W. S., Edinburgh (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

THE OWNERS, MASTER AND CREW OF S.S. "NESTOR" *v.*
THE OWNERS OF S.S. "MUNGANA," CARGO AND FREIGHT.
THE "MUNGANA."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J., with a Trinity Master), **November 10, 11, 18, 1936.**]

Shipping—Salvage—Apportionment.

There is no general rule as to the proper apportionment of a salvage award as between owners, master and crew, but the apportionment must in each case depend upon the particular circumstances.

[EDITORIAL NOTE.] It is said that the owner's share in an apportionment of salvage was generally one-half up to 1870; from 1870-1883 it was two-thirds, and since 1883 three-quarters has generally been given. The gradual increase is no doubt due to the increase in value of ships and to the preponderating influence of their steam power in effecting successful salvage. In the present case it was desired to argue the question afresh whether in law or by the practice of the court, the apportionment had now become fixed at three-quarters, but it is clear that the division is still dependent in each case upon the special circumstances of the case.

AS TO APPORTIONMENT OF SALVAGE, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 582-586, paras. 889-898; and FOR CASES, see DIGEST, Vol. 41, pp. 887-889, Nos. 7728-7759.]

Cases referred to:

- (1) *The Gipsy Queen*, [1895] P. 176; 41 Digest 887, 7728.
- (2) *The Sodupe* (1927), 27 Ll.L.R. 76.
- (3) *The Uganda* (1934), 49 Ll.L.R. 255.
- (4) *The Dunottar Castle*, [1902] W.N. 70; 41 Digest 889, 7759.

ACTION for salvage.

The "Mungana," which was on a voyage from Adelaide to Melbourne with a part general cargo, was about 17 miles to the southward of Margaret Brock Reef when on account of engine trouble the engines

were stopped for examination. The wind was blowing a gale with a high sea running. Both anchors were dropped, but the force of the wind and sea were such that both cables parted, and the "Mungana" started to drift towards the Margaret Brock Reef. The "Nestor," which in response to a wireless message had been standing by, was unable to get on the lee side of the "Mungana" to establish connection; all her rockets were fired in an unsuccessful attempt to get a line on to the "Mungana"; and a boat from the "Nestor" also made an unsuccessful attempt to get a line on to the "Mungana." The "Mungana" drifted clear of the reef, narrowly missing it, and the "Nestor" was then able to go up on the lee side to make fast. With considerable difficulty, and minor damage, connection was eventually established, and the "Nestor" proceeded to tow the "Mungana" to Port Adelaide, some 170 miles. The owners, master and crew of the "Nestor" claimed salvage.

H. G. Willmer for the plaintiffs.

Robert E. Gething for the master and crew in support of a claim for separate apportionment.

Owen L. Bateson for the defendants.

Willmer: As between the owners of a salving vessel, on the one hand, and her master, officers and seamen, on the other, the apportionment of the salvage reward depends upon the nature and circumstances of the salvage service. If the chief factors are the courage, skill and labour of the crew, and there has been no great risk to the property of the shipowner, it is the crew, and not the shipowner, who are entitled to the chief share of the reward. If, on the other hand, it is principally by means of the ship itself that the salvage has been effected, the owner's share will be the larger; and if, besides, his vessel and her cargo were valuable and were exposed to great risk, it will be larger still: see KENNEDY ON SALVAGE (2nd Edn., at p. 169). In the majority of cases the salving vessel is a steamship, and the chief instrument in effecting the salvage service is the steam power. The larger proportion of the reward will therefore be to the owners: see KENNEDY, at p. 171. The apportionment nowadays is almost invariably three quarters to the owners and one quarter to the master and crew: see KENNEDY, p. 172. See also *The Sodupe* (2) and *The Uganda* (3). In the present case the service is essentially a ship service. The owners risked a very valuable property, their regular schedule and their mail; and they incurred an expense of £300. So far as the master and crew are concerned, theirs was a short service.

Gething: So far from being essentially a ship service, it is entirely a master's service. There are 16 pages of engine movements and the master was on the bridge from beginning to end. He took a very great

responsibility upon himself ; as LANGTON, J., said in *The Uganda* (3), at p. 258 :

I think he was the person who took this big responsibility of jeopardising this big value.

The Sodupe (2) was a power service ; this is essentially a sailors' service. If things had gone wrong, the master would have been the one to suffer most. In *The Dunottar Castle* (4), mentioned in KENNEDY, at p. 175, where the salving vessel was a large mail steamship valued at £308,000, the court, in consideration of the responsibility which her master had assumed in undertaking the salvage services, gave him two thirds of the balance of the award after apportionment to the owners.

It is true that three quarters and one quarter have been awarded so frequently as to be generally called the " ordinary " apportionment, but in *The Gypsy Queen* (1), at p. 177, LORD ESHER, M.R., says about this :

That may be a very good working principle ; but there is no such rule. The apportionment must in each case depend upon the particular circumstances.

The court will bear in mind that, in this case, the master, besides endangering the owner's property, also endangered his own life and reputation.

BUCKNILL, J. : In this case the plaintiffs as the owners, master and crew of the British steamship " Nestor " claim salvage for services rendered to the British steamship " Mungana," her cargo and freight. [His Lordship considered the facts in detail and found that : (i) the " Mungana " was in imminent danger when the towage began ; (ii) none of the three other ships which at the request of the " Mungana " had stood by, could have rendered any effective assistance ; and (iii) the " Nestor " in rendering the salvage service was in danger of collision and of being disabled by the fouling of her propellers in the tow rope, in which case she would have been in a perilous position.]

There is one other matter to which I must refer. In this case the master, officers and crew of the " Nestor " were separately represented at the hearing in order that the question of apportionment should be fully argued. The owners of the " Nestor " are themselves bearing the costs of this separate representation so that the respondents will incur no extra expense. It was pointed out by counsel on the argument as to apportionment that in various cases the apportionment as between owners and master and crew has varied very widely from the usually recognised formula of three quarters and one quarter, in cases where success was mainly due to the steam power of the salving vessel. Counsel asked me to intimate my opinion as to a proper apportionment of a salvage award as between owners, master and crew as a general rule in a case of this kind. It is clear, however, that there can be no

general rule. As LORD ESHER, M.R., pointed out in *The Gipsy Queen* (1), the ratio of three quarters and one quarter may be a very good working principle, but there is no such rule. The apportionment must in each case depend upon the particular circumstances.

In this case I have approached the question of the total award by considering what would be the proper and separate award to make to the owners, to the master, and to the officers and crew. Taking the claim of the owners first. They provided a highly efficient and valuable steamship as the instrument of the salvage service, which was performed by their vessel at serious risk of damage and even of total loss. On the other hand, the expenses incurred by them in rendering the services were small, and the time lost was short. Taking the case of the master of the "Nestor," I think that Mr. Gething had substantial grounds for saying that this was a master's service. It was he who decided to endanger his ship and the lives of those on board to save the "Mungana," and took on his shoulders a heavy responsibility, which was justified by the event. It was he who handled the ship during the difficult and risky manœuvres of trying to make fast to a disabled vessel drifting rapidly on a pitch dark night in a dangerous locality. Taking the case of the officers and crew. There is a large crew of 170 hands all told, including a substantial number of deck officers and engineers and two wireless operators. All hands were on deck and all the engineers were on watch throughout the whole of the operations until the "Nestor" had made fast, that is to say, throughout Sunday night and early morning of Monday. All hands volunteered to go in the boat, including the firemen and stewards. After the towage started, double watches were kept on deck and in the engine-room. By reason of the services all hands on the "Nestor" were exposed to personal danger if the "Nestor" became disabled. In addition, those who handled and tended the towing hawser incurred some personal risk. Taking all these matters into consideration I award a total sum of £11,750, and I apportion this sum as follows: to the owners the sum of £8,000; to the master £1,000; and to the officers and crew £2,750, according to their ratings.

I direct that the chief officer and 2nd officer and the boat's crew receive double shares.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

NEWPORT *v.* POUGHIER.

[CHANCERY DIVISION (EVE, J.), November 4, 1936.]

Partnership—Dissolution—Appointment of receiver—Fund in court—Partnership insolvent—Charging orders on fund in court—Priority—Solicitors Act, 1932 (c. 37), s. 69.

The fund in court to the credit of a partnership action was insufficient to pay the creditors in full. Certain creditors of the partnership obtained a charging order on the fund in their favour in the form settled in *Kewney v. Attrill* (1), and the solicitors for both the plaintiff and the defendant obtained charging orders on the fund for their taxed bill of costs under the Solicitors Act, 1932, s. 69. The plaintiff's solicitor brought a petition asking for payment out of the fund of a sum representing his taxed costs in the action. The only question argued was whether any of the charging orders gave to the creditors who had obtained them a priority over the general body of creditors of the partnership:—

HELD: (i) the *Kewney v. Attrill* (1) order gave no priority to the creditors obtaining it over the general body of creditors.

(ii) the charging orders obtained under the Solicitors Act, 1932, s. 69, ranked in priority of the other creditors.

[EDITORIAL NOTE. The priority of the solicitor who had obtained a charging order under the Solicitors Act, 1932, s. 69, was admitted by all parties. The question at issue was whether a judgment creditor who had obtained an order in the form settled in *Kewney v. Attrill* (1) was entitled to any priority over the general creditors. It would appear that the purpose and object of such an order is to prevent an immediate execution and sale by the judgment creditor and allow the partnership assets to be realised in due course by the receiver. It is now held that after the assets are so realised, the judgment creditor has no priority over the general creditors, but ranks *pari passu* with them.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 24, Receivers, pp. 382, 383, para. 719; and FOR CASES, see DIGEST, Vol. 36, p. 489, Nos. 1540-1545.]

Case referred to:

(1) *Kewney v. Attrill* (1886), 34 Ch. D. 345; 36 Digest 489, 1540.

PETITION by J. J. McIntyre asking for payment out of a fund in court of a sum representing his taxed costs in the partnership action of *Newport v. Poughier*, in which he acted as the plaintiff's solicitor.

In 1933 the plaintiff commenced an action for the dissolution of partnership, in which judgment was given ordering the appointment of a receiver, accounts and inquiries. In June, 1933, the defendant was adjudicated bankrupt and his trustee was added as a defendant. The plaintiff had no means to proceed with the action, which became derelict. The receiver duly advertised for creditors and collected the assets, and at the date of the petition the ascertained partnership debts greatly exceeded the fund in court to the credit of the action. In July, 1935, Messrs. Mills and Evill obtained judgment against the partnership firm for a bill of costs, and on July 17, 1935, a charging order was made in their favour in the form settled in *Kewney v. Attrill* (1), which placed

them in the same position as if the goods of the partnership had been taken in execution and sold. On July 31, 1935, the petitioner and the defendant's solicitor obtained charging orders on the fund in court for their taxed bills of costs under the Solicitors Act, 1932, s. 69.

The only question argued on the hearing of the petition was whether any of the charging orders gave to the creditors who had obtained them a priority over the general body of creditors of the partnership.

G. D. Johnston for the petitioner.

A. G. Coulson for the defendant's trustee in bankruptcy.

J. A. Brightman (*J. A. Mackintosh* with him) for Messrs. Mills and Evill.

Milner Holland for Dulcetio-Polyphon, Ltd., unsecured creditors of the partnership firm.

EVE, J.: Since this matter was last before the court I have had the opportunity of inspecting a number of orders made on applications similar to the one now standing for judgment. The bulk of these applications were made on summonses, the amounts involved being less than £1,000. Here the fund in court exceeds that amount, and the matter has had to be dealt with by petition. I find nothing in any of the cases I have looked into to change the conclusion at which I arrived before the vacation, namely, that the obtaining of a *Kewney v. Attrill* (1) order gives no priority to the creditor obtaining it over the general body of creditors. The charging orders obtained under the Solicitors Act, 1932, have been properly made, and subject to the payment of the costs of this application rank in front of the other claimants. The balance of the fund must be distributed *pro rata* among the creditors of the business, and as the receiver's security has been discharged there must be some special order made for payment to each creditor of his respective share. There must also be a schedule of all the creditors entitled to receive any sum proved and exhibited, and therein will be stated the *pro rata* amount paid to each.

Solicitors: *John J. McIntyre* (for the petitioner); *G. B. Hemming & Son* (for the defendant's trustee in bankruptcy); *Mills, Lockyer, Church & Evill* (for Messrs. Mills and Evill); *A. E. Samuels & Co.* (for Dulcetio-Polyphon, Ltd.).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

THE UNION LIGHTERAGE COMPANY, LIMITED *v.* THE OWNERS OF THE SAILING BARGE "CURLEW."

"THE CURLEW."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J., with Trinity Masters), **October 19, 20, 1936.**]

Shipping—Navigation Rules—River Thames—Barge dropping down river on her anchor—Port of London River Bye-Laws, 1914-1934, bye-laws 5, 14.

A sailing barge, which was dropping down the Thames on her anchor, fouled the mooring of a dredger lying just above a bridge, through the centre arch of which the barge had intended to pass. The barge remained fast in the middle of the arch for about half an hour, and continued to show her under-way lights. A tug which was coming down river saw the under-way lights and intended to follow the barge through the centre arch of the bridge. Shortly afterwards the master of the tug realised that something was wrong, and changed his course in an attempt to pass through another arch, but the tug failed to clear the arch and suffered damage:—

HELD: the barge ought to have exhibited an anchor light as soon as her anchor held her, in accordance with the Port of London River Bye-Laws, bye-law 14, and she was negligent in continuing to show her under-way lights.

[**EDITORIAL NOTE.** The point here considered is at what point of time a vessel proceeding down a river should exhibit under-way lights, when in fact, though unintentionally, she becomes anchored or moored.

FOR THAMES RULES, see HALSBURY, 1st Edn., Shipping, Vol. 26, p. 482, para. 696; and FOR CASES, see DIGEST, Vol. 41, pp. 764-767, Nos. 6170-6212.]

ACTION by the owners of the steam tug "Bruno" and the barge "Hector" against the owners of the sailing barge "Curlew" for damages caused by the alleged negligence of the defendants' servants in charge of the "Curlew."

The facts are set out in the judgment and the Port of London River Bye-Laws, 1914-1934, therein referred to provide as follows:

5. The expression "under way," when used in relation to a vessel means when she is not at anchor, or moored, or made fast to the shore, or aground, and includes a vessel dropping up or down the river with her anchor on the ground.

14. A vessel under 150 feet in length when at anchor or moored shall, by night, exhibit forward . . . a white light.

H. G. Willmer for the plaintiffs.

Owen L. Bateson for the defendants.

BUCKNILL, J.: In this case the Union Lighterage Company are claiming against the owners of the sailing barge "Curlew" for damage sustained by their tug "Bruno" and their dumb barge "Hector." The plaintiffs allege that this damage was caused by the negligence of the defendants' servants in charge of the "Curlew." The damage was done about 5.45 p.m. on Dec. 28 last and was received when the "Bruno" and the "Hector" struck Battersea Bridge. There are 5 arches to

this bridge and the top of the wheel house of the "Bruno" struck the top of the No. 2 arch of the bridge counting from the north side.

The case made by the master of the "Bruno" was, to put it shortly, that he was coming down the Thames with 6 empty barges in tow in three ranks. The total length of the flotilla was about 330 feet and its maximum beam was about 49 feet. The "Bruno" is about 76 feet long and 20 feet beam. The weather was dark but clear. There was a moderate wind. There was some dispute as to its direction, but I accept the master's evidence that at Battersea Bridge it was southeasterly. The tide was ebb about two hours after high water, force about 3 knots. There was a P.L.A. steam dredger moored head up-river about in line with the south abutment of the centre arch of the bridge and about 100 feet above the fire-float which in its line is moored with its stem about 100 feet above this abutment. The dredger was exhibiting the three triangular white lights prescribed by bye-law 18 for a steam dredger moored in the river, and had four breast chains out, two forward and two aft, port and starboard. The starboard breast chains had about 175 feet on each chain and were laid at an angle on the bow and quarter and were in fact slack at the time.

The "Bruno," as I find, was coming down the river about mid-channel at a speed of about 7 knots through the water, and was shaping to pass through the centre arch which was the arch normally used by her master, who has been a master of tugs for 12 years. He seldom uses No. 2 arch. As he approached the bridge he saw a red light of a vessel which turned out to be the "Curlew," pretty well in the middle of the centre arch. The master of the "Bruno" thought that the vessel was a sailing barge which was driving down the river on the tide and that she was showing the proper under-way lights for a sailing barge in such circumstances, and he accordingly eased his engines from full to slow in order to follow the "Curlew" down through the centre arch, and blew one short blast to indicate to the sailing barge that he was going to pass to the southward of her, and he wanted the barge to sheer away to the northward after she cleared the bridge, and thereby give the "Bruno" more room to pass to the southward of her.

The master of the "Bruno" said—and I see no reason to doubt his evidence, which was given in a straightforward and candid way—that he expected to pass through the centre arch without difficulty after the "Curlew" had passed through. About the same time as he noticed the "Curlew" he put his helm amidships and thereafter kept his tug and tow heading for the centre arch. Shortly afterwards the master of the "Bruno" saw the red light of the "Curlew" shut in, and her green light appeared under the centre of the middle arch, and he then realised there was something wrong, and guessed correctly that the anchor of the "Curlew," on which she was dropping down river, had fouled the moor-

ings of the dredger lying just above the bridge. The master of the "Bruno" came to the conclusion that if he continued on his course for the centre arch he was bound to run down the sailing barge, and to prevent this happening he put his wheel hard-a-port, and shortly afterwards hard-a-starboard, to try to get through No. 2 arch, but he failed to get clear through the arch, and the damage was done which is the subject of the action. The reason why he failed to clear this arch was that owing to the sudden action which he had to take he was more to the starboard of the exact centre of the arch than he would have been if he had approached it in the normal way. At that state of the tide the width of the clear water way available for him and his tow under No. 2 arch was very limited.

Now, in this case I have only heard the evidence of the plaintiffs because the defendants—I expect wisely—elected to call no evidence. I accept as accurate the evidence called on behalf of the plaintiffs. I am satisfied that the master of the "Bruno" kept heading for the central arch, and intended to go through it, until he realised that the "Curlew" was stationary, and that he was compelled to depart from his intention by the position of the "Curlew." I am also satisfied that at the time when he took action to make No. 2 arch, instead of the centre arch, the "Curlew" was lying in the fairway approaching the centre arch, in such a position as to block that arch for the "Bruno" and her craft in tow.

I have asked the elder brethren whether, in their opinion, the circumstances were such that a careful tug-master ought to have realised sooner than the master of the "Bruno" realised that he could not make the central arch, owing to the position of the "Curlew," and they say "no." I have also asked them whether, in their opinion, the master of the "Bruno" took the right action when he did realise that the centre arch was blocked for him by the "Curlew." On this point they advise me that the master of the "Bruno" was justified in trying to make No. 2 arch in preference to the risk of trying to turn head to tide, having regard to the length of his tow, and the strength and set of the tide. I agree with this advice which coincides with my own view on these matters. I therefore absolve the "Bruno" from blame as regards her navigation.

I have now to consider whether the "Curlew" was to blame, and, if so, whether her negligence caused the damage in dispute. In my view the damage to the "Bruno" was solely due to the fact that the "Curlew" was improperly exhibiting the navigation lights for a sailing vessel under way, and thereby misled the master of the "Bruno."

The evidence before me proved that the "Curlew" when approaching the P.L.A. dredger was warned by a watchman on the P.L.A. dredger not to drop her anchor on the bottom, but notwithstanding this warning

she did so, and, in consequence, her anchor fouled the starboard after mooring chain of the dredger.

I think—and the elder brethren agree with me—that this was an act of negligence on the part of the “Curlew.” Thereafter the “Curlew” remained with her anchor foul of the anchor attached to the mooring chain of the dredger and thereby remained fast for nearly half an hour before the collision between the “Bruno” and the bridge. Notwithstanding this the “Curlew” continued to exhibit her under-way lights in breach of the Thames Bye-Laws, right up to the collision in question, although she had ample opportunity to take them in. The “Curlew” was certainly not under way within the meaning of these words as defined by the rules. Mr. Bateson argued that it was doubtful whether the “Curlew” could be said to be at anchor or moored under the circumstances and whether she ought to have exhibited the light prescribed by bye-law 14 for vessels at anchor or moored. If it is necessary for me to decide the point, I hold that the “Curlew” was at anchor or moored within the meaning of bye-law 14 and that she ought not only to have taken in her under-way light, but she ought also to have exhibited anchor lights because she was in fact riding to her anchor which was foul of the anchor of the dredger. The elder brethren agree with me that under the circumstances the “Curlew” ought to have exhibited an anchor light when her anchor held her.

For these reason I pronounce judgment for the plaintiffs.

Judgment for the plaintiffs with costs.

Solicitors : *Keene, Marsland, Bryden, Besant, Batham & Cork* (for the plaintiffs); *J. A. & H. E. Farnfield* (for the defendants).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

JACKSON, SUBSTITUTED FOR CHIEF KWAMINA SAKYIAMA
v. COOKE.[PRIVY COUNCIL (Lord Maugham, Lord Salvesen and Sir Lancelot Sanderson), **October 23, 26, 1936.**]*Privy Council—Gold Coast—Courts—Native courts—Jurisdiction—Ownership of land—Public Lands Ordinance, 1876 (c. 142), s. 7.*

In 1926 the Colonial Secretary of Gold Coast Colony issued a notice under the Public Lands Ordinance, 1876, to the effect that the land, the subject of this action, was required for the use of the public service. Before 1931 proceedings were taken in the divisional court of the Gold Coast Colony in respect of that order and the land here in question. The present action as to the ownership of the land was commenced in the native court in 1931. Counsel for each side in the court below admitted the pendency of the proceedings in the divisional court:—

HELD: (i) after the notice in 1926 all questions of ownership of the land and amount of compensation due in respect of it must be tried in the divisional court of the Gold Coast.

(ii) the native court had no jurisdiction to entertain the present action and the proceedings before it were a nullity.

(iii) the admissions of counsel did not make the judgment in the court below in strictness a judgment by consent, but one for which the court took some responsibility and an appeal lay therefrom.

[EDITORIAL NOTE.] The question of jurisdiction of the native courts on questions of the ownership of land in Crown Colonies is, of course, only of interest in such colonies. This case also contains the consideration of the limits of the restriction of a right of appeal in cases of judgment by consent, and the remarks upon this matter are of general interest. Where the court takes the responsibility for the construction of a statute or ordinance it seems that an appeal will lie to the appropriate higher tribunal.

AS TO WEST AFRICAN COURTS, see HALSBURY, Hailsham Edn., Vol. 11, p. 203, para. 386. AS TO EFFECT OF A JUDGMENT BY CONSENT, see HALSBURY, Hailsham Edn., Vol. 21, pp. 221-223, paras. 522-525; and FOR CASES, see DIGEST, Practice, pp. 620-625, Nos. 2571-2604.]

Cases referred to:

- (1) *Sikpo v. Lassinueh* (1922), Gold Coast Law Reports, F.C., 1922, p. 29.
- (2) *Ewua v. Wusu* (1926), Gold Coast Law Reports, F.C., 1926-29, p. 160.
- (3) *Renner v. Thensu* (1929), Gold Coast Law Reports, F.C., 1926-29, p. 498.

APPEAL by James Jackson (substituted for Chief Kwamina Sakyiama, deceased) caretaker for and on behalf of the Anona Stool and family of Dawson's Hill, Cape Coast, from a judgment of the West African Court of Appeal (W. P. MICHELIN, acting C.J., SIR DONALD KINGDON, C.J., and WEBBER, J.), dated May 9, 1933, dismissing an appeal from a judgment of the Provincial Commissioner Cape Coast, dated Aug. 22, 1932, under which an appeal by the respondent from a decision of the native tribunal had been allowed. The facts of the case appear in the judgment of their Lordships delivered by LORD MAUGHAM.

Sir William Brandford Griffith for the appellant referred to *Sikpo v. Lassinueh* (1), *Ewua v. Wusu* (2), *Renner v. Thensu* (3).

The respondent did not appear.

LORD MAUGHAM: This is an appeal from the decision of the West African Court of Appeal pronounced on May 9, 1933, deciding that the action, which had been commenced in a native tribunal, was not properly before such tribunal and that its judgment and all subsequent proceedings amounted to a nullity but awarding the respondent costs on appeal and in the courts below. The proceedings were begun by writ of summons dated Jan. 30, 1931, in the native tribunal of Cape Coast by the appellant as plaintiff against the respondent as defendant, and according to the appellant the substantial question was whether the land, the subject of such action, was the property of the family of the plaintiff or the family of the defendant. The writ, however, called upon the defendant to establish his claim to the land.

The native tribunal having given judgment on Oct. 31, 1931, in favour of the appellant (plaintiff) with costs, the respondent (defendant) appealed to the provincial commissioner's court of the Central Province. The provincial commissioner, on Aug. 22, 1932, gave judgment, reversing the decision of the native tribunal, in favour of the respondent with costs. From the judgment of the provincial commissioner's court the appellant appealed to the West African Court of Appeal and the appeal came up for hearing before that court on May 4, 1933. On May 9, 1933, after counsel for the appellant had addressed the court at length, it transpired that in 1926 the colonial secretary of the colony had issued a notice under the Public Lands Ordinance, 1876 (Laws of the Gold Coast Colony, c. 142), to the effect that the land, the subject of the action, was required for the use of the public service. What happened then is shown by the following note of the president of the court:

Both counsel agree that when this suit was instituted, proceedings under the Lands Ordinance in which the defendant Cooke was a claimant, were pending in the divisional court at Cape Coast, and had not yet been determined, and are not yet determined. Both counsel agree that under the Public Lands Ordinance, s. 7, writ of summons could not have been instituted in the native tribunal until the proceedings under the Public Lands Ordinance had been terminated.

The court adjourns for 10 minutes.

On resumption, the court delivers the following ruling:

By the court.

Counsel for each side having admitted to the court that at the time when the writ of summons in respect of which this appeal has been taken, was instituted in the native tribunal, proceedings were then pending in the divisional court of Cape Coast under the Public Lands Ordinance (c. 142), s. 7, as amended by Ordinance 17 of 1929, s. 2, in which the present defendant was a claimant to the identical land described in the writ of summons, it is clear that under the provisions of the latter section, such an action could not be instituted until after the proceedings before the divisional court had been terminated. The action was therefore not properly before the native tribunal and any judgment upon such an action was a nullity and all the subsequent proceedings thereon amounted to a nullity. We consider that the respondent (Cooke) should have his costs, not only in this court,

but in the courts below. The costs in this court are assessed at the sum of £33 8s. 6d. The court below to carry out.

From this decision the appellant has brought the present appeal. He has appeared by counsel to argue that notwithstanding the agreement by his counsel before the Court of Appeal that under the Public Lands Ordinance, s. 7, the action could not properly have been instituted in the native tribunal until the proceedings under the Public Lands Ordinance had been terminated, it was open to him to contend that both the admission and the finding by the Court of Appeal were erroneous and that the appeal should have been decided on the merits. The respondent did not appear on this appeal and their Lordships have not had the advantage of hearing an argument on his behalf. Their Lordships were not of opinion that the judgment appealed from could be regarded in strictness as a consent judgment. The decision on the construction of the ordinance appears to be one for which the court took at least some responsibility, and this is not the less true because the admission of counsel for the appellant seemed to justify the view expressed by the court. In these circumstances it seemed to their Lordships desirable to hear the question of construction argued by counsel for the appellant. At the close of this argument it seemed clear to their Lordships on a consideration of the ordinance as a whole and in particular of sects. 6 and 7 that, after notice had been given by the colonial secretary of the proposed acquisition of the lands in question as lands required for the service of the colony, the divisional court of the Gold Coast was the proper tribunal to determine the amount of compensation due in respect of the lands and also any case of disputed interest in or title to the lands. Under sect. 7 this determination (subject to appeal) is to be final and conclusive as respects all persons upon whom notices have been served or who have appeared and claimed. Payment of the compensation to the person appearing by the judgment of the court to have the best right thereto is a complete discharge to the colonial secretary :

but shall not hinder any subsequent proceedings at the instance of any person having or alleging better right thereto as against the person to whom such payment may have been made.

It is possible that these sections do not take away the right of the proper native tribunal to determine some temporary question of possession or receipt of rent or the like arising prior to the conveyance to the colonial secretary ; but in the present case it is to be noted that the writ of summons sought to establish the title of the Anona family to the land and that although the indorsement on the writ itself stated that the defendant was :

involved in litigation in the divisional court, Cape Coast, with the intent of alienating the said land to himself and the family he claims to represent and of divesting the said Anona family and their stool of their rights in the said land.

In their Lordships' view this question was within the jurisdiction of the divisional court by the express language of the ordinance. To the knowledge of the appellant there was a proceeding pending before that court relating to the matter. If the appellant for some reason was too late to make a claim before that court he would still under the words quoted be entitled to make a claim against the person to whom the payment of the compensation may have been made. In these circumstances their Lordships think that the proceedings before the native tribunal were misconceived and could have served no useful purpose. It does not seem to their Lordships necessary to determine whether the native tribunal was entirely divested of jurisdiction in the matter by the proceedings in the divisional court since on any view the proceedings in the native tribunal should have been stayed and the judgment of that tribunal if not a nullity must have been set aside. Their Lordships do not think they are called upon in the present case to consider the precise form of the judgment under appeal since they are satisfied that in substance it is correct.

As regard the costs awarded to the respondent by the judgment, it seems to their Lordships sufficient to say that the costs were in the discretion of the Court of Appeal and their Lordships do not consider that there is any special circumstance here which would justify an appeal to His Majesty in Council in respect of costs alone.

Their Lordships have therefore humbly advised His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *A. L. Bryden & Co.* (for the appellant).

[*Reported by T. A. DILLON, ESQ., Barrister-at-Law.*]

COWAN *v.* ENNERDALE RURAL DISTRICT COUNCIL.[CARLISLE AUTUMN ASSIZES (Finlay, J.), **October 16, November 16, 1936.**]*Rates—Collection—Amalgamation of districts—Transfer of officer—Remuneration of collector.*

In 1927 the Egremont U.D.C. appointed the plaintiff rent collector at a commission of 2 per cent. on all moneys collected. In 1928 it was resolved that the plaintiff should be paid at the rate of 3 per cent. on all rents collected by him. Although described as a rent collector, the plaintiff in fact collected rates as well as rent. In 1934 Egremont was transferred to the defendant council, the plaintiff becoming an officer of that council. By the order which effected the transfer the plaintiff was, while performing similar duties, to receive not less remuneration than he would have been entitled to if the order had not been made. The defendants appointed the plaintiff a rate collector. In an action for remuneration at the rate of 3 per cent. the defendants contended that the plaintiff was entitled to no remuneration in respect of rates. This contention was abandoned at the hearing, the defendants then arguing that remuneration should be at the rate of 2 per cent. and not 3 per cent. :—

HELD : upon the evidence the plaintiff was entitled to remuneration at the rate of 3 per cent. from the Egremont U.D.C. for collecting both rent and rates, and he was therefore entitled to 3 per cent. in respect of the rates collected on behalf of the defendants.

[EDITORIAL NOTE.] Recent legislation has made necessary in many cases the transference of employees from one authority to another, and the present case is of interest as interpreting a common form order in such circumstances.

FOR TRANSFER OF LOCAL GOVERNMENT OFFICERS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 247, 248, para. 449; and FOR CASES, see DIGEST, Vol. 38, p. 140, Nos. 1040-1042.]

ACTION to recover a sum of £237 12s., as remuneration alleged to be due to the plaintiff for his services to the defendant council.

The facts are stated in the judgment.

Geoffrey Hutchinson for the plaintiff.

F. E. Pritchard for the defendants.

FINLAY, J. : This case, which I tried at Carlisle, though rather a small case, raised a point which I thought was of some difficulty, and I desired to consider it. The plaintiff, Mr. Cowan, was a rent collector and also a rate collector. The defendants are the Ennerdale Rural District Council, and the action is brought to recover a sum of £237 12s. That action is based upon the view that the plaintiff was entitled to 3 per cent. on the amounts collected by him.

The facts and dates shortly appear to be these. On Sept. 9, 1927, the Egremont Urban District Council, who, as I shall explain in a few moments, were the predecessors of the defendants, appointed the plaintiff as rent collector at a commission of 2 per cent. on all moneys collected. On May 1, 1928, the Urban District Council resolved that the plaintiff

should be paid at the rate of 3 per cent. on the rents collected by him. There is there a variation of the language, but having heard the evidence I think it perfectly clear that the intention was to increase from 2 per cent. to 3 per cent. the remuneration generally. He was quite aptly described as a rent collector, but I think it is clear that for the Urban District Council he collected rates as well as rent. A book was produced before me, which I have looked at since with some little care, and I think it shows what happened. At first the rent and rates were shown separately. Latterly they were incorporated in one sum, but none the less, I think, it remains true that they were two distinct things, and that is proved by the fact that in his final summary, as it was called, he separated these two things. Different considerations might have arisen if any resolution had ever been passed, pursuant to sect. 11 of the Act of 1925, but it was not suggested to me that any such resolution had been passed. The position was then that he was entitled to 3 per cent. on everything paid on the rent and the rates. Then there came into operation an order called the Cumberland Review Order, 1934, and Egremont was transferred to the defendant council, and the effect of that was that the plaintiff, as from Apr. 1, 1934, was transferred to the defendants. It is necessary just to look at one or two, and only one or two, of the sections in that order. Sect. 86 (2) provides :

Any person who at the date of this order is an officer with any of the dissolved authorities shall on the appointed day as respects that office be transferred to and become an officer of the authority to whom the general property and liabilities of the dissolved authority are transferred.

Sect. 87 (a), (b) and (d) are worth looking at :

(a) The officer is to hold his office on the same tenure and upon the same terms and conditions as immediately before the appointed day, and while performing similar duties shall receive not less salary or remuneration than the salary or remuneration to which he would have been entitled if this order had not been made.

(b) Any council to whom the officer is transferred may employ the officer in the performance of such of their business as they think proper. He shall perform such duties in relation to that business as may be directed by the council.

(d) If at any time within 5 years after the appointed day the officer is required by the council to whom he is transferred to perform duties which are not analogous to or are an unreasonable addition to those which he was required to perform immediately before the appointed day he may relinquish his office or appointment.

That is what the plaintiff did. I refer to sect. 92, without reading it, as it is not really material. It has reference to the question of compensation.

The plaintiff was appointed by the defendants a collector in the rating and valuation department. That was done by a resolution of Oct. 1, 1934, and the plaintiff was informed of the fact in a letter which says this :

The Ennerdale Rural District Council has now given consideration to the staff

required in the various departments in the new administration, and the placing of the officers transferred to them from the dissolved authorities. I am instructed to advise you that the council has placed you in the rating and valuation department in the position of collector.

I am also instructed to advise you that the council has resolved that the present rates of remuneration will remain in operation for the period of 12 months.

Now the plaintiff then was a rate collector. The defendants at first said—and indeed I think that was their contention up to the hearing—that in respect of rates collected the plaintiff was entitled to no remuneration at all, but Mr. Pritchard at the hearing, very properly if I may say so, abandoned that contention. That leaves a comparatively minor issue only before me, the issue whether a proper basis is 2 per cent. or 3 per cent. I have arrived at the conclusion that the proper basis is 3 per cent. and on an extremely simple ground: 3 per cent. was his remuneration from Egremont, and that remuneration, if I am right, was for collecting both rent and rates. When it is said that he is to be entitled to the same remuneration I think that must mean 3 per cent. Different considerations would have arisen if he had been exclusively a rent collector and then he had been appointed a rate collector. It was with that in view that I examined with some little care the exact position which he held under the Egremont Council, but I come to the conclusion that the correct view to take is that he was a rent and rate collector at 3 per cent. and therefore was entitled to 3 per cent.

It is unnecessary in my view to consider any question of *quantum meruit*. I am not prepared to hold he was entitled on contract and some difficulties might arise as to *quantum meruit*. I ought, perhaps, to add this though, that I am not satisfied that on any view 3 per cent. would be an unreasonable remuneration. It is unnecessary to develop the matter further. Sufficient to say that I think the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Solicitors: *McDonnell, Jackson & Co.* (for the plaintiff); *John J. McIntyre* (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

THOMSON v. LOUIS DREYFUS & CO.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.), **November 5, 1936.**]

Shipping—Charterparty—Construction—“ Full cargo of wheat in bulk ”—Cost of bagging extra cargo—Ownership of bags—Bill of lading in form indorsed on charterparty—Indemnity to shipowner—Additional expense by reason of form of bill of lading.

The defendants chartered the plaintiff's ship to carry a full and complete cargo of wheat in bulk from Sydney to Birkenhead. The defendants undertook to supply up to 15 per cent. of the cargo in bags for purposes of safe stowage. The captain of the ship demanded additional cargo in bags, and a dispute arose as to who was to pay for the cost of the bags and bagging of this additional cargo. This dispute was submitted to arbitration, and an award was made in favour of the defendants. The captain was bound under the charterparty to sign bills of lading in the form indorsed, and the bills of lading signed in consequence forced the ship to deliver the cargo and the bags to the defendants or their assignees. The defendants assigned the cargo to a third party, and the cargo and the bags were delivered to the assignees. The plaintiff claimed the costs of the bags which had been delivered to the assignees in accordance with the bills of lading:—

HELD : the bags belonged to the plaintiff and as he was required by the charterparty to sign bills of lading which necessitated their delivery to the consignee he was entitled to recover the cost of them.

[EDITORIAL NOTE.] If the charterer requires the shipowner to sign bills of lading which involve the shipowner in liabilities to third parties, he is bound to indemnify the shipowner. The complication in the present case is that the shipowner required extra cargo to trim the ship and get her down to her marks. He also required this cargo to be in bags and the charterers had already supplied the amount of cargo they were obliged to supply in bags. It was therefore decided that the cost of bags and bagging fell upon the ship. On the other hand, the bill of lading, the form of which was indorsed in the charterparty, forced the ship to deliver the bags as well as the cargo to the consignee. The ship was successful in a claim against the charterer for the value of the bags so delivered to the consignee, applying the decision in *Kruger & Co. v. Moel Tryvan Ship Co., Ltd.* (1), the effect of which is stated at the beginning of this note.

FOR THE PRINCIPLE, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 173-175, para. 263; and FOR CASES, see DIGEST, Vol. 41, pp. 403, 404, Nos. 2503-2510.]

Cases referred to :

- (1) *Kruger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.*, [1907] A.C. 272; 41 Digest 403, 2503.
- (2) *Elder, Dempster & Co. v. Dunn & Co.* (1909), 101 L.T. 579; 41 Digest 432, 2713.
- (3) *Dawson Line, Ltd. v. Aktiengesellschaft Adler für Chemische Industrie of Berlin*, [1932] 1 K.B. 433; Digest Supp.

APPEAL from a decision of BRANSON, J., dated Feb. 18, 1936.

The plaintiff was the owner of the steamship “Sithonia.” The defendants chartered her to convey a cargo of wheat in bulk from Sydney

to Birkenhead. By virtue of the regulations made under the Navigation Acts of 1912 to 1920 of the Commonwealth of Australia, the Navigation Department surveyor was entitled to demand that a proportion of the cargo was to be bagged for purposes of safe stowage. By the terms of the charterparty the charterers undertook to supply up to 15 per cent. of the cargo in bags, but any cargo in excess of this amount that was required to be in bags had to be bagged by the shipowner free of charge. When the cargo had been loaded, the captain of the ship required more cargo in bags : (i) to get the vessel in trim, and (ii) to get her down to her marks. The charterers protested that they were not bound to supply any further cargo in bags. To save time, they did supply the required amount of wheat in bags, upon the owner depositing the cost of bags and bagging in the bank, and the dispute was referred to arbitration. The captain signed a bill of lading undertaking to deliver the wheat in bulk to the charterers or their assignees. The ship sailed ; the cargo was assigned ; and the captain delivered the wheat, partly in bags, to the assignees in England. The arbitrator then found that the owner should pay for the cost of bags and bagging in respect of the additional cargo. The plaintiff thereupon sued the defendants for the cost of the bags, alleging breach of contract or conversion. The judge held that no term could be implied into the contract whereby the bags should belong to the ship, but that it was not a dispute arising out of the charterparty, so that the plaintiff was not debarred, by the arbitration clause in the charterparty, from bringing a claim. The plaintiff appealed to the Court of Appeal.

Sir Robert Aske, K.C., and Cyril T. Miller for the appellants.

H. U. Willink, K.C., and A. A. Mocatta for the respondents.

Sir Robert Aske, K.C. : It is submitted that the learned judge has taken too narrow a view which does not carry out the intention of the parties. He thought that the defendants were not bound to supply any further cargo ; but that was not the dispute between the parties ; the dispute was as to who was to pay for the cost of bags and bagging. The defendants had to supply a full cargo, that is, as much cargo as the ship wanted. The captain refused to receive further wheat except in bags. The plaintiff has paid for the bags, but the defendants have sold them and kept the proceeds. If a charterer asks a master to sign bills of lading which will prejudice the position of the owner, that implies an indemnity to the owner. The cargo would have been delivered in bulk, except for a mistake in the bills of lading. It was not the intention of the parties, and it is not reasonable to imply a term into the contract. [Counsel referred to *Krüger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.* (1), *Elder, Dempster & Co. v. Dunn & Co.* (2), and *Dawson Line, Ltd. v. Adler* (3).]

Willink, K.C. : There was no obligation under the charterparty to

load a full and complete cargo, or for the ship to carry that. The obligation was to supply a full cargo of bulk wheat and that was fulfilled when the defendants had supplied all the bulk wheat that the ship was allowed by law to carry. The charterers were bound to provide such cargo in bags as was required for the safety of the ship, and no more. There was no provision as to what was to happen to any bags in excess of this, which the ship had to provide, and it is submitted that these belonged to the charterers. Cargoes are often sold as cargoes, and it is not usual to have a clause that some of the bags may not belong to the charterers. The only possibility was that these bags were to be free to be dealt with as the charterers wanted. The plaintiff can only be entitled to recover on some implied term, and to imply such a term would lead to endless commercial complications. It might have happened that more than 15 per cent. of the cargo had to be in bags for safe stowage; in that case the owner would have had to supply the extra bags; if such a cargo were assigned, it could not be that the excess was intended to be treated differently. Therefore the charterparty must have contemplated that in some circumstances the ship might have to pay for some bags that would become the property of the charterers. When the arbitration was held, it was known to both parties that the bags had already been delivered to the assignees, but the question was not raised at all at the arbitration; this action is clearly an afterthought. When the master signed the bill of lading promising to deliver the wheat to the charterers or their assignees, there was no reservation made as to what the result of the arbitration might be. In the learned judge's view, if the ship was wrong, it should pay the £634, and he refused the view that there should be an implied condition to pay back a portion of that sum. The charterparty contemplates only one sort of cargo—so much wheat in bulk as the ship could take, of which so much was to be in bags (supplied by the charterers) as the surveyor required for safe stowage. There is no provision in the charterparty for any cargo supplied in bulk, but bagged by the ship. The dispute was as to whether the ship was entitled to extra cargo, not as to who was to pay for the bagging. The amount deposited by the ship was the whole cost of bags and bagging; if the plaintiff's argument is right, this could never have been done, because if the ship was right it would have got back the whole of the deposit, whereas if it was wrong it would still be entitled to the cost of the bags; therefore that sum could never have been payable at all. It was done as a consideration for obtaining further valuable freight. There was no suggestion by the ship that the entire cargo should not be sold. It is clear that the owner intended the defendants to deal with the bags as their own. At the time the cargo was sold the bags might have belonged to the owner, because the arbitration award had not then been given. They must have been entitled to deal with them in the ordinary course

of business, and in so doing they only received £92 for them ; that must be the measure of damage.

Sir Robert Aske, K.C., in reply : The cases cited establish the principle that if one party requests a second to do something for him, that raises an implied promise that the first party will indemnify the second party.

GREER, L.J. : This is an appeal from the decision of BRANSON, J. For my part, I have come to the conclusion that the argument ought not to succeed and that BRANSON, J., went wrong because he misunderstood what the effect of the agreement of reference in Sydney was. Broadly speaking, the plaintiff's case, that is to say, the case of the shipowner, which we have to consider, is this : " Having regard to the decision of the arbitrator in Sydney that the bags in the 'tween decks, in which were loaded rather more than 1,300 tons of wheat, were my bags, you, the charterers, without my authority, by reason of the wrong documents you presented and the assigning of those documents and the bills of lading to a purchaser, have deprived me of my bags, and they were worth at least £236, the amount of my claim, that being either as a conversion or by reason of the doctrine as to indemnity, and you must pay me the value of those bags." The matter is a little complicated having regard to the history of the question and the way in which it arises, the agreement of reference and the decision of the arbitrator in Sydney. The plaintiff is the owner of the steamship " Sithonia," and he chartered her to the defendants under a charter in which he agreed to load a full and complete cargo of wheat in bulk (and then are printed the words, which are struck out, " and/or bags, and/or flour in bags ") which the charterers bind themselves to provide, not exceeding what the vessel can reasonably stow and carry. I read that as meaning that, as between the charterers and the shipowner, the agreement is that the shipowner will receive and the charterers will deliver or load on the vessel a full and complete cargo of wheat in bulk. Unfortunately, having regard to the regulations prevailing at Sydney, from where the cargo was to come, it was not possible for them to load the whole range of the ship with wheat in bulk, because the Commonwealth Navigation Department's surveyor was entitled to require, for the purpose of safe stowage and to comply with the Grain Regulations under the Navigation Acts of 1912 to 1930 or any amendment thereof, cargo in bags for this purpose. The cargo in bags was required by the proper authority to be supplied for that purpose. That consisted of 82 tons in what I describe conveniently as feeders, which would stiffen the vessel so as to prevent the cargo from shifting. We have nothing to do in this action with those 82 tons, because the claim in this action is in reference to the 1,300 odd tons of cargo shipped in bags in the 'tween decks, and not bags which the authority required

should be shipped in the 'tween decks, or required the charterers to deliver in the 'tween decks. For my purpose, I do not think it is necessary to refer in detail to the other provisions of the charterparty, except to say that it provides a form of bill of lading which can be used either for cargo in bulk or for cargo in bags, or for cargo partly in bulk and partly in bags, because, as one knows, these forms are used for charterparties which may vary, and circumstances which may vary, and it might well be that in order to meet the difficulty which is referred to in the charterparty, there would be some cargo necessarily carried in bags. Therefore the part of the bill of lading which refers to bags is not crossed out in the charterparty, which contains indorsed upon it the kind of bill of lading which has to be signed.

Now, what happened in these circumstances was this: that the vessel sailed under this charterparty to Sydney, and there a dispute arose, the master, representing the vessel, contending that if the charterers wanted any more cargo carried than that which could under the law be carried in bulk, they must supply it in bags at their own expense. The charterers, on the other hand, contended: "You, the shipowner, want the full complement of the ship, down to her marks, and therefore if we are put to the expense of buying bags and bagging the cargo you must pay us the cost of doing so." That dispute was referred to arbitration in Sydney in these words:

A dispute having arisen between charterers and the master regarding quantity of bagged wheat charterers should supply free under the charterparty, it has been mutually agreed that charterers' claim of £643 18s. 2d. shall be submitted to arbitration in Sydney in accordance with the terms of the charterparty, and that pending a decision owner's agents will lodge the sum of £643 18s. 2d. in the Commonwealth Savings Bank for the joint account of the representatives of Messrs. McIlwraith McEacharn, Ltd. [the ship] and the charterers.

I understand that to mean that the ship is claiming that the ship is entitled to have those bags supplied full of wheat by the charterers; and the charterers are saying: "Nothing of the kind; we do not care whether the bags are put on board or not; we are under no obligation under the charterparty to put them on board; but if you require them then you must pay for them; and in order that there may be no delay in dealing with the matter, we agree that you shall pay the total cost of the bags and the cost of bagging into a bank and leave it to the arbitrator to decide whether or not the claim made by us, the charterers, is entitled to succeed."

Now, the ship sailed, and on the same date, Oct. 19, 1934, a bill of lading was presented to the master to sign, and he signed it. It is a bill of lading which refers to the cargo which was in bags without any qualification whatever. The master signed it, thereby making himself liable, if the bill of lading was assigned by the charterers to third parties,

to deliver the cargo, which was in bags, to them, and of course that included the bags. In due course the ship arrived, in Jan., 1935. The award of the arbitrator was made in Feb., 1935. The bagged part of the cargo having been assigned by the charterers to Messrs. Spillers, upon the discharge of the cargo, as they were bound under the bills of lading, the ship delivered to Messrs. Spillers the contents of the bags and the bags. The plaintiff, the shipowner, now says: "I am entitled to say that as a consequence of your act, which was wrongful as against me, I am entitled to indemnity against having to deliver the bags to the assignee under a contract which, by reason of the bills of lading, you forced upon me." The arbitrator, having considered the matter, and having had before him a statement of facts for the purpose of arriving at his decision, decided that the contention of the ship was wrong, that the charterers were not bound to supply free, that is to say, at their cost, the bags and the work of bagging, and that therefore they were entitled to be paid the £643 which had been paid into the bank as the cost of work done which they had done not free on their own account but which they had done on account of the ship, because the ship wanted its full cargo and was wrong in contending that it was entitled to have that cargo free of expense.

In my judgment the result of the arbitration means this: that in order to decide in the way in which the arbitrator did decide he must have treated the £643 as a payment to the charterers for work done for and on behalf of the ship, seeing that the ship's contention was ill-founded that that work had to be done free of cost to the ship. It is admitted by both parties that the decision of the arbitrator was binding by way of estoppel on both the ship and the cargo. If that be so, I cannot see what difference there is between the position in which the ship would have been if, instead of asking the charterers to buy the bags and do the bagging, it had asked, say, stevedores, or some third party, to do it, in which case, of course, it would have had to pay for it; but, having paid for the work and having paid for the bags that were supplied, the bags would have belonged to the ship. For the purpose of this action, the ship says: "Those were my bags, and, inasmuch as, by means of the bill of lading and its assignment, you have forced me to deliver those bags to your purchaser, you must pay me what I have lost by being deprived of the bags, either by way of damages or by way of indemnity, because you presented a bill of lading, under the powers given to you in the charterparty, which put me into that position." It would have been quite easy so to word the bill of lading as to show the assignee of the charterers that he was only entitled to get the wheat which was in the bags, the bags being the property of the shipowner.

Then it is said: "The plaintiff is not entitled to the value of the bags which he has lost, he is only entitled to the £91 which he has received."

In my judgment that is a fallacy. The only reason why £91 has been received by the plaintiff for these bags is that he made an agreement binding himself to accept that figure on the calculation which had to be made. But the ship has nothing whatever to do with that. Had the bill of lading been worded as I think it ought to have been worded, then the ship would be entitled to retain the bags; but as the bill of lading was worded, the ship was bound to deliver those bags.

It has been decided on many occasions—and I will only refer to the case of *Kröger v. Moel Tryvan* (1), which is a leading case on the subject—that where bills of lading are presented under a charterparty which requires shipowners to sign bills of lading as presented and the result is that through the signing of those bills of lading the ship has suffered a loss, then the ship is entitled to be indemnified in respect of that loss. It is either as damages for wrongful conversion of the bags or for an indemnity that the plaintiff says he is entitled to recover, and as I think he is entitled to recover, in this case, the £236 which he claims.

The only other matter upon which I wish to say a word is in reference to the judgment of BRANSON, J. In the course of his judgment, he says this, after reciting the relevant facts:

The point in the arbitration was, whether the ship or the charterers were right with regard to the amount of wheat the charterers were under obligation under the charterparty to put on board.

Now, I differ from that view, because I think the point in the arbitration was whether the charterers claim for £643 18s. 2d. was a good one. For those reasons, with some hesitation, because I always have some hesitation in differing from BRANSON, J., on any question which is decided by him, I think he was wrong in this case, and that the appeal must be allowed with costs.

SCOTT, L.J.: I agree both with the judgment which has been delivered by GREER, L.J., and with the reasoning of it. As I see the essential nature of this dispute which took place at Sydney, it was that the two parties were contending as to what their rights were under this charterparty in regard to the cost of bags and bagging, in so far as it was necessary to put part of this bulk cargo into bags in order, on the one hand, to achieve a complete cargo, and on the other to comply with the regulations of the Commonwealth Navigation Department under the Navigation Acts of 1912 to 1920. Very sensibly, rather than delay the ship, they agreed that the amount of the charterers' claim for the cost of the bags and bagging in respect of the quantity about which the dispute arose should be paid into a joint account, and that the question of the right of the charterers to claim that money should be referred to an arbitrator. That that was the precise question that was referred seems to me beyond doubt.

I agree with my Lord that *prima facie* the bags bought or produced for the purpose of putting a part of the cargo into bags would belong to the party that paid for the bags. In one sense, that conclusion is enough, as my Lord has said, to dispose of this case. But Mr. Willink argued that that is not so because you must read into the agreement made at that time, or alternatively read into the charterparty, an agreement by the owner of the ship that any cargo put into bags should go to the holders of the bill of lading at any time to the extent of conveying to the holders not only the property in the wheat mentioned in the bill of lading but the property in the bags containing it. That involves the necessity of looking at the charterparty. Mr. Willink's argument was that, because there is a clause which requires the master to sign bills of lading presented in the form indorsed, because there was a form there which dealt not only with wheat in bulk, but also with wheat in bags and flour in bags, when the master signed, as he did sign at the request of the charterers, a bill of lading for part of the cargo put into bags, the shipowner must be taken to have agreed that those bags should become the property of the charterer and ultimately of his indorsee. I think that is a misconception. The form on the back of the charterparty is a form intended to cover the different contingencies contemplated by the form of charter in its printed words. You get a large list of contingencies under, *inter alia*, clause 1, where it is provided that the ship should load a full and complete cargo of wheat, either in bulk or in bags, or, on the other hand, a cargo of flour, with provisions that it may be a part cargo of each one of the three. The form of bill of lading in print is appropriate to the different alternatives, but the mere fact that it is printed there does not mean that the shipowner by the charterparty agrees to be bound by the implications of that form of bill of lading if in the event it turned out that part of the form was inappropriate to the circumstances at the port of shipment. Here the part of the bill of lading providing for the shipment of wheat in bags was inappropriate, for this reason. At first I was disposed to think that clause 1 must be read as a clause providing for the shipment of a full and complete cargo of wheat in bulk and partly in bags, because of the provisions in clause 9, but I agreed in the course of argument with the comment of Mr. Willink himself, that that does not follow, and I think his view is right, that the cargo that is the subject matter of this contract of carriage was only wheat in bulk, however much of it had to be put into bags for the purpose of safe carriage, and particularly in order to comply with the regulations of the Commonwealth Navigation Department referred to in clause 1. I think that the cargo remained only a cargo of wheat in bulk and that when the wheat was put into bags it was still wheat in bulk carried in bags merely for the purpose of safe carriage. Consequently the appropriate bill of lading was the form on the back of the charterparty, with

the provisions about wheat in bags and flour in bags deleted from it, as my Lord has indicated. If that was the position, when the charterers asked the master to sign bills of lading for wheat in bags they were asking for a form to be signed which was inappropriate to the charterparty, which prejudiced the charterparty in the sense that it would put upon the owner of the ship obligations inconsistent with the obligations of the charterparty. That is precisely the kind of event dealt with in the well known case of *Krüger v. Moel Tryvan* (1), which raised the implied indemnity or implied warranty which entitled the shipowner to be put in the same position by a money payment as if the bill of lading had been strictly in accordance with the form and contents required by the charterparty. Therefore that argument of Mr. Willink's in my view fails.

Subject to those additional observations, I agree entirely with what my Lord has said, and that the appeal should be allowed.

EVE, J. : I agree with each of the judgments to which I have just listened, and do not feel that there is anything which I can usefully add thereto.

Appeal allowed with costs. Leave to appeal refused.

Solicitors : *Thomas Cooper & Co.* (for the appellants) ; *Richards, Butler, Stokes & Woodham Smith* (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

BROOKS WHARF & BULL WHARF, LTD. v. GOODMAN BROTHERS.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Macnaghten, J.),
October 21, 22, November 18, 1936.]

Revenue—Bonded Warehouse—Time when duty becomes due—Goods stolen from bonded warehouse—Liability of importer—Customs Consolidation Act, 1876 (c. 36), ss. 13, 85.

By an agreement between the plaintiffs, bonded warehousemen, and the defendants it was agreed that the defendants should pay to the plaintiffs certain wharf charges and that the plaintiffs should warehouse certain goods which the defendants were importing, undertaking in respect of them the usual obligations of bonded warehousemen. The goods were duly imported, customs duties becoming due. The goods were stolen before the duty had been paid. The plaintiffs paid the duty, pleading obligation to H.M. Customs and alternatively their obligations as bonded warehousemen, and sued for the sum paid. The defendants contended that the duty was paid as a personal liability of the plaintiffs as bonded warehousemen and counterclaimed for the value of the goods stolen, alleging negligence :—

HELD : (i) there was no evidence that the theft of the goods was due to negligence of the plaintiffs who had taken such precautions as reasonable and prudent care demanded.

(ii) duty becomes due on importation, though it is not payable whilst the goods remain warehoused, and it only ceases to be due on being actually paid when the goods are taken out for home use or if they are entered for exportation or ships' stores.

(iii) the defendants therefore, as the importers, were and remained liable for duty.

(iv) the plaintiffs were entitled to recover the amount paid in respect of duty as money paid to the use of the defendants.

[EDITORIAL NOTE.] This case depends upon the time at which customs duty becomes due when goods have been imported and placed in a bonded warehouse. The decision follows that in *A.-G. v. Ansted* (4) where it was held that the liability attaches to the importer upon the importation, although payment may be postponed. This is not affected by the Customs Consolidation Act, 1876, s. 13, which requires a warehouseman to give security for the payment of duties chargeable on any goods warehoused, and the liability imposed on the warehouseman by sect. 85 to pay the duty on any goods removed before the duty has been paid is merely a deterrent against collusion by the warehouseman to defraud the Revenue. Where the goods are removed without his knowledge and without negligence on his part, as was the case here, the warehouseman can properly recover the duty which he has had to pay in compliance with the statute.

AS TO LIABILITIES OF WAREHOUSEMEN IN RESPECT OF CUSTOMS DUTIES, see HALSBURY, 1st Edn., Vol. 24, pp. 589, 590, paras. 1160, 1161; and FOR CASES, see DIGEST, Vol. 39, pp. 229, 230, Nos. 80-85.]

Cases referred to :

- (1) *Morison, Pollexfen & Blair v. Walton* (1909), cited [1915] 1 K.B. at p. 90 ; 3 Digest 74, 143.
- (2) *Travers (Joseph) & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73 ; 3 Digest 75, 144.
- (3) *Ballard v. North British Ry. Co.*, [1923] S.C. 43, H.L. ; 36 Digest 88, 581, *xix*.
- (4) *A.-G. v. Ansted* (1844), 12 M. & W. 520 ; 39 Digest 230, 85.
- (5) *Moule v. Garrett* (1872), L.R. 7 Exch. 101 ; 31 Digest 412, 5587.

- (6) *Bonner v. Tottenham & Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161; 31 Digest 414, 5604.
- (7) *Pownal v. Ferrand* (1827), 6 B. & C. 439; 6 Digest 301, 2004.
- (8) *Dawson v. Linton* (1822), 5 B. & Ald. 521; 31 Digest 308, 4528.
- (9) *Taylor v. Stray* (1857), 2 C.B.N.S. 175; 12 Digest 535, 4452.
- (10) *Dugdale v. Lovering* (1875), L.R. 10 C.P. 196; 42 Digest 981, 120.
- (11) *North v. Walthamstow Urban Council* (1898), 67 L.J.Q.B. 972; 12 Digest 529, 4410.

APPEAL from a judgment of BRANSON, J., delivered on Feb. 10, 1935, giving judgment for the plaintiffs in an action to recover money paid for and on behalf of the defendants.

The plaintiffs were a firm of wharfingers and bonded warehousemen. The defendants were a firm of fur merchants. In Aug., 1934, the plaintiffs and the defendants entered into an agreement, of which the material clauses provided that the plaintiffs should take certain goods into bond and the defendants should pay 1 per cent. of the value of the goods for wharfage charges and warehousing. The defendants later requested the plaintiffs to take into their bonded warehouse 10 bales of squirrel fur linings, value £4,119 9s. 3d., without the duty being paid, and this the plaintiffs did. Before duty was paid, the goods were stolen by burglars, and the plaintiffs were thereupon obliged to pay the duty on them, pursuant to their obligation as bonded warehousemen, amounting to £823 17s. 10d. The plaintiffs accordingly claimed an equivalent sum, on the ground that the defendants, having imported the goods, became liable to the Crown to pay duty on them, and that as the plaintiffs had been obliged to pay that duty in discharge of the defendants' liability, they were entitled to recover the amount as money paid at the implied request of the defendants. Alternatively, they maintained that as the defendants had requested them to take into their bonded warehouse dutiable goods upon which duty had not been paid, and to assume the liability for the duty if the goods left their warehouse, the defendants must indemnify the plaintiffs for the consequences which followed without any default on their part. They also claimed £41 3s. 11d. for wharfage charges and warehousing.

The defendants pleaded that it was an express term of the agreement that the goods should be taken into bond and that no duty should be paid on them, and that the plaintiffs had no authority to pay the duty; that it was an implied condition that the plaintiffs should keep and warehouse the goods safely and that they had allowed the goods to be stolen through their negligence. They argued that when dutiable goods are entered for warehousing, the duty is a charge upon the goods and not upon any person, and that the liability to pay the duty only attaches to a person if the goods leave the warehouse otherwise than by being re-exported; it then attaches either to the person duly entering them for home consumption or, if they leave the warehouse without having

been duly entered, then upon the warehouseman. They counterclaimed for £4,119 9s. 3d., the value of the goods. The plaintiffs, in their reply and defence to the counterclaim, said that they were not liable to pay the duty, also that they had not been guilty of negligence, and alternatively that they were not responsible for the consequences of negligence committed by them; they set up the London Wharfingers' Clause, which was settled in 1934 between London bonded warehousemen and importers and of which the relevant clauses were incorporated in the agreement: they were not to be liable for "loss, detention, damage or injury of goods or property, howsoever and whensoever caused." They also denied that the theft was due to any breach of obligation or duty by them.

BRANSON, J., gave judgment for the plaintiffs on the claim and the counterclaim, with costs.

The defendants appealed.

W. L. McNair and *C. A. Roberts* for the appellants, the defendants in the action.

H. U. Willink, K.C., and *Eric Sachs* for the respondents, the plaintiffs in the action.

McNair submitted that the learned judge was wrong in finding as a fact that the plaintiffs had not been guilty of negligence, but LORD WRIGHT, M.R., indicated that the court would not interfere with this finding. The counterclaim and the plaintiffs' defence to it, relying on the London Wharfingers' Clause, were therefore eliminated and the plaintiffs' claim for wharf and warehouse charges stood established. The appeal proceeded on the sole ground of whether the defendants should repay to the plaintiffs the sum of £823 17s. 10d. duty, paid by the plaintiffs to the Revenue under their statutory obligation.

McNair: The relevant sections of the Customs Laws Consolidation Act, 1876, lay down that the importer entering goods for home use should pay the duty; the warehouseman who cannot produce the goods to a customs officer should pay the duty; and a person who clears warehoused goods for home use should pay the duty. The importer, on a true construction of the Act, never comes under a personal liability to pay the duty on dutiable goods unless he makes an entry for home use. If the goods are entered for warehousing, as here, and lost, the occupier of the warehouse, and not the importer, pays the duty. If the goods, having been warehoused, are then brought into home use, the person making the entry for home use, and not the importer, pays the duty. *A.-G. v. Ansted* (4) is distinguishable. Since 1853, when the present system of bonding was introduced, it cannot be said, on a true construction of the statute, that the duties are payable on importation. If there were a statutory personal liability on the importer to pay the duties, he could not avoid it by selling the goods, but in law it passes with the goods and is not a personal liability. It is sufficient for the customs

that they should have a remedy against the person in charge of the goods, as they have. *Taylor v. Stray* (9) may also be distinguished, for here there is no agency but only a contract of bailment. In *Taylor's* case (9), plaintiffs incurred liability by doing the very act they were employed to do; here the liability was not incurred by the plaintiffs' receipt of the goods into the warehouse, but by their failure to keep them there—by a completely new act, the theft of the goods. The plaintiffs incurred the liability under their bond. Another case which clearly shows the distinction is *Dugdale v. Lovering* (10), which was decided on the principle that if A. is requested to do something by B. and by doing so he incurs liability to C., B. must pay. In the present case the plaintiffs incurred liability, not by doing something which the defendants had asked them to do, but by failing to carry out the terms of their bond and their agreement with the defendants. The liability was not imposed upon them by any act of the defendants. A shipowner incurring third-party liability cannot claim indemnity from the charterer. The mere fact that A. is carrying out services for B. does not entitle him to be indemnified against any loss he incurs.

Willink, K.C.: The person liable for the duty was at all material times the importer, and his liability was, owing to the machinery of the Act, discharged by the warehouseman. The plaintiffs are therefore entitled to recover the amount they have paid in discharging his liability. Alternatively, if the liability was imposed on the plaintiffs by sect. 87, it arose in the course of their business because they were acting on the defendants' instructions. The defendants asked them to warehouse the goods with all reasonable care; they were doing that. It does not matter that they were engaged in an occupation which is largely governed by statute. The payment of the duty is merely postponed; the liability is imposed on the importer at the moment of import. In *Ansted's* case (4) no entry for home use was ever made, so the defendants' condition precedent for the liability of the importer was not fulfilled. The liability was on the warehouseman and the importers, for the importers were debtors of the Crown at the time the goods were stolen. This is an instance of *debitum in presenti solvendum in futuro*. The Act was passed for the convenience of merchants and was never intended to shift the liability from the importer. It merely provides machinery whereby the Crown may collect the duties if the goods leave the warehouse. Assuming that there is a liability in debt to the Crown which is not immediately payable when the goods are imported but is postponed: it is suggested by the defendants that the liability only arises when the event happens which is named by the Act defining the time of payment—when the goods are delivered from the warehouse or entered for home consumption. In *Ansted's* case (4), the importer was held liable, although no such event had occurred; the warehouse keeper

was also liable, but the Crown successfully sued the importer under his primary liability. If in the present state of facts the Crown had sued the importers, they would have had to set up the defence that, though on importation they had become debtors of the Crown for the duties, they need not pay until the goods were entered for delivery for home consumption. To that the Crown could reply that these goods could never be entered, because they were not in the warehouse; and the defence would fail. That was the *ratio decidendi* of *Ansted's* case (4), and is not affected by the change in the legislation: see HIGHMORE'S CUSTOMS LAWS, 3rd Edn., 1922, p. 132. The bonded warehouseman is now a statutory guarantor of the person on whom the charge primarily rests. The charge by which he enters into a general bond instead of being forced to give a particular security has no materiality here. In all the sections in which the word "duties" is used, there is no language inconsistent with the view that duties are a debt due immediately on importation.

The plaintiffs are entitled to recover this sum, which they were obliged to pay on behalf of the defendants: see LEAKE ON CONTRACT, 8th Edn., p. 46, and *North v. Wallhamstow Urban Council* (11). There is an implied request, which gives rise to a right to indemnity.

LORD WRIGHT, M.R.: The law implies a request to pay where the debt is legally due from the defendant, but the plaintiff pays under compulsion—not necessarily legal compulsion.

Willink, K.C.: Here the compulsion is legal, so the warehouseman's right to indemnity is clearer still. The principle is exactly illustrated by *Taylor v. Stray* (9). He was also entitled to indemnity on the true construction of the contract, whether this was a debt of the importers or not. See also *Moule v. Garrett* (5), *Bonner v. Tottenham & Edmonton Permanent Investment Building Society* (6), and *Pownal v. Ferrand* (7). Justice plainly requires that the warehouseman should recover this money, especially since the goods might perfectly well be recovered. The effect of placing goods in a bonded warehouse is to place the warehouseman, *quoad* the importers of the goods, under a contingent liability to pay, and unless it can be seen from the contract that he has promised to pay, for the consideration which he is getting, a request is implied and a right to indemnity arises.

McNair, in reply: At the date first after the theft, the importers could not have been sued by the Crown for the amount of the duty. He had not made entry for home use, or removed the goods, without paying down the duties. All the statutory provisions are equally consistent with a statutory, impersonal charge on the goods. The obligation on the warehouseman is absolute.

LORD WRIGHT, M.R.: The defendants are a firm of furriers, who had imported from Russia a consignment of Russian squirrel skins in

Aug., 1934. Out of the consignment 10 packages were stored by the defendants in the bonded warehouse of the plaintiffs. While in the warehouse they were stolen on the night of Sept. 7-8, 1934.

The plaintiffs, as bonded warehousemen, were compelled by law at the demand of the customs to pay the duties on those packages out of their own moneys. The defendants had refused to supply the plaintiffs with the necessary funds for that purpose. The plaintiffs claimed from the defendants the amount of the duties, £823 17s. 10d., which they had thus been compelled to pay to the customs, on the ground that, as between themselves and the defendants, the defendants were primarily liable for the duties. There was also a claim for the landing and warehousing charges, amounting to £41 3s. 11d., but, as to these, no question arises on this appeal. The defendants counterclaimed for £4,119 9s. 3d., as being the value of the furs, on the ground that the furs were stolen by reason of the negligence of the plaintiffs and of their failure to exercise due care in the safe keeping of the goods. BRANSON, J., who tried the case, held that there was no breach of duty on the part of the plaintiffs and that they were not liable to the defendants on their counterclaim. He also held, as regards the claim for £823 17s. 10d., that the plaintiffs were entitled to recover it. The appeal is brought from this judgment.

I think it convenient to deal first with the defendants' counterclaim. The allegation of negligence, if proved, would also furnish a defence to the plaintiffs' claim, because they could not recover a sum for duties paid on goods which had been lost through their negligence. Whether that allegation is made out or not is a question of fact. The law as to the position of warehousemen in such circumstances and the extent of the duty of care which rests upon them has been discussed in various cases, but I proceed on the basis of the statement of the law on the liability of warehousemen contained in two passages from the judgments in the House of Lords in an unreported case of *Morison, Pollexfen & Blair v. Walton* (1) quoted by KENNEDY, L.J., in *Joseph Travers & Sons, Limited v. Cooper* (2), at p. 90. The first passage is quoted from the judgment of LORD LOREBURN, L.C., in the following words :

"Here is a bailee . . . who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discover at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing he must make that loss good."

Then KENNEDY, L.J., says :

And so LORD HALSBURY : "It appears to me that here there was a bailment

made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

In the present case, the stealing of the goods being admitted, the plaintiffs have given evidence that they have taken all reasonable precautions to protect the goods against the risk of theft, and they say that they have satisfied the burden of proof which rests upon them and that they are outside the rulings I have just quoted. They further rely on a statement of the rule given (in a dissenting judgment, it is true) by LORD DUNEDIN in *Ballard v. North British Ry. Co.* (3), at p. 54. LORD DUNEDIN there said :

I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.

I think this is merely stating the same rule as that stated by LORD LOREBURN, L.C., and LORD HALSBURY from another aspect. If the plaintiffs show that they took all reasonable and proper care of the goods, the mere fact that they were, notwithstanding, stolen is not sufficient any longer to make them liable for negligence. Their explanation is, then, that the thieves must have shown ingenuity and daring against which reasonable precautions could not avail. Hence, I think the plaintiffs discharge the burden of proof upon them if they can show that the theft took place notwithstanding that they had taken all reasonable precautions to guard against the danger. The learned judge has held that they have shown that, and I entirely agree with his conclusion.

I do not think it necessary to repeat in any detail the analysis which the learned judge has made of the facts. It seems to me to be fully justified by the evidence. The plaintiffs' warehouse is a large building in four blocks. The furs in question were stored on the fourth floor of the block called block R. The warehouse was naturally visited, while it was open, from time to time not only by the owners of furs, but by traders who came in with orders to view, from time to time, in order to examine the goods that were stored, so as to determine whether or not to buy. A large portion of the furs was hung on the walls; other portions were stacked. It appears from the circumstances that were discovered afterwards that the thieves must somehow have got into the building the night before the theft or during the day before the theft when the warehouse was open and concealed themselves until the next morning. The theft involved a difficult series of operations. Not only had they to get into the warehouse and secrete themselves, but during the night they had to break open doors and to pack into a number of

cases the furs, which weighed about half a ton in all, and get them down to the door, on the ground floor, opening on to the lane. In order to get them away in the morning it was necessary to have in the lane outside at the proper moment a lorry or other conveyance and to effect the removal in the short period between 7.5 in the morning, when in the ordinary course of business the inspection of the outside lock took place, and 7.30, when the lane was again visited by the plaintiffs' watchman. It is clear that the thieves were persons of great daring and of great ingenuity and I agree with the learned judge in thinking that the success of such individuals in carrying out their scheme is not inconsistent with the system of vigilance exercised by the plaintiffs being reasonably careful. The learned judge has found that the plaintiffs adopted the system which is in vogue in big warehouses in the city of London. It was argued that, according to the general system of the plaintiffs, no one was admitted into the bonded warehouse unless under permits from owners of goods, and persons so admitted were never let out of the supervision of the keeper of the particular portion of the warehouse and that his duty was to see that everyone who came in left before the warehouse was shut up. Hence, it was argued that the thieves could only have been allowed to remain if there had been some negligence on the part of the plaintiffs' employees who were charged to see that nothing of the sort happened. It was further alleged that the search which was made in due course before the premises were locked up for the night must have been inadequate. I agree, however, with the learned judge that the system adopted was a reasonable and proper system, and I think that it is impossible to say by what ingenious contrivances the thieves managed to effect their nefarious scheme.

The duty of the plaintiffs cannot be put higher than that they must do what is reasonable. They are not insurers and they have established their defence here by satisfactory evidence that the precautions they took were such as reasonable and prudent care demanded. The counter-claim accordingly fails and so does the defence to the claim so far as it is based upon the allegation that the loss was due to want of care in the custody of the goods.

The plaintiffs' claim thus depends on considerations of law. Customs duties are charged on goods under the charging section, which in this case is the Import Duties Act, 1932, s. 1. That section provides that there shall be charged on all goods imported into the United Kingdom, subject to certain exemptions, a duty of customs equal to 10 per cent. of the value of the goods. That means, I think, that the importer is the person who is primarily liable for the duties. The general principle is stated in *A.-G. v. Ansted* (4), at p. 528. PARKE, B., said :

The defendants clearly were, by the general law, liable, as importers of the goods, to the payment of these duties.

He was there referring to the system under the earlier Acts operative in 1844 ; but the same general principle applies under the law now in force, and under that law I think it is true to say that the duties became a debt to the Crown immediately on the importation. It is true that the actual levying of these duties is the subject of complicated machinery now to be found in the Customs Laws Consolidation Act, 1876 ; but throughout all that machinery there remains the basic principle that the duties are due on importation from the importer and remain due from the importer until the goods have been duly discharged from the customs' custody. "Importer" is defined in sect. 284 in these terms :

"Importer" shall mean, include, and apply to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof until the same are duly delivered out of the charge of the officers of customs.

The machinery embodied in the Act includes a system of bonded warehouses, of which the plaintiffs' warehouse was one. The owner of the bonded warehouse is required under sect. 13 of the Act to give security by bond for the payment of the full duties chargeable on any goods warehoused with him or for the due exportation thereof. The importer of goods may make what is described as "a perfect entry" under sect. 55, if he intends them to be delivered for home use, on the landing from the importing ship. A special form is provided for that purpose. In that case he must pay the duty immediately on the entry ; but the importer has also the option under sect. 57 of warehousing goods without payment of duty on the first entry, and for that purpose another form is provided. Such an entry was made of the furs now in question. If goods are so entered, they may be dealt with by being taken out of bond for export or the goods may be entered for ships' stores. In neither of these cases will duty be payable ; the goods will have been duly delivered out of the charge of the customs. Thus it is clear that the duties become due on importation and only cease to be due on being actually paid when the goods are taken out for home use or if they are entered for exportation or ships' stores.

The sections which deal with the entry of warehoused goods for home consumption and exportation and for their delivery are sect. 97 and the following sections. Sect. 97 provides :

No warehoused goods shall be taken or delivered from the warehouse, except upon due entry and under the care of the proper officers, for exportation, or upon due entry and payment of the full duties payable thereon for home use, except goods duly delivered to be shipped as stores, in such quantities—

as the customs may direct.

It is, however, clear, in my opinion, that the importer is and remains liable for duty as at the date of the importation, though he may relieve

himself of that liability either by selling the goods subject to the same liability for duties or by entering them for exportation or for use as ships' stores. That the time at which the duty attaches is the time of importation is shown by sect. 40 of the Act. The Customs Act has, however, also imposed upon bonded warehousemen a liability for the duties so due in certain events. Thus in sect. 82 it is provided that a warehouseman failing to produce to an officer of customs on request goods deposited which have not been duly cleared and delivered from the warehouse, shall be liable to a penalty of £5 in respect of every package or parcel not so produced, besides the duties due thereon; and by sect. 85, if goods are taken out of any warehouse without due entry, the warehouseman shall pay the duties due upon such goods. In each of these sections the phrase is used "duties due on the goods," and I think these words refer to the duties due from the importer as from the date of importation. The purpose of these provisions appears to me to be to enable the customs to have ready recourse to the warehouseman wherever goods are improperly removed from the warehouse. It is for this reason that the security referred to in sect. 13 is taken. In accordance with that section the plaintiffs were required to enter into and did enter into a bond in the sum of £10,000, guaranteed by a surety company, and condition 4 of the bond was in the following terms:

All goods which have been deposited or warehoused in the warehouses and not duly cleared therefrom or otherwise accounted for to the satisfaction of the commissioners or which hereafter shall be deposited or warehoused therein shall be safely and securely kept therein until duly delivered under the law and with the authority of the proper officer of customs and excise for the purpose of being exported or warehoused in some approved warehouse or used as ships' stores or for home consumption upon payment of the full and proper duties of customs and excise chargeable thereon.

That is an undertaking that the requirements of the Act as to the payment of duty shall be duly complied with; but, in my opinion, the obligations so imposed on the plaintiffs as warehousemen are ancillary to and by way of security for the due payment to the customs and do not supersede the liability of the importers, though, if the warehousemen pay the duty, the importers cannot be made by the customs to pay it over to them a second time.

In the present case a demand was made on the warehousemen under sect. 85 and the customs refused to remit the duties payable on these goods, as they were entitled to do under sect. 87, which provides:

If any goods warehoused or entered to be warehoused, or entered to be delivered from the warehouse, shall be lost or destroyed by unavoidable accident, either on ship board or in removing, landing, or receiving into the warehouse, or in the warehouse, the commissioners of customs may remit or return the duties due or paid thereon.

The duties due under that section must, I think, refer to duties due from the importers under the charging section. Sect. 87 may apply before the goods are delivered to a warehouse at all; the accident may have occurred on board the importing vessel or in removing, landing, or receiving into the warehouse and in all these cases the warehouseman cannot be liable in any sense for the duty. The only person from whom the duties are due in these cases must be the importer. In the present case the demand on the warehouseman was made under sect. 85, because the goods had been taken out of the warehouse without due entry. Under these circumstances, the plaintiffs claim that they are entitled to recover from the defendants the amount which they have paid to the customs in respect of duties due on the defendants' goods. They make their claim as for money paid to the defendants' use on the principle stated in *LEAKE ON CONTRACTS*. The passage in question is quoted in the Exchequer Chamber by COCKBURN, C.J., in *Moule v. Garrett* (5), at p. 104, and is in these terms:

Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.

This passage remains, with a slight verbal alteration, in the eighth edition of *LEAKE ON CONTRACTS*, at p. 46. The principle has been applied in a great variety of circumstances. Its application does not depend on privity of contract. Thus, in *Moule v. Garrett* (5), it was held that the original lessee who had been compelled to pay for breach of a repairing covenant was entitled to recover the amount he had so paid from a subsequent assignee of the lease, notwithstanding that there had been intermediate assignees. In that case the liability of the lessee depended on the terms of his covenant, but the breach of covenant was due to the default of the assignee and the payment by the lessee under legal compulsion relieved the assignee of his liability.

That class of case was discussed by VAUGHAN WILLIAMS, L.J., in *Bonner v. Tottenham & Edmonton Permanent Investment Building Society* (6), where *Moule v. Garrett* (5) was distinguished. The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or *pro tanto*, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal.

I need not refer to more than two of the numerous cases in which this principle has been applied. In *Pownal v. Ferrand* (7), an endorser of a

bill had been compelled on default by the acceptor to make a payment on account to the holder. He sued the acceptor for the money so paid as money paid to his use. The money so paid was a part only of the amount of the bill. He was held entitled to recover. LORD TENTERDEN, C.J., said, at p. 443 :

I am of opinion that he is entitled to recover upon the general principle, that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter.

As an instance of money payable under a statute, I may refer to *Dawson v. Linton* (8), where a tax was due from the landlord, but there was power to enforce payment by distress, if necessary, from the tenant. ABBOTT, C.J., said, at p. 523 :

It is clear that this tax must ultimately fall on the landlord, and that the plaintiff has paid his money in discharge of it ; he has therefore a right to call upon the landlord to repay it to him.

These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract. It is true that in the present case there was a contract of bailment between the plaintiffs and the defendants, but there is no suggestion that the obligation in question had ever been contemplated as between them or that they had ever thought about it. The court cannot say what they would have agreed if they had considered the matter when the goods were warehoused. All the court can say is what they ought as just and reasonable men to have decided as between themselves. The defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt.

I agree with the learned judge in holding that this principle applies to the present case. As I have explained, the duties were due from the importer. There is nothing in the machinery of the Customs Act which had removed this liability from him when the warehousemen paid the duties, as they were compelled to do under sect. 85. The payment relieved the importer of his obligation. The plaintiffs were no doubt liable to pay the customs, but, as between themselves and the defendants, the primary liability rested on the defendants. The liability of the plaintiffs as warehousemen was analogous to that of a surety. It was imposed in order to facilitate the collection of duties in a case like the present, where there might always be a question as to who stood in the

position of importer. The defendants as actual importers have obtained the benefit of the payment made by the plaintiffs and they are thus discharged from the duties which otherwise would have been payable by them. It may also be noted that the goods which were stolen were the defendants' goods and the property remained in them after the theft. If the goods had been recovered, the defendants could have claimed them as their own and would have been free to apply them for home use without further payment of duty.

I think there is every reason in this case for applying the general principle which I have stated. In commercial dealings of this character it is difficult not to think of the case of the point of view of insurance; but I do not know whether these particular goods were insured by the defendants for their full arrived value as duty-paid goods or were not, nor do I know whether the plaintiffs have insured their contingent liability under sect. 85 as an ordinary trade risk. Either course would be in accordance with prudent commercial practice. I do not, however, lay emphasis on that aspect of the case.

I agree with the learned judge that the claim for the amount of the duties succeeds. I think that the judgment of the learned judge should be affirmed and the appeal as a whole dismissed with costs.

ROMER, L.J. : I agree.

LORD WRIGHT, M.R. : MACNAGHTEN, J., has asked me to say that he also agrees with the judgment which I have just delivered and which he has had an opportunity of reading.

Appeal dismissed with costs.

Solicitors : *Hair & Co.* (for the appellants) ; *Keene, Marsland, Bryden, Besant, Batham & Cork* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

MOLINS AND MOLINS MACHINE CO., LTD. v. INDUSTRIAL
MACHINERY CO., LTD.

[CHANCERY DIVISION (Farwell, J.), **November 4, 5, 6, 9, 10, 11, 12, 13, 1936.**]

Patent—Validity—Prior publication—Problem before earlier inventor.

The plaintiffs were the owners of letters patent relating to a cigarette-making machine, the feature of which was that it had slanting vanes which ensured that the shower of tobacco falling upon the paper should not have a vertical movement, but a movement in the direction in which the paper was moving. The advantage of the machine was that it avoided an uneven distribution of the tobacco in the cigarettes and by its use the speed of production was markedly increased. There was, however, a patent of 1880 in the specification of which there was a drawing of a similar arrangement of vanes and the arrangement was described, but its purpose was not described nor was it claimed that such arrangement had the effect of increasing the speed of production of a perfect cigarette. The machine shown in the 1880 specification worked at a much lower speed than the plaintiffs' :—

HELD : the problem before the inventor of 1880 was the same as that before the later inventor, and the earlier specification was an anticipation of the patent in suit.

[EDITORIAL NOTE.] A patent is here held to be invalid by reason of anticipation in a specification over 40 years old. The point to be noticed is that the machines were similar in principle, but the earlier machine did not and could not work at anything like the speed of the later one. The principle upon which each of these two machines was constructed had, in the case of the later machine, been specially adopted to ensure the production of a consistently good article when working at a high speed. It should be noted that the earlier patent did not claim that the principle in question would enable production at any greater rate than was possible with any other machine then known, nor was the particular construction described as being for the achievement of this result. The law is said, however, to regard the problem before the inventor and it is held that in the case of each of these machines the same problem confronted the inventor, and there was, therefore, anticipation.

AS TO ANTICIPATION BY PREVIOUS SPECIFICATION, see HALSBURY, 1st Edn., Vol. 22, pp. 147-149, paras. 211, 212 ; and FOR CASES, see DIGEST, Vol. 36, pp. 599-604, Nos. 614-660.]

Cases referred to :

- (1) *Mullard Radio Valve Co., Ltd. v. Philco Radio & Television Corpn. of Great Britain, Ltd.*, [1936] 2 All E.R. 920 ; Digest Supp.
- (2) *Kaye v. Chubb & Sons, Ltd.* (1886), 5 R.P.C. 641 ; 36 Digest 593, 543.
- (3) *Herrburger, Schwander et Cie. v. Squire* (1889), 6 R.P.C. 194 ; 36 Digest 555, 216.
- (4) *Pugh v. Riley Cycle Co., Ltd.* (1914), 31 R.P.C. 266 ; 36 Digest 598, 598.
- (5) *British Thomson-Houston Co., Ltd. v. Metropolitan-Vickers Electrical Co., Ltd.* (1928), 45 R.P.C. 1 ; Digest Supp.
- (6) *No-Fume, Ltd. v. Frank Pitchford & Co., Ltd.* (1935), 52 R.P.C. 231 ; Digest Supp.
- (7) *Woodrow v. Long, Humphreys & Co., Ltd.* (1933), 51 R.P.C. 25 ; Digest Supp.
- (8) *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (1907), 25 R.P.C. 61 ; 36 Digest 634, 1040.

- (9) *Hickton's Patent Syndicate v. Patents & Machine Improvements Co., Ltd.* (1909), 26 R.P.C. 339; 36 Digest 579, 409.
- (10) *Lightning Fastener Co., Ltd. v. Colonial Fastener Co., Ltd. & G. E. Prentice Manufacturing Co., Ltd.* (1934), 51 R.P.C. 349.
- (11) *British United Shoe Machinery Co., Ltd. v. Fussell (A.) & Sons, Ltd.* (1908), 25 R.P.C. 631.

ACTION for an injunction to restrain the defendants from infringing letters patent No. 325,265, granted in respect of "Improvements in or relating to cigarette-making machines," and for an inquiry as to damages and delivery up of the infringing machines. The first and second plaintiffs were respectively the registered owner and the beneficial owners of the letters patent.

The cigarette-making machines in respect of which the letters patent were granted were of the class known as the continuous rod cigarette-making machines, whereby a long rod of tobacco finds its way into the paper covering and is severed so as to produce cigarettes of the same length. The tobacco is delivered in a shower on to the band or web which is to carry it along, the shower being delivered, in the type of machines most commonly used, directly on to the paper which forms the outer covering of the cigarette. An increase in the speed of cigarette-making by such machines tended to reduce the uniformity of the cigarettes produced. The plaintiff came to the conclusion that when the tobacco was showered upon the band, and when the machines were running at a high speed, of at least 1,000 cigarettes a minute, there was a tendency in the tobacco to bounce or slip, and it appeared to him that this was caused by the fact that the tobacco was being showered in a vertical direction, whereas the band was moving in a horizontal direction. It occurred to the plaintiff that the remedy was to cause the tobacco, when it was showered, to have a movement in the same direction as the moving band, and he showed in his specification methods by which that movement could be imparted to the tobacco. There was, however, a German patent dated 1880, the Bonsack specification, for a cigarette machine of the same type which was fitted with a device which in effect would give to the shower of tobacco a forward movement. In 1880 continuous rod machines produced about 160 cigarettes per minute, and at the date of the plaintiff's invention these machines produced at least 1,000 cigarettes per minute.

Claim 1 of the plaintiff's specification read as follows :

A cigarette-making machine of the continuous rod type wherein the tobacco showered into the trough of the machine is given a movement in the direction of movement of the cigarette rod prior to the same engaging with the band or web of cigarette paper.

The consistory clause of the specification read as follows :

This invention relates to cigarette-making machines of the continuous rod type

wherein tobacco is fed from a hopper into a trough having a travelling band or web of cigarette paper arranged to move relatively thereto, and has for its object the provision of means for improving the consistency of the cigarette rod produced upon such machines running at high speeds.

The plaintiffs commenced an action for infringement of these letters patent. The defendants denied infringement and pleaded that the letters patent were invalid by reason, *inter alia*, of prior publication. They relied upon a number of prior specifications including German specification No. 14,203 of Bonsack.

This case is reported solely on the question whether a device designed to solve a problem which arises when a machine is working at a high speed is anticipated by a similar device already in existence in connection with another machine, working and only capable of working at a much slower speed.

Trevor Watson, K.C., James Mould and Kenneth Johnston for the plaintiffs.

G. H. Lloyd-Jacob and Lionel F. Heald for the defendants.

Trevor Watson, K.C. : This invention deals with high speed machines. In 1880 the band type of machine was known, but continuous rod machines could only produce 160 cigarettes per minute. At the date of the patent in suit as many as 900 good quality cigarettes could be produced per minute, but at speeds greater than that the quality was uncertain. This inventor was the first person to realise the cause of this variation in quality at high speed. This invention overcomes the difficulty by giving the tobacco a horizontal component of motion in the direction in which the band is moving. Bonsack's machine is of the band type, but there is no explanation given in his specification of the slight tilt of the band on to which the tobacco is showered. It is true that the tobacco will be given a component of motion in the direction in which the band is travelling, but Bonsack's machine was a low speed one, and the problem solved by Molins had not then arisen.

Mould, following on the same side : Good quality cigarettes depend upon evenness of the filler. Molins diagnosed the cause of poor quality ; once this was done the general solution of the problem was obvious. But the problem did not arise until machines were run at high speeds. Bonsack was not dealing with this problem ; moreover, no such Bonsack machine was ever made.

Lloyd-Jacob : The specification does not mention any critical speed. The inventor was concerned not with an increase of speed, but with an improvement of quality. When putting anything on to a moving band, it is obvious to avoid relative movement between the thing and the band. Bonsack's specification is a complete anticipation ; the inclined picker roll is the exact equivalent of Bonsack's inclined trough. See *Kaye v.*

Hubb & Sons, Ltd. (2). Even though the inclined trough is not described in the earlier specification, it is still an anticipation: *Herrburger & Schwander et Cie. v. Squire* (3). The discovery that a useful result may be obtained from a known machine is no ground for the grant of a further monopoly: *Pugh v. Riley Cycle Co., Ltd.* (4). Even though Bonsack may not have realised all the advantages of his machine, it is a complete anticipation. The fact that that machine was not made or used is immaterial. It is not invention to apply his discovery to a high speed machine. The plaintiff's claims are too wide; all he is entitled to is to claim the precise machine he has described.

Heald, following on the same side: If on the true construction of the specification there is complete anticipation, the plaintiffs must fail. The claim here is for a machine; such a machine was old. If this claim be valid, no one can make Bonsack's machine. You cannot allow the type of machine to be defined by speed. [Counsel referred to *British Thomson-Houston Co., Ltd. v. Metropolitan-Vickers Electrical Co., Ltd.* (5); *No-Fume, Ltd. v. Frank Pitchford & Co., Ltd.* (6); *Mullard Radio Valve Co., Ltd. v. Philco Radio & Television Corp'n. of Great Britain, Ltd.* (1); *Woodrow v. Long, Humphreys & Co., Ltd.* (7); and *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (8).]

Trevor Watson, K.C., in reply: The invention in this case consisted of three things: (i) the discovery of the reason for poor cigarettes being produced when the machines were run above a certain speed; (ii) the idea of removing this defect by giving a forward movement to the shower of tobacco; and (iii) a method of doing this. The inventive step may reside in the idea itself: *Hickton's Patent Syndicate v. Patents & Machine Improvements Co., Ltd.* (9). A patentee is entitled to claim a machine for carrying his idea into effect, but he is not limited to the precise machine he has described: *Lightning Fastener Co., Ltd. v. Colonial Fastener Co., Ltd. & G. E. Prentice Mfg. Co., Ltd.* (10). Because a thing when done seems obvious, that is no ground for assuming it was obvious to apply it to high speed machines: *British United Shoe Machinery Co., Ltd. v. Fussell (A.) & Sons, Ltd.* (11). No one would have gone to Bonsack's specification to solve this problem; it is useless unless the cause of the trouble is known. It is wrong to say that a claim is invalid merely because the words used in the claim will cover something that is old. There can be no anticipation unless the earlier specification is dealing with the same problem and attains the same result. Bonsack is an accidental anticipation. In this case a part of the invention consisted in the discovery of the cause of the problem. [Counsel referred to *British Thomson-Houston Co., Ltd. v. Metropolitan-Vickers Electrical Co., Ltd.* (5).]

FARWELL, J.: The question, and to my mind the only real question,

in this case is whether the patent is a valid patent or whether it is invalid on the ground that it is anticipated by the Bonsack specification. The Bonsack specification is a German patent, dated 1880, for a cigarette-making machine of the type described, that is to say, of a continuous rod type, wherein the tobacco is showered. Before I proceed to consider that a little more in detail, I desire to say this : I have had cited to me a very large number of authorities, some of them decisions of the House of Lords, some of them decisions of the Court of Appeal, and all of them cases of the highest authority, in which the courts in considering alleged anticipation by a document or documents have been able to find in the particular case they were dealing with that the anticipation was not established, and that the patent was valid, notwithstanding the fact that as a matter of language, and upon the face of the document, there would appear to be a plain anticipation. Those authorities, so far as they deal with the particular facts of each case, are not of any assistance to me when I have to consider in another case a quite different case and different facts, but they are, of course, invaluable if one can extract from them a principle upon which this sort of question has to be determined. As I understand those authorities, the principle may be stated in this way : When the court is dealing with an anticipation by a document alone, what is sometimes called a paper anticipation, it is not enough in order to invalidate the patent to show that if the earlier document be read and compared with the specification in suit there are words which apparently exactly fit the one to the other, and which apparently, on the face of it, would indicate a clear case of anticipation. Notwithstanding the similarities of the language used in the apparent anticipation, it is not enough to entitle a defendant to have the patent invalidated. What the court has to do is much more than that. The court has to see what is the invention in each case, that is to say, the court has to inquire what are the problem or problems with which the author of the original document was dealing, and the problem or problems with which the patent in suit was dealing. If those problems prove to have been the same problems, and if the method of solving the problem which the patentee in suit has discovered is the same as that which is disclosed in the earlier documents, there can then, of course, be no question that there is anticipation. If, however, the problems are not the same, and the difference lies in the different nature of the problem, then mere similarity of language is not in itself enough. But if the problems are the same, or if one of the problems considered by the earlier author is the same as that considered by the later patentee, and if the earlier document does actually disclose the same solution as that which the patentee has disclosed, or if he discloses sufficient to lead any person of reasonable intelligence directly to the solution which the patentee has found, then there may be anticipation, and in that way

it may prevent the patent being a valid patent. As I have already said, it is not enough to look at the language and compare the language of the two documents and say: "Well, it looks very much as though the one is the same as the other, and is dealing with the same matter as the other, and therefore there must be anticipation." I have, as it seems to me, to approach this part of the case with those considerations in mind, and to look back and see what was the problem which faced Bonsack, what was the problem which faced the patentee, and can it fairly be said that Bonsack gives a solution which is the solution for which the patentee desires a monopoly.

Before I deal with that, there is one matter which I have forgotten and which ought to be dealt with. It was suggested on behalf of the defendants that this patent, so far as it relates to claims 1 and 2, is bad on the ground that the claims are too wide. It was said, and I think said truly, that if this patent is a valid patent the monopoly granted to the patentee is a monopoly for a means whereby the difficulty which arises by this bumping or slipping can be avoided, or at any rate very greatly reduced, and if that be so, then by whatever method that end is produced in a similar type of machine, that would amount to an infringement of the plaintiffs' patent, and that however different a machine might be, supposing someone invented a machine of this type upon quite a different principle altogether from anything which is known at the moment, which works in quite a different way, and which is in every way a different machine, if it does in fact contain something which gives to the showered tobacco this movement, it would infringe the patent. I think that is so, but the fact that this is a claim for a monopoly in respect of this discovery of the cause of the difficulty and the means of removing it, as distinct from any particular method of using that discovery, was not in my judgment invalid. It is a very wide claim, but it is one which, in my view, the law will recognise, and I do not think the decision in the *Mullard* case (1) in the House of Lords really has any relevance in considering this particular case. I should add this, that the very width of the claim may put the patentee in greater peril when I come to consider this question of anticipation.

Now, what is the problem with which Bonsack was dealing? I think there can be no doubt that Bonsack's attempt was to manufacture a cigarette-making machine which would produce satisfactory cigarettes, and when I say "satisfactory cigarettes" I mean cigarettes which would be satisfactory from the point of view of the persons who were going to buy them. One of the necessities, or one of the requirements of such a cigarette-making machine was that the cigarettes should be more or less uniform. Lack of uniformity, if it was serious, would obviously very seriously detract from the value of any cigarette-making machine, and therefore one of the problems with which Bonsack was faced was

to get a cigarette-making machine which would produce uniformity in the cigarettes which it was making. The same problem faced the patentee. His problem was to get a machine to produce uniformity of the cigarette. It is quite true that the problem may have been rendered more difficult for the patentee than for Bonsack by reason of the fact that the speed at which it is nowadays required that these machines should work is invariably higher than it was in Bonsack's day, or anybody thought about in Bonsack's day ; but one of the basic problems, so far as Bonsack was concerned, was the same as the problem that the patentee had to face, how to get uniformity, and the fact that the problem was accentuated by the speed does not differentiate it so as to make it a different problem. I cannot accept the view which has been pressed on me on behalf of the plaintiffs that there is something quite new, merely because the speed at which these cigarette machines can be run is very much higher than it was at the time of Bonsack. The problem is the same, although it may be a problem which it is less easy to solve than it was in 1880.

Now the patentee has discovered that the cause of the trouble is this slipping or bouncing of the tobacco, and he has found that the remedy for it is giving a component to that vertically falling tobacco which is in the same direction as the moving band or web, and he has shown methods by which that can be obtained. That end can be attained in very various ways ; in fact the patentee himself has shown three methods that can be adopted. The defendants have found another method by which that end can be attained, and there is yet another method by which undoubtedly the same thing could be attained, namely, by having the rod or trough inclined to a sufficient angle. When I come to examine Bonsack's specification I find that in his specification he describes the trough as being inclined, and he shows it in his diagram. It is quite true that he does not in terms say why that trough is inclined, but when one is considering that one of his objects was to produce cigarettes of reasonable uniformity, it is not difficult, I think, to come to the conclusion that one, at any rate, of the reasons for the inclination of the trough was to get that uniformity, and in fact, Sir James Swinburne, who gave his evidence with that complete candour which always characterises his evidence, said in answer to me that he himself could see no other reason which could have induced Bonsack to have this trough inclined, if it was not to get what in fact the patentee gets, namely, the component of movement in the vertically falling tobacco in correspondence with the movement of the cigarette rod. It seems to me that if one considers it from that point of view it is impossible to avoid the conclusion that the Bonsack specification is an anticipation of the plaintiff's invention. It is quite true that the evidence shows that the Bonsack machines, which are well known machines in the trade, so far

as the witnesses in this court could tell me, were all machines in which there was no inclined trough, but a horizontal one, and that is the type with which they were familiar, the type which with various improvements was used and has been used quite generally ; but nevertheless, the specification itself shows that Bonsack invented a machine in which there was this inclined trough. It may be that at the speeds at which the machines were then being run it was found that that inclination was unnecessary, because this difficulty as to bounce and slip was not sufficiently serious to necessitate any device of that sort. But however that may be, applying the test which I venture to think may be said to be the right test, having regard to the authorities which have been cited to me, I come to the conclusion that it is not correct to say that the problem of Bonsack and the problem of the patentee were so different that there can be no anticipation. In my judgment the problem is the same, although in a different degree, and the solution of that problem, or one method of removing the difficulty, is shown in the Bonsack specification. Although I feel some sympathy with the patentee, who no doubt never saw this document, and who has been met with this document when this action was commenced, on the other hand I cannot forget that the patentee is the person who is responsible for the form of the specification. The patentee no doubt desired to frame his claim to a monopoly in the widest possible terms so as to give himself the full benefit of his discovery, and in so doing he has had, in my view, the misfortune to fall into the pit which is sometimes dug for those who draw specifications on those lines of finding an earlier document which anticipates the patent.

Accordingly, I must hold that this patent is invalid, the action fails and must be dismissed with costs.

Judgment for the defendants with costs.

Solicitors : *Bristows, Cooke & Carpmael* (for the plaintiffs) ; *Coote & Co.* (for the defendants).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

BRITISH UNITED SHOE MANUFACTURING CO., LTD. v.
HOLDFAST BOOTS, LTD.

[CHANCERY DIVISION (Bennett, J.), November 12, 13, 16, 17, 18, 1936.]

Practice—Costs—Taxation—Preparation of affidavit of documents—Relevancy of documents—Necessity for master to see and consider documents.

In an action for infringement of a patent the plaintiffs were an English company and an American company. The defendants obtained an order for discovery and in their bill of costs the plaintiffs made a charge of 500 guineas for instructions for affidavits of documents of the two plaintiffs and instructions for brief. This was taxed down to 300 guineas, of which the master stated that 275 guineas was referable to the instructions for affidavits of documents. The bill referred to correspondence which passed between the solicitors and the American company and to the consideration of a large number of documents sent over from American to be advised upon in England. The master saw none of these documents and had no opportunity of deciding how far they were material to the issues in the action :—

HELD : the master's duty in taxation was not only to see that the work was done, and find the value of the work, but also to see that the work was necessary to be done. The master, therefore, should have seen the documents referred to (which were, of course, privileged documents and not disclosed in the action) in order to satisfy himself that the work done upon them was necessary and not the result of over-caution. A review of the taxation before another master must be ordered.

[EDITORIAL NOTE.] The taxing master is always left with a wide discretion in allowing or disallowing items in a solicitor's bill of costs ; but it is essential that he shall see that any work done is necessary to be done and not done through the exercise of too great a degree of caution on the part of the client or the solicitor. If, therefore, a great number of documents is considered in the preparation of an affidavit of documents, it becomes necessary that the taxing master shall satisfy himself that those documents are relevant documents and material to some issue or issues in the action and safeguard the other party from having to defray the cost of perusing and advising on documents in no way connected therewith.

AS TO DISALLOWANCE OF IMPROPER OR UNNECESSARY COSTS, see YEARLY SUPREME COURT PRACTICE, 1937, pp. 1501-1503 ; and FOR CASES, see DIGEST, Practice, p. 942-944, Nos. 4835-4845.]

Cases referred to :

- (1) *Alsop v. Oxford* (Lord) (1833), 1 My. & K. 564 ; 42 Digest 214, 2390.
- (2) *In the Estate of Ogilvie*, *Ogilvie v. Massey*, [1910] P. 243 ; 42 Digest 216, 2430.
- (3) *Frankenburg v. Famous Lasky Film Service, Ltd.*, [1931] 1 Ch. 428 ; Digest, Practice, 948, 4878.
- (4) *Pecheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.*, [1928] 1 K.B. 750 ; Digest, Practice, 947, 4875.
- (5) *Stevens v. Griffin*, [1897] 2 Q.B. 368 ; Digest, Practice, 956, 4968.

ADJOURNED SUMMONS taken out by the defendants in the above-named action, and asking for a review of the taxation of the plaintiffs' and defendants' bills of costs. The facts which are more fully stated in the judgment are shortly these. The action was a patent action in which the respondents herein and another company joined as plaintiffs

alleged the infringement by the applicants herein and two other companies joined as defendants. The pleadings being closed the defendants applied for an order for discovery of documents, to which the plaintiffs objected on the ground that until the summons under R.S.C. Ord. 53A, r. 21A, the purpose of which was to get directions as to the mode of trial, had been dealt with, the application for discovery was premature. The master upheld the plaintiffs' objection and refused to make the order, but his decision was reversed by BENNETT, J., in chambers on June 6, 1934. The plaintiffs then gave notice of motion to discharge that order. This motion was dismissed, and the plaintiffs thereupon appealed to the Court of Appeal. The appeal was dismissed, and the parties proceeded with the preparation of their affidavits of documents. Between Nov., 1934, and Feb., 1935, the respective solicitors of the parties were in correspondence with each other with the object of admissions being made in order to restrict the extent of the discovery, and during that time the plaintiffs suspended their activities in the preparation of their affidavits of documents. In Mar., 1936, the defendants made an application to amend their particulars of objection and upon that application the usual order, set out in the judgment herein, was made.

The plaintiffs elected to discontinue, and the parties put in their bills of costs for taxation. The defendants objected to the master's certificate in respect of two items :

(1) An item of 500 guineas for affidavits of documents and instructions for brief, which had been taxed down by the taxing master to 300 guineas, 275 guineas of which, he stated, were referable to instructions for affidavits of documents.

(2) The taxing off their own solicitors' bill of a sum of £100, charged in respect of the attendance of the defendants' representatives at two inspections of the machine alleged by the plaintiffs to have infringed their patent.

G. W. Tookey for the applicants, the defendants in the action.

Robert Burrell for the respondents, the plaintiffs in the action.

Tookey : 275 guineas is a grossly extravagant amount to allow for settling an affidavit of documents. The amount of time spent by the defendants' solicitors on their affidavit was only 6 hours as compared with the 39½ days for which the plaintiffs' solicitors are charging. Nor did the defendants find it necessary to consult counsel at all, whereas the plaintiffs' solicitors are claiming for 14 conferences with counsel and 9 cases to advise. Although the plaintiffs' solicitors may have done the work for which they are charging on the instructions of their lay clients, it is not work for which the defendants should be made to pay. As appears from the plaintiffs' affidavit sworn by Mr. Mellerio the plaintiffs were facing discovery for the first time and that has made

them over-cautious and led them into incurring unusual expenses which, under R.S.C., Ord. 65, r. 27, is not an expense which should be allowed against the defendants.

BENNETT, J. : But I cannot interfere, as I understand the practice, with the master's discretion when the matter in issue between the parties is merely one of quantum, but only where the master has made a mistake upon a matter of principle. What is the principle from which the taxing master has departed ?

Tookey : There are two matters of principle. In the first place the master has failed to pursue the inquiry which he ought to have made in order to satisfy himself that this large sum was not due to over-caution. The only way in which he could have formed an idea as to whether the work done by the plaintiffs' solicitors was necessary was by examining the correspondence which passed between the plaintiff companies and their solicitors. There is nothing in the master's answers to the defendants' objections to his order to indicate that he made any real inquiry as to whether all this work was necessary, and that it was not unusual and not due to over-caution.

The second matter of principle upon which the master went wrong is that he allowed himself to be influenced by the fact that the plaintiffs had resisted discovery up to the Court of Appeal. He used the Court of Appeal proceedings as a criterion of the importance of the discovery and of the amount of work necessarily involved.

BENNETT, J. : But what are you asking me to do ?

Tookey : There are two courses open to you. I should prefer you to look at the documents which the taxing master refused to examine and say whether all this time and money which was spent on discovery was necessary, or work for which the defendants should be asked to pay.

BENNETT, J. : I do not think I am competent to express a view of what would be a reasonable charge even if I did that.

Tookey : Alternatively I ask you to send the matter back to the master with a direction to him to look at these documents and to decide whether all this work ought to have been done, or whether it does not come under the category of unusual work having regard to the fact that this was the first time the plaintiffs had had to face the question of discovery in a patent action.

With regard to the defendants' second objection to the taxation, i.e., the master's disallowance of the expenses incurred by reason of the defendants' attendance at the plaintiffs' inspections of the machine, I admit that, normally, expenses incurred prior to action are not allowable, but that rule is not a rigid one : see *Frankenburg v. Famous Lasky Film Service, Ltd.* (3), at p. 441. These charges were not charges thrown away.

BENNETT, J. : But the result of the first inspection was that the plaintiffs did not bring an action.

Tookey : Not in the events which happened, since the writ, when eventually it was issued, contained allegations of infringement by the machine both in Oct., 1932, when it was first imported by the defendants and had not been altered, and in 1933, when it was re-imported in its altered state. It was particularly essential for the defendants' experts to attend the first inspection in order that they could deal at the trial with the machine in its unaltered form. As the master did not look at the defendants' experts' report there was no ground on which he could properly say that these costs were not properly incurred.

Burrell : The discretion of the taxing master is not merely a discretion as to quantum, but a discretion as to how he does his work : see *In the Estate of Ogilvie, Ogilvie v. Massey* (2), at p. 244.

BENNETT, J. : But if you arrive at the opinion that the way in which he chooses to do his work is a way in which he cannot reach a reasonable conclusion, it is right that the court should review his decision. Otherwise the taxing master would be supreme, and one cannot blind one's eyes to the fact that the costs which an unsuccessful party has to pay are often a greater burden than the subject matter of the suit.

Burrell : In this case the master was in a position to form a *prima facie* view of the amount of work involved in discovery by considering what had happened in the court proceedings and the matters involved by the issues disclosed in the pleadings. Having formed that opinion he was able to check it, as he did, from the statement which he obtained from the plaintiffs' solicitors as to the time spent by them on discovery, a statement which has not been challenged by the defendants.

The method which, it is suggested by the defendants, the master ought to have followed was wholly impracticable and a counsel of perfection. The only way in which he could have judged with complete accuracy what amount of work should have been done would have been by going again through the whole of the work done by the solicitors with the same expert assistance that they had. He could not decide whether a technical document was relevant or was properly placed before the solicitors unless it was properly explained to him by someone who understood it. The mere fact that the master adopted the alternative method of asking for a statement of the amount of work that was done, and of the time spent in doing it does not mean that he has exercised his discretion by a method which is contrary to principle.

As to the defendants' second objection to the certificate, i.e., the disallowance of the charges made in their solicitors' bill for the attendance of their representatives at the two inspections of the machine, those expenses were not incurred by any persons who were at the time of the inspection being threatened by the plaintiffs with a writ. There were

three defendants in the action, and the only one of them who was being threatened in the early days was the Holdfast Boot Co., Ltd., as importers and users of the machine, but the expenses in connection with the inspections were incurred by Maschinenfabrik Moenus A.G. one of the other two companies ultimately made defendants. The master has fairly exercised his discretion in disallowing these charges, and has not failed in his duty as far as any question of principle is concerned. It is always a matter of fact for the master whether costs were or were not reasonably incurred : see *Société Anonyme Pêcheries Ostendaises v. Merchants' Marine Insurance Company* (4), at p. 762.

Tookey, in reply : If this matter goes back to the master with a direction to him to look at certain documents and review the case, the defendants will not be allowed to look at those documents and will be barred from arguing the matter with the master. It will also be very difficult for the master who has already purported to exercise his discretion to readjust his mind, and I submit, therefore, that the matter should be referred back to a different taxing master. You have jurisdiction to make such an order: see ANNUAL PRACTICE, 1937, p. 1507, and *Stevens v. Griffin* (5).

BENNETT, J. [to Burrell] : What objection is there to my taking this course ?

Burrell : I do not contest that you have jurisdiction to send the matter back to another master, but it would be highly inconvenient to do so. In taxing instructions for brief the taxing master always takes into consideration what he has allowed or disallowed in respect of other items in the bill of costs. If this taxation is referred back to a different master on one matter only, he will have no idea as to what was in the mind of the master who has dealt with the other items in the bills. Moreover, a good deal of time has already been spent by a taxing master in considering the papers, and it will add considerably to the expense if it is sent back to another master, which is also a point to be considered. In *Stevens v. Griffin* (5) the reason for the decision to send the matter back to another master was that CHITTY, L.J. (see p. 373), took the view that it was a question of incompetence or something of that sort.

BENNETT, J. : The matter before me is an application by the defendants in the action to review the taxation of two bills of costs taxed under an order of Mar. 12, 1936. The order was made in an action in which there were two plaintiffs, the British United Shoe Machinery Co., Ltd., and the United Shoe Machinery Corpn., a company incorporated under the laws of the United States of America, as I understand it, and in which these plaintiffs claimed that the defendants had infringed letters patent No. 351386 granted to the plaintiff company in respect of an invention entitled "Improvements in or relating to machines for shaping boot or shoe uppers over lasts."

The action was begun on Aug. 14, 1933, and on Mar. 27, 1934, the defendants delivered their defence and their particulars of objections, in which they asserted that the letters patent upon which the plaintiffs sued were invalid. In March, 1936, the defendants made an application for leave to amend their particulars of objections, and upon that application there was made an order under which the two bills of costs were taxed. The order is, I am told, the recognised form of order in patent actions, in which the defendant applies to amend particulars of objections to the letters patent for the infringement of which he is being sued. The order is in these terms :

It is ordered that the plaintiffs do on or before Apr. 9, 1936, elect whether they will discontinue this action and if the plaintiffs shall elect to discontinue this action and shall give notice thereof to the defendants within the time aforesaid,

It is ordered that it be referred to the taxing master to tax the costs of the defendants of this action up to and including the date of the delivery of the particulars of objections on Mar. 27, 1934, and to tax the costs of the plaintiffs of this action subsequently to the said Mar. 27, 1934, to the date of this order.

And the taxing master is to set off the said costs of the defendants and of the plaintiffs and certify to which of them the balance after such set off is due.

And it is ordered that such balance be paid by the party from whom to the party to whom the same shall be certified to be due.

And if the plaintiffs shall not give notice to the defendants of their discontinuance of this action within the time aforesaid,

It is ordered that the defendants be at liberty to amend their defence and counterclaim and particulars of objections as set forth in the copy of the proposed amended defence and counterclaim and amended particulars of objections signed by the registrar.

Then there is a provision for costs in that event.

The plaintiffs did elect to discontinue, and so there fell to be taxed the costs of the defendants down to Mar. 27, 1934, and the costs of the plaintiffs from that date until Mar. 12, 1936.

As a result of the taxation the taxing master made his certificate on July 31, 1936, certifying the costs of the plaintiffs to be taxed at £559 8s. 5d. and those of the defendants at the sum of £160 2s. 11d. After setting off the said sums one against the other the master certified that there was due from the defendants to the plaintiffs the sum of £399 5s. 6d.

The defendants objected to the taxation by the master of the plaintiffs' costs and also of their own. The defendants complain that in respect of the plaintiffs' costs the master has allowed too much, and that in respect of the defendants' costs the master has allowed too little. So far as the plaintiffs' costs are concerned their objection rests upon the allowance made by the master in respect of one matter, the charge which he has allowed the plaintiffs' solicitors in respect of instructions for affidavits of documents of the two plaintiffs. The charge made in the bill which was brought in for taxation in respect of that matter and

in respect of instructions for brief is £525. Off that charge the master has taxed £210, leaving as the charge he has permitted the plaintiffs solicitors to make in respect of instructions for affidavits of documents of the two plaintiffs at the figure of 275 guineas.

The question is whether upon the materials before the taxing master he was entitled to find that that sum of 275 guineas was a proper sum for the plaintiffs' solicitors to charge on taxation for the preparation of the two affidavits of documents. The specification of the work done in connection with the affidavits of documents set out in the bill seems to me to be a piece of work which has been done by somebody who is a master of his craft. It does convey the impression, as no doubt it is intended to do, of a very great amount of labour expended by the plaintiffs' solicitors in the preparation of these two documents, which are documents for which I suppose, in most actions, the charge allowed would be something measured by shillings and not by pounds or guineas. It is necessary, I think, to read the specification of work done, for the purpose of considering whether the charge which the master has allowed is a proper one in the circumstances. I am not for one moment saying there may not be cases, or that this may not be a case, in which a substantial sum ought not to be allowed for the preparation of affidavits of documents. This is the legend in the bill for the instructions for the affidavits of documents of the two plaintiffs :

Instructions for affidavits of documents of the two plaintiffs and instructions for brief.

Correspondence with the plaintiff company the United Shoe Machinery Corpn. in America as to the order which has been made for discovery and the refusal of the court to limit the extent of the discovery against the American company to the issue of title to the patent. Preparing a skeleton form of affidavit for their guidance, supplying them with copies of the pleadings and the order for discovery and explaining to them the searches they would have to make among the documents, correspondence and books in their possession or in the possession of the whole of their depots in the United States and arranging for them to send us all the documents which might have a bearing on the issues raised in the action except those about which they had no doubt as to disclosure in order that we might advise as to whether they should be included. Subsequently on receipt of a large number of documents, correspondence, reports, memoranda, drawings and other papers engaged many days perusing and considering the same and selecting those which came within the terms of the order for discovery. Attending conferences with counsel thereon and ultimately completing the preparation of the affidavit which was duly sworn by the American company and returning the documents which counsel advised did not come within the terms of the order.

Numerous conferences and lengthy correspondence with the plaintiffs the British United Shoe Machinery Co., Ltd., as to the affidavit of documents to be filed under the order for discovery, which necessitated the making of full investigations covering the past eight years and detailed inquiries into the history of the patent in suit from the making of the invention in America to the sealing of the patent in this country and the arrangements necessary for the examination of the documents, correspondence, etc., in the possession of the various departments of the plaintiff

company and also in the large number of depots of the plaintiff company scattered over Great Britain.

Numerous conferences with Mr. Mellerio, the company's patent agent, as to his collecting from each department and depot the documents discovered and perusing and considering the same when obtained and deciding which of them came within the terms of the order for discovery, and attendances at Leicester examining books and papers which could not be dispatched to London. Considering the reports of the results of the searches at the various depots of the company.

Advising as to the production and examination of all the papers, documents, reports, etc., which were taken over by the plaintiff company on their acquisition of the business of the Gimson Shoe Machinery Co., Ltd., the defendants having pleaded as a prior user the supply in the year 1928 (before the plaintiff company acquired the Gimson Co.) of Gimson Heel Seat Lasting Machines to certain manufacturers.

Subsequently perusing and considering all the documents so found and advising as to those which were definitely not covered by the order for discovery.

Preparing cases to counsel from time to time submitting to him certain classes of documents for his opinion as to whether they came within the order and attending numerous conferences thereon obtaining his opinions.

Long correspondence with the defendants' solicitors (between July 23, 1934, the date of the order for discovery and Nov., 1935, the date when the affidavits were completed and exchanged) as to the making of admissions by both plaintiffs and defendants to endeavour to curtail the time and expense occasioned by the preparation of the affidavits of documents, preparing admissions and having same settled by counsel and perusing certain admissions made by the defendants and obtaining counsel's advice thereon.

The time entailed in the preparation of the above affidavits occupied from July, 1934, to Nov., 1935, and entailed the payment to counsel of fees amounting to £39 13s. 6d., and the expenses of the American plaintiff corporation for obtaining and dispatching documents, etc., to England £15 9s. 5d.

That is the specification of the work in respect of which the taxing master has allowed the charge of 275 guineas.

Now it is settled that, generally speaking, the decision of the master on taxation is final. He is the sole judge of the fact whether the business has been done and the proper charge to be made for it, and it is his duty to inquire whether the business was required to be done. If a solicitor negligently or ignorantly takes any unnecessary proceedings it is the duty of the master to protect the client from any charge in respect of such proceedings. That is the rule laid down many years ago by SIR JOHN LEACH, M.R., in the case of *Alsop v. Lord Oxford* (1) and stated quite recently by COZENS HARDY, M.R., in *In the Estate of Ogilvie, Ogilvie v. Massey* (2), at p. 244. And if the only question was whether 275 guineas was a right sum to be allowed the plaintiffs' solicitors for the preparation of these two affidavits of documents it would be a matter for him, and I should have no jurisdiction to review his decision upon a mere question of quantum. But the sum allowed by the master in respect of these two affidavits of documents is, I will not use Mr. Tookey's expression "grossly extravagant," because before one can find that a charge is extravagant there must be some standard by which one can

be guided before one can come to a decision, but I will say that the sum of 275 guineas for the preparation of two documents which have to be prepared in most actions is a large one, and it does therefore become necessary to see the material upon which he arrived at the conclusion that 275 guineas was a proper sum for the plaintiffs' solicitors to charge in respect of this work. He has to find first of all that the work was done, then he has to find the value of the work that was done, and then he also has to see that the work was necessary to be done by the plaintiffs' solicitors. The specification of the work done in the bill which I have read refers to certain correspondence which passed between the solicitors and the American corporation. The master saw none of that. There is a reference to the large number of documents which were sent over by the American corporation to be advised upon by the plaintiffs' solicitors. The master did not know what those documents were. He had no information as to whether they were documents about which there was any real question of whether or not they were relevant to the matters in question. The specification refers to the numerous conferences and lengthy correspondence with the English plaintiffs, the British United Shoe Machinery Co., Ltd. The master saw none of that correspondence. Nor did he have before him any record as to the matters which were discussed between the plaintiffs' solicitors and these plaintiffs. Although the specification refers to the examination of numerous books, papers and documents at Leicester and in London, the taxing master had no information as to the nature of these books, papers and documents, and as to whether it was really necessary or not for the plaintiffs' solicitors to examine these documents. And the same observation applies to the documents taken over by the plaintiff company on the acquisition by them of the Gimson Shoe Machinery Co., Ltd.

In my judgment it was not possible fairly to arrive at what was proper to be charged by the plaintiffs' solicitors against their clients on a party and party taxation in respect of this matter unless the taxing master had before him some of these materials at any rate. It might not have been necessary for him to have all of them. But with none of them it seems to me that his conclusion that 275 guineas was proper to be charged could be nothing more nor less than guessing, and I do not think it is right, where material is available to the taxing master, but not to the defendants' solicitors, material, that is, that is privileged from the defendants' solicitors, for him to arrive at the conclusion that this sum of 275 guineas is a sum which is proper to be allowed without looking at that material.

The defendants summarised their objections to the master's certificate and their reasons for their objections, and the last paragraph of these reasons is in these terms :

The defendants' solicitors respectfully submit that the taxing master was in

error in not requiring from the plaintiffs' solicitors what the defendants themselves could not require and in which alone a proper judgment could be exercised, namely, the private documents, letters and correspondence passing between plaintiffs' solicitors and their own clients. It is pointed out that where a decision is given in court a taxing master frequently receives valuable information from the brief of the party whose costs are being taxed. This is a private document. The solicitor who taxes the bill does not see it, but the taxing master does and on the contents of it he can form some judgment as to the value of the work done preliminary to its preparation, usually included in the item "instructions for brief." In this case there was no brief, but there are private documents, equally available to the taxing master into which we respectfully submit it is his duty to make close enquiry and investigation.

The reply of the taxing master to those reasons is in these terms :

With reference to the remarks on p. 5 of the objections as to the taxing master's duty, etc., I would only say that the objecting solicitors well know that I have gone very fully into the documents relating to the action and have heard the parties at great length on all points raised in the objections.

That answer misses the point. It is not the documents relating to the action which are necessary to be examined for the purpose of seeing whether the charge is proper. The documents relating to the action afford no information as to either the value of the work done by the plaintiffs' solicitors or the quantity of it in reference to the particular matters in question in the preparation of these affidavits of documents, and so far as the documents disclosed by the two affidavits are concerned, in number they are quite few. Apart from privileged documents there are 32 in the English company's affidavit and 40 in the American company's affidavit. It does not follow from that that a great deal of work and a great deal of necessary work was not done, but in my judgment the master did not have before him the materials upon which he ought to have insisted, and upon which alone he would have been able to arrive at the proper sum to be awarded to the plaintiffs' solicitors in respect of this particular matter. I am not suggesting that, if he has all the materials before him the master may not arrive at the conclusion that the sum which he has awarded is right. He may. All I am deciding is that he did not have before him, when he allowed 275 guineas, the material which he ought to have had, in order to be able to award the plaintiffs' solicitors that sum for the preparation of the affidavits of documents. In my judgment, upon the defendants' objections to the taxation of the plaintiffs' bill of costs there must be a review of that taxation.

So far as the taxation by the master of the defendants' bill of costs is concerned, the defendants' objection is as to the master's disallowance of costs incurred by the defendants before action brought. It is settled that upon a party and party taxation, the taxing master has power to allow costs incurred before action brought if incurred in respect of matter

which proved useful in the action. It is a question for his discretion as to whether costs incurred before action have or have not been useful to the party incurring them in the action. It appears from the master's answers to the defendants' reasons for objections to his taxation of *their* bill that the taxing master has directed his mind to the point he ought to have considered and has exercised his discretion upon that point, and I see no grounds whatever on which I can properly interfere with the exercise by him of the discretion he undoubtedly has as to disallowing these items. I can see no ground whatever for supposing, in respect of that matter, that he exercised his discretion otherwise than with perfect propriety. So far as that part of the defendants' application is concerned, in my judgment it fails.

I have already said that there must be, in my judgment, a review of the taxation of the plaintiffs' bill. I am not able to form any estimate of what it would have been proper to allow the plaintiffs' solicitors for the work they did in connection with the preparation of these two affidavits of documents. I have no more, in my judgment, than the master had, the necessary materials. So the matter must go back for review, and the question is who is to be the person to review? It is conceded that if I make an order for review I have jurisdiction to say by whom the review should take place, and the question between the parties in this matter is whether the bill should be reconsidered by the master who taxed it or by a new one. It is always desirable, I think, when you are dealing with matters about which there is a real conflict between the parties, that there should not be the smallest doubt about the impartiality and freedom from prejudice of the mind of the person who has to decide between them. On the whole I think, without in any way making any reflection upon anybody, but in the interests of justice, that it is desirable that the review of the taxation of this bill should be made by somebody who has not had anything to do with it before. Therefore I propose to send this matter back for review by the chief taxing master. The order on the summons therefore will be referred back for review of the costs of the plaintiffs under the order of Mar. 12, 1936, to the chief taxing master for review. The plaintiffs must pay the costs of this application. Leave to appeal.

Solicitors: *Ravenscroft, Woodward & Co.* (for the applicants); *Bristows, Cooke & Carpmael* (for the respondents).

[Reported by C. M. YOUNG, *Barrister-at-Law.*]

WILSON BOX (FOREIGN RIGHTS), LTD. (IN LIQUIDATION)
v. BRICE (INSPECTOR OF TAXES).

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **November 23, 1936.**]

Income Tax—Trading profit—Sale of patent rights—Sale in course of liquidation of company.

The appellant company was formed in 1933 with a capital of £2,500 and was formed for and did in fact purchase the foreign right in a patent for £2,500 payable in the shares of the company. Subsequently all the holders of the shares agreed to sell those rights to two gentlemen for £50,000. This agreement was the subject of litigation, and in settlement thereof the following agreement was made. It was agreed that the previous agreement should be annulled and that the company should go into voluntary liquidation and the liquidator should sell the Belgian, French and Italian rights in the patent to the purchasers for £20,000. This agreement was implemented and the £20,000 purchase money was distributed among the shareholders according to their respective shareholdings and treated as part of the distribution of the assets of the company in the liquidation. The revenue authorities claimed that such sale of rights for £20,000 was a trading transaction, the profit of which was assessable to income tax:—

HELD: the realisation of the asset in question by the liquidator was not done in the course of carrying on the trade of the company, but merely in the performance of the liquidator's duty of realising the assets of the company and bringing it to an end. The profit upon the transaction was therefore not a trading profit and not assessable to income tax.

[EDITORIAL NOTE.] There have been several cases where the sale of assets have been treated as a trading transaction and the profit made thereon assessed to income tax. The cases distinguish the various transactions as follows. There are first those transactions where there is no liquidation of the company and secondly where the sale is by the liquidator. In the latter cases, the sale may be in the course of the carrying on of the business of the company by the liquidator or it may be, as here, a sale in the realisation of the assets for the purposes of distribution. It will be noted that the contract in existence before the liquidation was annulled and the contract actually carried out was a new one entered into by the liquidator himself.

AS TO WHAT ARE PROFITS OF A TRADE, see HALSBURY, Hailsham Edn., Vol. 17, p. 118, para. 223, and FOR CASES, see DIGEST, Vol. 28, pp. 18-21, Nos. 92-107 and Supp.]

Cases referred to:

- (1) *Re Wreck Recovery & Salvage Co.* (1880), 15 Ch. D. 353; 10 Digest 923, 633*A*.
- (2) *Inland Revenue Comrs. v. Burrell*, [1924] 2 K.B. 52; 9 Tax. Cas. 27; 28 Digest 108, 665.
- (3) *Ducker v. Rees Roturbo Development Syndicate, Inland Revenue Comrs. v. Rees Roturbo Development Syndicate*, [1928] A.C. 132; 13 Tax. Cas. 366; Digest Supp.
- (4) *Inland Revenue v. Oban Distillery Co. Liquidator*, [1933] S.C. 44; 18 Tax. Cas. 33; Digest Supp.

- (5) *Collins v. Firth-Brearley Stainless Steel Syndicate, Ltd.* (1925), 133 L.T. 616 ; 9 Tax. Cas. 520 ; 28 Digest 18, 93.
- (6) *Re Old Bushmills Distillery Co., Ex p. Brett*, [1897] 1 I.R. 488 ; 10 Digest 753, case a.
- (7) *Hüllerns & Fowler v. Murray* (1932), 146 L.T. 474 ; 17 Tax. Cas. 77 ; Digest Supp.

APPEAL from a judgment of LAWRENCE, J., delivered on May 19, 1936 (reported [1936] 2 All E.R. 452), allowing the plaintiffs' appeal against their assessment to income tax in the sum of £20,000 derived from the sale of foreign patent rights.

The respondent company was formed in the following circumstances. A company called Improved Gears, Ltd., owned certain foreign patent rights in epicyclic gears. In 1932 it contemplated selling these rights to a Mr. Leigh and a Major Lago for £50,000, but as its directors feared that a direct sale might attract a claim for income tax they decided to form another company to acquire those rights for a nominal sum and sell them to the purchasers for £50,000. Accordingly, the respondent company was formed with a capital of £2,500, and its memorandum of association empowered it, *inter alia*, to turn to account all or any of its inventions and patent rights. Improved Gears, Ltd., transferred the patent rights to the respondent company for £2,500, and shareholders of the respondent company sold their respective holdings in its capital to Mr. Leigh and Major Lago for £50,000 by an agreement. The purchasers paid £2,500 deposit and £11,000 more then but refused to complete the transaction.

The vendors instituted an action for specific performance, alternatively for rescission and forfeiture of the deposit. This action was settled upon the following terms, incorporated in a latter dated Nov. 2, 1934. The agreement for the sale of shares was cancelled, the company was put into liquidation and the liquidator was authorised to sell to Mr. Leigh and Major Lago the Belgian, French and Italian patent rights for the sum of £20,000, the purchase money to be distributed among the shareholders according to their respective shareholdings and to be treated as part distribution of the assets in the liquidation of the company ; that the liquidator should be authorised to transfer or cause to be transferred to a company known as the Self-Changing Gear Trading Co., Ltd., the remaining foreign patents, patent rights and other assets of the company for such consideration in shares as might be determined by the shareholders of the company, and that such shares should be distributed amongst them and treated as a further distribution of the assets in the liquidation of the company. It was part of the settlement that the £13,500 which was in the hands of the shareholders should be treated as part of the purchase price of the patent rights and be distributed by the liquidator as part of the £20,000.

The defendant, one of H.M. Inspectors of Taxes, assessed the liquidator of the company in this sum of £20,000. It was contended by the company before the commissioners (i) that the company did not carry on any trade of dealing in patent rights; (ii) alternatively, that the sum of £2,500 only fell to be treated as a trading receipt of the company. The defendant contended that the company carried on the trade or business of dealing in patent rights and inventions and that the sale of the foreign rights for £20,000 constituted a trading transaction the profit of which was assessable to income tax. The commissioners held:

(i) That the trade of the company included dealing in patent rights and inventions and that the proceeds of sale in the rights in question were trading receipts received by the liquidator in the course of trading.

(ii) That the amount of such trading receipts comprised not only the sum of £6,500, but also the sum of £13,500 previously paid by the purchasers under the agreement for sale of the shares of the company.

It appeared to them that this agreement was discharged by the mutual consent of the parties and that the sum of £13,500 previously paid under it would, but for the terms of the settlement, have been repaid to the purchasers and in turn paid over by them to the company. The figures having been agreed, the commissioners reduced the assessment to £18,750. The company required the commissioners to state a case for the opinion of the High Court under the Income Tax Act, 1918, s. 149. The case was heard by LAWRENCE, J., and his decision is reported in [1936] 2 All E.R. 452. He allowed the company's appeal, holding that the company was not liable to be assessed to tax on assets so realised. The respondent collector appealed.

The Solicitor-General (Sir Terence J. O'Connor, K.C.) and Reginald P. Hills for the appellant.

Raymond Needham, K.C., and J. S. Scrimgeour for the respondents.

The Solicitor-General: If a liquidator performs an action which comes within the trade of the company, he is *prima facie* continuing the trade of the company and, notwithstanding the fact that he is winding up the business, the receipts are trading receipts. The finding that the business is dealing with patent rights and inventions is a finding of fact. Admittedly the company was dealing in assets, but so is a company which acquires a concession and tries to dispose of it. The substantial business of the company was to dispose of its assets. It is not material that the business of the company was to deal only with one particular asset. The mere intervention of the liquidator does not affect the transaction for the purposes of income tax. Patents as disposable assets were considered in *Ducker v. Rees Roturbo Development Syndicate* (3), where ROWLATT, J., made a classic exposition of the law at p. 378. That company's business was to sell royalties and in one

isolated instance it sold a patent right; yet the court held that the profits of the sale were liable to taxation.

SLESSER, L.J. : By the Companies Act, 1929, s. 191, the liquidator has power to carry on the business of the company so far as may be necessary to the beneficial winding up thereof. In *Re Wreck Recovery and Salvage Co. (1)*, the MASTER OF THE ROLLS said :

I find it difficult here to see that there is any evidence that the realisation of this asset was done for the beneficial winding up of the company. *Prima facie* it would appear to be merely the performance of the liquidator's duty without carrying on the business of the company merely to bring the company to an end. The mere fact that there is a power, possibly, to do something in law does not quite satisfy me. Is there any evidence that this was done for a mercantile reason, for the beneficial winding up of the company? If that is wrong, it seems to me that the intentions of the parties and the particular device they practise does not decide the matter.

The Solicitor-General : In *Inland Revenue v. Oban Distillery Co. Liquidator (4)*, a distillery company in liquidation held certain stocks in bond and was only entitled to receive payment for the storage rents of those stocks at certain dates which had not yet fallen due. The liquidator proceeded to collect some of these rents which were not due. It was argued that these payments were not the result of trading, but the court held that they were. LORD SANDS stated in his judgment that it is necessary to ask what the transaction would have been if the company had carried it through.

GREENE, L.J. : In that case a transaction with a third party began before the winding up and continued after it. A sum of money was paid equal to an apportioned part of the rent. LORD SANDS only said that that sum was referable to the period before winding up, for storage of goods, which was the company's business, as a receipt of the company.

The Solicitor-General : He is saying more than that :

This case would not have any different aspect if the Oban Distillery Company, without going into liquidation, had transferred its business, so far as the premises are concerned, to another company.

The transaction was a trading transaction, and the liquidator played a part in it.

GREENE, L.J. : The company was not a party to this contract.

The Solicitor-General : The matter is not concluded by saying, as the learned judge has said, that the liquidator had disposed of the assets promptly. The commissioners had a right to take into account the fact that there was no evidence that the company had done any business, and hence evidence on which they could find that the company's business was to sell patents: *Inland Revenue Commissioners v.*

Burrell (2). It was here open to the commissioners to say that the liquidator was carrying on the business of the company with a view to the beneficial realisation of the assets in the course of which he did exactly what the company would have done if it had not been in voluntary liquidation. It was formed with the power to do this very thing : to sell the patent rights.

Hills, following for the appellant : In the *Rees Roturbo* case (3), which followed *Collins v. Firth-Brearley Stainless Steel Syndicate, Ltd.* (5), there was a well established business : the company controlled a particular invention and did not wish to sell the patent rights but merely to grant licences and collect royalties. Nevertheless the court held that it was open to the commissioners to say whether part of the business of the company was to deal in patent rights, although a patent right was transferred in one instance only. If a company's business is to deal in a certain class of articles, it cannot escape tax by negotiating to sell a particular valuable article and then going into liquidation and leaving the liquidator to carry out the arrangement. The incidence of liquidation does not prevent a judge of fact from finding that the liquidator is carrying on the company's trade. There is no *cessio bonorum* : the company continues to exist and has a title to its property ; all the liquidator does is to supplant the directors. This is therefore a sale by the company. This case is very different from that of an executor dealing with the assets of a deceased person, who has ceased to exist altogether.

ROMER, L.J. : This argument would not hold good if this were a compulsory winding up, where by the Companies Act, 1929, s. 191, the liquidator may with the sanction of the court or of the committee of inspection carry on the business of the company so far as may be necessary for a beneficial winding up. If this winding up had been compulsory, the liquidator would not have had to ask the court's leave to carry out this sale.

Hills : The transaction was in the ordinary course trading, and there is no principle of law by which it ceases to be trading because it is carried out by a liquidator. In *Re Old Bushmills Distillery Co., Ex p. Brett* () and *Hillerns & Fowler v. Murray* (7) the question of whether an act of the liquidator was trading was rightly treated as one of fact.

Nedham, K.C., was not called upon.

SLESSER, L.J. : The question which arises in this case is whether a certain sum of money received by the liquidator of the respondent company was money received in the course of trading, in the nature of a trading receipt, and so attractive of tax, or whether, on the other hand, it is merely the proceeds of the realisation of assets in the liquidation.

There is some question in the case whether the sum so to be regarded is to be taken to be the actual sum in money received of £6,500, or whether there should be added to that sum a sum of £13,500 which had previously been paid and has been treated as under the agreement for sale of the shares of the respondent company, and should in all amount to £20,000. As in my view the learned judge was right in his conclusion that there was no evidence in this case which justified the commissioners in coming to the conclusion that these amounts, either the smaller or the larger, were amounts received by the liquidator in the nature of trading receipts, I do not find it necessary to consider whether, had the conclusion been the contrary, the sum to be regarded would have been £6,500 actually received, or the larger notional sum of £20,000.

The facts of the case, so far as they are material here, may be, I think, shortly stated. They have been stated concisely by the learned judge, but, in order to give my own reasons why I agree with his conclusions, I find it necessary to restate some of them. The respondent company was formed on July 20, 1933, with a capital of £2,500. It was formed, as is stated in the memorandum and articles of association, cl. 3 :

To acquire and purchase all or any of the foreign letters patent . . . and rights relating to the inventions of Walter Gordon Wilson for improved epicyclic gears—

and other improvements connected with gears. There are stated in cl. 3 to be among the objects of the company :

(c) To use, exercise, develop, grant licences in respect of or otherwise turn to account all or any of such inventions or letters patent, applications and rights.

(m) To sell, let or otherwise dispose of the whole or any part of the undertaking, business and property of the company, either altogether or in portions, for such consideration as the company may think fit, and in particular for shares.

Now, that company being so constituted, on July 21, 1933, the company entered into an agreement with another company called Improved Gears, Ltd., and Mr. Walter Gordon Wilson, who had been the inventor of the gears to which the letters patent and the rights referred. Improved Gears, Ltd., had itself, by an earlier agreement of Dec. 3, 1928, agreed with Mr. Wilson, the inventor, for the acquisition of the British, colonial and foreign patents and rights for the sum of £5,000, to be satisfied by the allotment of 5,000 shares of the company of £1 each ; so that of that general right which Improved Gears, Ltd., thereby acquired, only a portion, namely, the foreign rights, were transferred by the agreement of July 21, 1933, from Improved Gears, Ltd., to Wilson Box (Foreign Rights), Ltd. In accordance with that agreement the respondent company, for the sum, as I have said, of £2,500, purchased the foreign rights and remained, at all material times from then onwards until the liquidation, in possession of those rights. But a number

of other agreements were entered into by certain shareholders of the Wilson Box (Foreign Rights), Ltd., whereby their holdings in the capital of the respondent company were sold to two gentlemen, a Mr. Leigh and a Major Lago. That agreement between the various shareholders, including the Armstrong-Siddeley Motors, Ltd., as vendors, and a number of gentlemen of the name of Wilson, and Leigh and Lago was entered into in Sept., 1933, and it is sufficient to say that the respondent company was no party to that agreement at all. It was there provided that Leigh and Lago should purchase the holdings of these shareholders and, in accordance with that agreement, a certain sum was paid, £2,500 by way of deposit and further sums amounting in all to £11,000, making up the £13,500 to which I have already referred. These gentlemen refused to complete their agreement. Had they completed their agreement, the total sum of money which they would have been called upon to pay would have amounted in all to the sum of £50,000 ; but an action was commenced by the vendors for specific performance and, in the alternative, for rescission and forfeiture of the deposit, and while this action was pending the matter was settled in accordance with the terms of a letter dated Nov. 2, 1934, which is a letter of compromise in which again, as I point out, the respondent company, as such, were not directly concerned ; a letter of compromise between the shareholders on the one part, as vendors, and Mr. Leigh and Major Lago on the other, as purchasers. That compromise involved certain matters : first, that the agreement for the sale of the shares should be cancelled ; secondly, that a special resolution should be passed putting the Wilson Box (Foreign Rights), Ltd. (that is the respondent company) into liquidation by means of a members' voluntary winding up and providing that the resolution would authorise the liquidator to sell to Leigh and Lago the Belgian, French and Italian rights owned by the company for the sum of £20,000, the £13,500 in hand to be treated as part of the purchase money, and that he would be authorised to distribute the purchase money of £20,000 among the shareholders ; the remaining patent rights owned by the company (that would be the foreign rights, other than the rights which had been the subject of these agreements, in other foreign lands) to be transferred to the Self-Changing Gear Trading Company, Ltd., for such consideration in shares as might be agreed upon by the shareholders. That was on Nov. 2, 1934. On Dec. 8, 1934, an extraordinary general meeting of the respondent company was held and a resolution was duly passed that the company be wound up voluntarily and that the liquidator, Andrew Gordon Wilson, who was appointed liquidator of the company for the purpose of such winding up, be authorised to sell to Leigh and Lago :

or as they may direct, the Belgian, French and Italian patents and rights owned by the company, for the sum of £20,000, such purchase money to be distributed

amongst the shareholders according to their respective shareholdings and to be treated as a part distribution of the assets in the liquidation of the company.

As I have already said, it is in respect of that £20,000 for which the liquidator was authorised to sell the rights to Leigh and Lago that it is said that it is a trading receipt which attracts tax. In my view, there is no reason to assume on the evidence which was before the commissioners that that sum was anything more than a sum realised in the ordinary duties of the liquidator in winding up the company. The powers of a liquidator in the winding up of a company voluntarily wound up are stated in the Companies Act, 1929, s. 248 (1) :

The liquidator may . . . (b) without sanction, exercise any of the other powers by this Act given to the liquidator in a winding up by the court.

Apart, therefore, from the question of sanction, no other particular matter here concerned being mentioned in sect. 248, we turn to sect. 191 (1), where it is provided that :

the liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection . . . (b) to carry on the business of the company, so far as may be necessary for the beneficial winding up thereof.

It is also perhaps important to notice that by sect. 228 :

In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof.

The expression "beneficial winding up" has been considered in relation to the language in sect. 191, "so far as may be necessary for the beneficial winding up thereof," among other cases, in the case of *Re Wreck Recovery & Salvage Co.* (1). It is only necessary for this purpose to cite a passage from THESIGER, L.J., at p. 362, where he speaks of the necessity mentioned in sect. 191 (then the Companies Act, 1862, s. 95) not

as importing an absolutely compelling force, but what may be called a mercantile necessity, something which would be highly expedient under all the circumstances of the case for the beneficial winding up of the company.

I ask myself in the present case : What reason is there to suppose that the winding up in this case was done for any other purpose than the normal carrying out of the duties of the liquidator which are stated by ATKIN, L.J., in *Inland Revenue Comrs. v. Burrell* (2), at p. 42 :

The liquidator's duty is to realise it, to pay off the liabilities and distribute the remaining assets amongst the shareholders subject to the rights given under the articles.

In my view, there is no reason here to suppose that there is any evidence pointing to a different view but that the liquidator, in taking this £20,000 or £6,500, was doing anything other than his mere duty as liquidator of the company. In the first place, it is to be observed that at no time after this respondent company on July 21, 1933, purchased these foreign rights, did they in fact ever sell or part with any foreign rights before the time of the actual liquidation, and it is a confusion, I think, to have regard to the transactions entered into by the shareholders for the purchase of shares as in any way interfering with that view. There is no evidence that at any time, had the company continued, they would have sold these foreign rights. There is, in my view, no evidence at all here, except the reliance placed upon the transactions of the shareholders in selling their holdings in the company, and one other matter to which I shall refer, which seems to me irrelevant to any conclusion in favour of the Crown. It appears that in 1932 the Improved Gears, Ltd., contemplated selling its foreign patents rights to Lago and Leigh for the sum of £50,000, but (I quote from the case) :

as it was feared that a direct sale might attract a claim for income tax it was decided to form another company to acquire these rights for a nominal sum and that Mr. Wilson and Sir John Siddeley as shareholders of the new company should sell their shares to the purchasers for £50,000.

It does not seem to me to be relevant to consider, in dealing with the behaviour of this company, what may have been the motive of the Improved Gears, Ltd., or what arrangement Messrs. Lago and Leigh may have made with the shareholders in the respondent company, Wilson and Siddeley. In so far as the arrangement shows anything, it points out quite clearly that there was, in the formation of this new company, no proposal that it should deal in these patent rights at any particular time, but only, as I have said, that the shares of Wilson and Siddeley should be sold to the purchasers for £50,000.

The only other matter that remains is in the memorandum itself, which, it is true, does contain power "to use, exercise, develop, grant licences," and also power "to sell, let or otherwise dispose of the whole or any part of the undertaking." That is, I should think, almost common form, or, at any rate, very usual, that a company may take power in its memorandum to deal with or to dispose of all or part of its assets. The mere fact that the power is there in the memorandum contained does not seem to me to afford any evidence that, in fact, in this particular matter they were dealing under that memorandum. In my view, what was done here was what the resolution appointing the liquidator clearly ordered to be done, namely, that the liquidator should realise the assets of the company. He was appointed and authorised to sell for the sum of £20,000. He did so, I think, under his powers given to him by reason

of the resolution in the voluntary winding up, and there is no evidence that he acted or purported to act in any other capacity.

For these reasons I am of opinion that the learned judge was right and that this appeal fails.

ROMER, L.J. : I have come to the same conclusion. It was stated by LAWRENCE, J., in the course of his judgment :

It is perfectly true that if the sale of these patent rights had been effected by the appellant company without the appellant company going into liquidation, such a sale might, and probably would, have attracted income tax because of the objects and powers of the appellant company.

I will only say, as regards that, that I am by no means satisfied at the present time that the learned judge's view was right. The mere fact that a company has power to sell a particular asset, or all its assets, does not in the least imply that it is part of the business of the company to sell that particular asset or its assets. Most people of sound mind and understanding have power to dispose of their property. It does not follow from that that they carry on the business of buying and re-selling property such as that which they possess. Indeed, looking at the memorandum of association of Wilson Box (Foreign Rights), Ltd., I think if Wilson Box (Foreign Rights), Ltd., as a going concern had sold these foreign rights which it had acquired, that any shareholder in that company might well have come to the court and asked for a winding up order on the ground that the substratum of the company had gone. He obviously could not put such a contention as that before the court if the company which he had joined was formed for the purpose of carrying on the business of buying and re-selling these foreign rights. However, I desire to express no concluded opinion upon that point, and I am willing to assume for the purpose of my judgment that part of the business of this company was the buying and re-selling at a profit of these foreign rights of Mr. Wilson. Even so, I am unable to see that there was any evidence at all upon which the commissioners could arrive at the conclusion that, in effecting the sale which he did, the liquidator was carrying on the business of the company.

One knows that in the case of a voluntary winding up the company is by statute compelled to cease to carry on its business except so far as may be required for the beneficial winding up thereof. That is the effect of the Companies Act, 1929, s. 228. In accordance with that section one finds that the liquidator is given power to carry on the business of the company to that limited extent. In the present case, at the time that the company went into liquidation, it was not actually carrying on any business whatsoever ; there is no evidence that it was, and I will assume that it was not ; at any rate, it certainly was not

carrying on the business of buying and re-selling at a profit any patent rights at all; so that there was no business of the company which it was necessary to carry on for the purpose of the beneficial winding up thereof. It seems to me, with the greatest respect to the argument that has been addressed to us to the contrary, that it really is fantastic to suggest that the liquidator in this case carried out this sale of part of the only remaining asset of the company with a view to carrying on a business which the company never carried on for the more beneficial winding up of that business. The business not having been carried on, it required no winding up at all.

For these reasons, I agree that this appeal fails.

GREENE, L.J.: I agree, and I will only add a few words. The finding of the commissioners upon which reliance is placed is:

that the trade of the appellant company included dealing in patent rights and inventions and that the proceeds of sale of the rights in question were trading receipts received by the liquidator in the course of trading.

It appears to me reasonably clear that the second half of that finding is dependent upon the first half. However that may be, in my opinion there is no evidence to support the first half of the finding, if it means more than that the appellant company had power to deal in patent rights and inventions. It is not necessary to decide one way or the other on the true construction of the memorandum that they had such a power; but assuming that they had, there is nothing, in my judgment, which justifies this finding beyond that limited extent. I say that for this reason: the appellant company's history was very short and very simple; it had been formed to acquire certain patents; it acquired those patents, and it paid for them; after it had acquired those patents and paid for them, so far as appears from the facts stated in the case, it did nothing else whatever until it was put into liquidation; it never carried on any trade, any dealing in patents, beyond the original acquisition, and it is quite impossible to draw any inference from the facts stated as to what the company would or would not have done if it had not gone into liquidation. What it certainly never did was to trade in patents in the sense of selling them, or attempting to sell them, or anything of that kind. The confusion, I venture to think, which has arisen in this case has arisen, if I may respectfully say so, from a failure to observe that the relevant transactions which led up to the liquidation of this company and the sale of these patents, were transactions in relation not to the patents, but to the shares of the company which held the patents. The distinction is a vital one and must not be lost sight of. The original scheme was one under which the shares in the new company were to be acquired by Mr. Leigh and Major Lago. We have no know-

ledge as to what they would have done if that arrangement had been carried out. They might have carried on the company and kept the company alive as a patent-owning company earning its profits from the granting of licences ; nobody can tell. What in fact happened was, the sale of the shares having been shipwrecked before it was completed and the vendors and purchasers being in controversy and in litigation about it, they decided that the best way out of the *impasse* was to put an end to the litigation and to put an end to the company in the process. The complication was this : the dispute being between the vendors and the purchasers of the shares, if they had settled the dispute on terms that the original purchase should be concluded, possibly at a reduced price, the purchasers would then have got something which at that stage they apparently were not willing to acquire, because the only thing that they were interested in at this time, apparently, was the Belgian, French and Italian patents. Accordingly, if as part of the compromise a severance was to be made between the Belgian, French and Italian patents on the one hand and the remaining patents on the other, the only effective way in which it could be done was, I think, the way which was in fact adopted. However that may be (and it is not perhaps very relevant for this purpose) the only act of the company in relation to the sale of its assets was done after it was put into liquidation and was done by the liquidator.

The facts that the liquidation took place and that the liquidator acted in a particular way because those interested in the shares of the company had agreed that the liquidation should take place and that the assets should be sold, appear to me to be no evidence whatever to justify the finding of the commissioners. Most companies have in their memorandum a power to sell their assets, and it is a very common thing indeed for companies, when they are reconstructed and sell their assets in whole or in part, to have an arrangement or an agreement between the shareholders beforehand, deciding what is to be done, agreeing that certain resolutions shall be passed putting the company into liquidation and agreeing that the assets of the company in the liquidation shall be disposed of by the liquidator in a particular way. To accept the proposition which has been put before us would really come to this : that whenever a company acted in that way, the act of the liquidator in selling the assets would be an act of the company trading, instead of an act of realisation. In truth and in fact, in my opinion there is not a particle of evidence in this case to justify the finding either that the trade of the appellant company included dealing in patent rights and inventions in any sense of that expression which is relevant for present purposes, or that the proceeds of sale were trading receipts received by the liquidator in the course of trade ; in my opinion they were nothing more nor less than receipts by the liquidator on realisation by him

in the ordinary course of his duty as liquidator to realise and get in the assets of the company.

Appeal dismissed with costs.

Solicitors : *Solicitor to the Inland Revenue* (for the appellant) ; *Johnson, Weatherall, Sturt & Hardy* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Re DEPENDABLE UPHOLSTERY, LTD.

[CHANCERY DIVISION (Crossman, J.), November 23, 24, 1936.]

Companies—Winding up—Misfeasance summons—Allegation that dividends paid out of capital—Particulars of allegation—R.S.C., Ord. 19, rr. 4, 6.

In a misfeasance summons by the liquidator of a company against two directors it was alleged in the points of claim that certain dividends were paid wholly out of the capital of the company and not out of profits, and that there were in fact no profits of the company out of which the dividends could properly and lawfully have been paid. The directors asked for an order for further and better particulars of the facts relied upon in support of these allegations, contending that under R.S.C., Ord. 19, r. 6, the fullest particulars are necessary where a breach of trust is alleged:—

HELD: the fact that the dividends were paid wholly out of capital was a material fact within R.S.C., Ord. 19, r. 4, and the fact upon which the liquidator relied. The liquidator ought not to be ordered to give particulars of that fact, as to give any further particulars would be merely to disclose the evidence by which it was intended to be proved.

[EDITORIAL NOTE.] Particulars are restricted so that a party is not called upon to disclose his evidence, though he must particularise his claim so that his opponent can know the case he has to meet. The application of this principle to particular cases is always difficult, and its application here to the case of an allegation of a distribution of dividends out of capital will be of general interest.

AS TO PARTICULARS, see HALSBURY, 1st Edn., Vol. 23, pp. 454-458, para. 928; and FOR CASES, see DIGEST, Pleading, pp. 184-205, Nos. 1561-1710. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 302-312.]

Cases referred to:

- (1) *Williams v. Wilcox* (1838), 8 Ad. & El. 314; Digest, Pleading, 6, 1.
- (2) *Philipps v. Philipps* (1878), 4 Q.B.D. 127; Digest, Pleading, 15, 111.

MOTION to discharge an order of MR. REGISTRAR STIEBEL for particulars.

In the points of claim in a misfeasance summons by the Official Receiver and liquidator of Dependable Upholstery, Ltd., against two directors of the company, it was stated that:

6. By the articles of association of the company it was, *inter alia*, provided that no dividend should be payable except out of the profits of the company . . .

7. On or about July 1, 1930, the directors of the company (including the respondents) paid or caused to be paid out of the moneys of the company the sum of £2,069 18s. 8d. by way of dividend . . . and on or about Jan. 1, 1931, the said directors paid or caused to be paid out of the moneys of the company a further like sum of £2,069 18s. 8d. by way of dividend.

8. Each of the said dividends was in fact paid wholly out of the capital of the company and not out of profits and there were in fact no profits of the company out of which either of the said dividends could properly or lawfully have been paid.

The liquidator claimed a declaration that the two dividends were paid out of the capital of the company and that the payment thereof was *ultra vires* the company and that each of the respondents was guilty of misfeasance, breach of trust and breach of duty to the company, and

of misapplication of its moneys. The respondent obtained an order for further and better particulars of (i) the facts relied on in support of the allegation that the two dividends were respectively paid out of capital, and (ii) the issued and paid-up capital of the company on July 1, 1930, and Jan. 1, 1931, respectively. The liquidator appealed against this order.

H. A. H. Christie, K.C., and *J. G. Strangman* for the applicant.

Fergus Morton, K.C., and *J. B. Lindon* for the respondents.

Christie, K.C. : If the applicant answered the particulars ordered, all he could say is that there were no profits out of which a dividend could have been paid. The applicant's pleading must contain the material facts, but not the evidence by which they are going to be proved. It has already been alleged that the respondents have done a particular thing in particular circumstances. [Counsel referred to *Williams v. Willcox* (1) and *Philipps v. Philipps* (2)]

Strangman following on the same side : The order means that the applicant must prepare the whole of his evidence now and when the case comes on for trial it may prove to have been entirely unnecessary.

Morton, K.C. : This is a case making a charge of misconduct and breach of trust. R.S.C., Ord. 19, r. 6, provides that in all cases in which the party pleading relies on any breach of trust, particulars shall be stated in the pleadings. The applicant must state those facts which will put the respondents on their guard and state his charges with as much definiteness as is reasonably possible : see per COTTON, L.J., in *Philipps v. Philipps* (2), at p. 139. The material question in this action is : Did the respondents on two separate dates pay dividends out of capital ? In other words : Were the assets of the company equal in value to the liabilities plus the paid-up capital ? If they were the respondents did not pay the dividends out of capital. The liquidator must know and he should be required to say what he relies on. The respondents do not know what it is they have to meet. The liquidator ought to have his material ready before he makes these allegations. The respondents are not asking for subordinate facts.

Christie, K.C., in reply.

CROSSMAN, J. : This is a motion by the Official Receiver and liquidator of Dependable Upholstery, Ltd. :

that the order made in the above-mentioned matters [that is to say, in the matter of Dependable Upholstery, Ltd., and in the matter of the Companies Act, 1929] by Mr. Registrar Stiebel on Tuesday, Nov. 3, 1936, may be discharged, and that the summons issued on behalf of the respondents dated Oct. 26, 1936, may be dismissed with costs.

The proceeding here is what is commonly called a misfeasance summons, which has been taken out by the official receiver and liquidator in the

winding up of the company against two of the directors of that company. In that proceeding a common summons was taken out on Oct. 26, 1936, asking :

for an order that the official receiver and liquidator within 4 days deliver further and better particulars of the points of claim herein as follows.

Therefore, I must look at the points of claim which were delivered, presumably under the registrar's order for directions, in the proceedings. The points of claim are as follows :

(1) The applicant is the official receiver and liquidator of the above-named company, Dependable Upholstery, Ltd. (hereinafter called "the company"), which was on Nov. 20, 1933 [I observe the date] ordered to be wound up compulsorily. (2) The respondents are John James Middleton and Isaac Breckman, both of whom were at all material times directors of the company. (3) The company was on Dec. 6, 1928, incorporated as a company limited by shares under the Companies Acts, 1908 to 1917. (4) At all material times the capital of the company was £125,000 divided into 280,000 preference shares of 5s. each and 1,100,000 ordinary shares of 1s. each and 220,793 of the said preference shares were issued and were or were credited as fully paid-up. (5) The said preference shares conferred on the holders thereof the right, *inter alia*, to a fixed cumulative preferential dividend at the rate of $7\frac{1}{2}$ per cent. per annum. (6) By the articles of association of the company it was, *inter alia*, provided that no dividend should be payable except out of the profits of the company, and that the directors of the company might from time to time pay any fixed dividend half-yearly or at such other intervals as they might determine without obtaining the prior declaration or sanction thereof of the company in general meeting. (7) On or about July 1, 1930, the directors of the company (including the respondents) paid or caused to be paid out of the moneys of the company the sum of £2,069 18s. 8d. by way of dividend on the said 220,793 preference shares (being a half-year's dividend thereon at the rate of $7\frac{1}{2}$ per cent. per annum) and on or about Jan 1, 1931, the said directors paid or caused to be paid out of the moneys of the company a further like sum of £2,069 18s. 8d. by way of dividend on the same shares (being another half-year's dividend thereon at the rate aforesaid).

Then para. (8), which is the important paragraph, says :

Each of the said dividends was in fact paid wholly out of the capital of the company and not out of profits and there were in fact no profits of the company out of which either of the said dividends could properly or lawfully have been paid.

Then para. (9) states the knowledge or imputed knowledge of the respondents, which is necessary for the purpose of establishing their liability. Then the applicant claims a declaration of their liability and an order on them to pay. That is substantially equivalent to an action for breach of trust against the directors in connection with their trust. In this case it is alleging that, in the management of the company, they have done what is a wrongful act, namely, the payment of dividends out of capital. The important allegation is in para. (8) :

Each of the said dividends was in fact paid wholly out of the capital of the company

and not out of profits and there were in fact no profits of the company out of which either of the said dividends could properly or lawfully have been paid.

The summons, which I was reading, which is a summons taken out in misfeasance proceedings, asks for an order :

that the official receiver and liquidator within 4 days deliver further and better particulars of the points of claim herein as follows : (1) of the facts relied upon in support of the allegation that (i) the dividend paid on or about July 1, 1930, (ii) the dividend paid on or about Jan. 1, 1931, were respectively (a) paid out of capital, (b) not paid out of profits. (2) of the capital referred to, stating of what the same is alleged to have consisted on such respective dates.

Then there is the usual order deferring the date of the affidavit of documents. On that summons the registrar made the following order, omitting the formal parts. I did not mention that points of defence had been delivered. They are referred to in the order. I do not think they are material for me to consider, except that they put in issue the fact stated in paras. 7, 8 and 9 of the points of claim, except as regards certain small details of the dates of the payments of the dividends. The order of the registrar was :

It is ordered that the said official receiver and liquidator do within 14 days from the date hereof deliver to the said John James Middleton and Isaac Breckman further and better particulars of the said points of claim as follows : (1) Of the facts relied upon in support of the allegation that (i) the dividend paid on or about July 1, 1930, (ii) the dividend paid on or about Jan. 1, 1931, were respectively paid out of capital—

that follows pt. 4 of the summons under para. 1 :

(2) Of the (a) issued and (b) paid-up share capital of the company on July 1, 1930, and Jan. 1, 1931, respectively.

That does not seem to follow what is asked for in the summons, because I think, reading the summons as a whole, the "capital" referred to in para. 2 must mean the capital out of which the dividend was alleged to have been paid. Here the capital referred to is issued and paid-up capital, which is not by any means the same thing. At the present moment I do not see on what ground an order was made for particulars under para. 2 : "Of the (a) issued and (b) paid-up share capital of the company on July 1, 1930, and Jan. 1, 1931, respectively." But that is a comparatively unimportant matter. The important question is whether the respondents to the summons, the directors, are entitled to the particulars given to them by para. 1 of the order : "of the facts relied upon in support of the" two allegations that the two dividends were paid out of capital. The words "not out of profits" for some reason or other were not inserted in the order. I have been referred to

R.S.C., Ord. 19, r. 4, which is the material rule, I think, which deals with this. That rule says :

Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

Then R.S.C., Ord. 19, r. 5, provides for the form of pleading. Rule 6 is :

In all cases in which the party pleading relies upon any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

I think that this case would come within the words "Where the party pleading relies on breach of trust." It seems to me that that rule means that where such particulars as are required to be stated in the pleading are not stated in the pleading, an order should be made that those further particulars shall be given. One is thrown back on rule 4 to see what in fact is required by "in the pleading." There I find :

Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence.

In the present case the material fact on which the applicant, the official receiver, relies, is the alleged fact that each of the two dividends was in fact paid wholly out of the capital of the company. But it is suggested by Mr. Morton on behalf of the respondents, the directors, that you have to go behind that allegation and find out the allegations or facts upon which that statement is based. It seems to me if one begins there, I do not know where one would end in the particulars which would have to be ordered; because the fact that each of the dividends was paid wholly out of the capital of the company is the fact on which each party relies in the claim or defence. The facts which lead up to that are, in my view, really the evidence of the fact that the dividends were in fact paid wholly out of the capital of the company. It seems to me, as the first piece of evidence of that, that the court might be asked again to order something which leads up to that piece of evidence, and so on *ad infinitum*. But the main point, to my mind, which I feel compels me to come to the conclusion that this order ought not to have been made, is that the payment of these dividends wholly out of the capital of the company is a fact, and the fact upon which the parties pleading rely for claim or defence. I do not think in these circumstances I ought to make an order, in the general terms made by this order, that the liquidator shall give particulars of the facts relied on in support of the allegation, that is to say, facts relied upon in support of the material fact. The facts relied upon in support of that can, to my mind, only mean the evidence which leads one to the conclusion

that that is the fact. In these circumstances, I think that the order of the registrar ought not to stand in its present form. What the Official Receiver asks for, I think, is that the order should be discharged. As regards para. 2, in any event I do not think I ought to leave that standing ; so it seems to me that the order I ought to make now is an order that that order of the registrar be discharged, and nothing more. I think that is all that is necessary.

Solicitors : *Allen & Overy* (for the official receiver and liquidator) ;
Judge, Hackman & Judge (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

HARRISON (INSPECTOR OF TAXES) v. JOHN CRONK & SONS, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **October 16, November 27, 1936.**]

Income Tax—Profits from trade—Builder—Sale of house—Mortgage to building society by purchaser—Guarantee of repayment by builder—Deposit with building society of part of sum guaranteed.

The respondents, who were engaged in the development of building estates, erected small dwelling-houses which they sold at prices ranging between £525 and £625. The purchasers were able to pay only a very small sum down, varying between £20 and £30, and the balance of the price was obtained by each purchaser from a building society, and secured by a mortgage on the house. As the building society did not usually make an advance in excess of three-fourths of the value of the mortgaged property, and, as the amount advanced was thus insufficient to enable the purchasers to pay the balance of the purchase-price, the respondents in effect guaranteed to the building society the difference between the full sum advanced and the sum amounting to three-fourths of the value of the house which would have been advanced in the ordinary course. In addition, the respondents were required to deposit with the building society an amount which was usually one-third of the sum guaranteed, upon which the building society allowed the respondents interest at the current rate payable by the society on ordinary deposits. As soon as the purchaser's periodical payments to the building society had reduced the loan to a sum at which the house itself was regarded as sufficient security for the loan, the liability under the guarantee ceased, and the deposit was returned to the respondents; but, in the event of the default of the mortgagor, the society had the right to apply the amount of the deposit towards reduction of the loan in each case. The respondents were assessed to income tax on the basis that the full nominal purchase price stated in the conveyance should in each case be brought in by the respondents as a receipt of trading profit at the time of the completion of the sale. The respondents contended that, for the purpose of computing their trading profits, the sums deposited by them with the building society ought not to be included as trading receipts until they received or became entitled to receive such deposited sums:—

HELD: the sums deposited with the building society ought to be brought in as trading receipts, not at their face value, but on a proper actuarial valuation as at the time of the completion of the sale. In the event of the commissioners finding such valuation to be impracticable, the sums deposited with the building society should not be treated as trading receipts except in so far as such sums, or any part thereof, were released to the respondents during the trading periods in question.

Per LORD THANKERTON: Although the acknowledgment of receipt of the whole price in the conveyance is conclusive in favour of a purchaser for value without notice, it does not prevent consideration of the true facts in a case like the present one.

[EDITORIAL NOTE. The arrangement here made between the builder and the building society to facilitate the sale of houses is quite a common one, and the incidence of income tax under such an arrangement is of some importance. It will be noted that the judgment of the House is rather restricted by the fact that the respondent did not cross-appeal. It seems that their Lordships were inclined to the view that the deposits were not trading receipts until such time as the building

society released them to the builder, but, in the absence of a cross-appeal, they were bound to confirm the decision of the Court of Appeal.

FOR TRADING PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, p. 117-120, paras. 221-225, and FOR CASES, see DIGEST, Vol. 28, pp. 17-21, Nos. 87-107.]

APPEAL from an order of the Court of Appeal allowing an appeal by the respondents from an order of FINLAY, J., whereby an appeal by the respondents upon a case stated by the commissioners for the special purposes of the Income Tax Acts was dismissed and the decision of the said commissioners was affirmed. The facts and the arguments are set out in the judgment of LORD THANKERTON.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellant.

A. M. Latter, K.C., and F. Heyworth Talbot for the respondents.

LORD THANKERTON (read by LORD ROCHE): My Lords, the question to be determined in this appeal arises in connection with the ascertainment of the balance of the profits and gains of the trade carried on by the respondents, assessable under the Income Tax Act, 1918, Sched. D, Case I. The assessments here in dispute were for the years ending Apr. 5, 1932, and Apr. 5, 1933.

The respondents carry on business as speculative builders; they purchase areas of suitable land, make the roads and sewers, and erect small dwelling-houses, which they sell for about £500 or £600 to persons of small means, who are not usually able to provide from their own resources more than a very small part of the purchase price. The rest of the purchase money is advanced to the purchaser on mortgage by a building society under certain arrangements which give rise to the present question, and which are described in the case stated as follows:

A building society will not in the ordinary way make an advance in excess of 75 per cent. of the value of the property mortgaged, and this was insufficient to enable the purchasers to pay the balance of the purchase money. In order that the advance by the building society to a purchaser might be for the full amount of the balance of the purchase money, an arrangement was entered into by the company with the society, under which the company guaranteed to the society a proportion of the amount advanced. In addition to giving the guarantee, the company was required to make a deposit with the society of the whole or a part of the sum guaranteed, and on the amount of this deposit the society allowed the company interest at the current rate payable by the society on ordinary deposits. The amount deposited with the society was usually one-third of the amount guaranteed. For example, on a house which was sold for £625, the purchaser provided from his own pocket a sum of £35. The society advanced £590 to the purchaser and the company gave a guarantee for £95, as security for which it deposited the sum of £31 13s. 4d. with the society. The actual procedure on the completion of the sale was as follows: the representatives of the building society attended at the office of the company's solicitors and handed to the solicitors a cheque or banker's draft for the net sum of £558 6s. 8d. as representing the difference between £590, the amount advanced to the purchaser, and £31 13s. 4d., the

amount of the company's deposit with the building society. The solicitors thereupon paid over the cheque or draft for the net sum to the company. All the arrangements with the society were made through the company's solicitors.

In each case the company and the society entered into an agreement providing for the guarantee by the company of repayment by the purchaser of the advance by the society to him, the amount of the guarantee being limited, and further providing for a deposit by the company with the society of an amount equal to the whole, or, as was usual, only a part of the amount guaranteed. Two specimen agreements are annexed to the case. It appears that the amount advanced to the purchaser on mortgage was usually repayable with interest in 20 years by equal monthly instalments. The title of the purchaser was completed by a deed of transfer by the company to him, in which the company acknowledged receipt of the whole purchase price. The case further states :

In the company's trade account a deduction was made from the receipts from the sale of houses of the net amount deposited with the society during the year under the guarantees, i.e., the sums deposited under the guarantees given during the year less any sums received back during the year on the release of guarantees. The interest received from the society on the deposits is shown as a receipt in the profit and loss account, but the deposits are not shown as an asset in the company's balance sheet.

The Crown maintains that the full amount of the purchase money of the houses should be brought in as a trading receipt at the time of purchase, and that any subsequent losses under the guarantees should be allowed at the time when they occur. The respondents maintained before the special commissioners and in the courts below : (i) that the sums deposited by the company with the building society ought not to be treated as receipts of the company's trade at the time of purchase, but only when and in so far as such sums should subsequently be released to the company by the society ; or (ii) alternatively, that if the deposited sums are to be treated as receipts at the time of sale, they should be brought into account at figures not exceeding their actual " present values " as assets of the company's trade. These were the main contentions of the respondents. The special commissioners dismissed the respondents' appeal, their decision being as follows :

We held that the purchase price of each house was fully paid in cash at the time of each completed sale with a contingent liability on the company in respect of its guarantee to the building society. The whole of the purchase money should therefore be brought in as a receipt of the company's trade at the time of completion of the sale, and any loss under the contingent guarantee should be allowed at the time when the loss arose. If we were wrong in this view and a question of valuation arises, this was not, in our opinion, after hearing the evidence, a case in which an actuarial valuation was possible, there being too many factors which are not capable of statistical evaluation. Further, we think that the fact that less interest is earned

on the deposits than could be earned if the money were used in the company's business would not affect the valuation.

The appeal by the present respondents to the King's Bench Division, on the case stated by the special commissioners, was dismissed by FINLAY, J., who affirmed the determination of the special commissioners, but both these decisions were reversed by the unanimous decision of the Court of Appeal, which held that the sums deposited with the building society should be brought in as trading receipts at the time of each sale, not at their face value, but on a proper valuation, and the case was remitted to the commissioners for determination of such values and adjustment of the assessments. The Crown now appeals from the order of the Court of Appeal, but the respondents have not appealed, and are therefore not in a position to maintain their first contention above referred to.

My Lords, I take it that in finding that the purchase price of each house "was fully paid in cash at the time of each completed sale," the commissioners meant that the payment of the cheque or banker's draft for the whole amount advanced to the purchaser less the amount of the deposit, was merely the shorthand way of giving a cheque for the whole advance in exchange for a cheque from the company for the amount of the deposit. Taking the example given in the case stated, we are not told when, or by whom, the payment of the £35 provided by the purchaser was made to the company, but it is clear that, as regards the balance of the price, the building society acted as the agent of the purchaser. In my opinion, the whole arrangement was a tripartite one, which should not be separated up. It never was part of the arrangement that the company was to be entitled to payment of the whole price at the time of sale, and that the company was to hand over to the society the amount of the deposit. It is enough to say that the purchaser was never entitled to get the whole amount advanced paid over to him or paid over to the company by the society as the purchaser's agents. It was clearly a condition of the advance to the purchaser by the society that the latter should retain the amount of the deposit. The acknowledgment of receipt of the whole price in the deed of transfer, which is conclusive in favour of a purchaser for value without notice, cannot prevent the true facts being regarded in such a question as the present one.

I am therefore unable to agree with the view of the commissioners and of FINLAY, J., that the whole of the purchase price should be brought into the account as a trading receipt at the time of sale. In my opinion, it would be more correct to treat the retention of the deposit as a retention of part of the nominal purchase price with the consent of the company, such sum to be applicable to reduction of the advance made by the society to the purchaser, in the event of the latter's default, any surplus going eventually to the company. In other words,

in the example referred to, the true purchase price was not £625, but two sums of £35 and £558 6s. 8d., payable at the time of the sale, with a further addition of any balance eventually available from the deposit. On the other hand, I am not prepared to say that the view taken by the Court of Appeal is not a legitimate one, though I should prefer my own view expressed above. The view of the Court of Appeal, as I understand it, is that, at the time of the sale, the company received, in addition to the £35 and the cheque for £558 6s. 8d., an asset in the shape of a credit in the books of the building society, on which interest was payable to the company, but which was subject to a contingent liability, which materially affected its value to the company; that such asset should be valued as at the time of the completion of the sale, and that such value should be entered as part of the price received for the house. It is unnecessary to consider now whether such valuation will be subject to revision or readjustment on its eventual realisation.

I am therefore of opinion that the case of the Crown has not been made out and that the appeal fails, and, in the absence of a cross-appeal, the decision of the Court of Appeal will fall to be affirmed. But I have serious doubt as to whether the valuation ordered by the Court of Appeal is practicable in any proper sense; the commissioners, after hearing evidence, have expressed the view that an actuarial valuation is not possible, and it may well be that no proper valuation is possible. I propose, therefore, that the order of the Court of Appeal should be varied by adding that in the event of the commissioners finding such valuation to be impracticable, the sums deposited with the building society under the circumstances described in the case stated should not be treated as receipts of the company's trade except in so far as such sums, or any part thereof, were released to the company during the trading periods in question.

One other point should be mentioned. Counsel for the Crown drew your Lordships' attention to that part of the order of the Court of Appeal which ordered repayment by the Crown, pending determination of the matter, of the amount of income tax overpaid by the company on the basis that the deposits were of no value to them. The Crown has made the repayment, but counsel suggested that such an order was not within the capacity of the court, in view of the provisions of the Income Tax Act, 1918, s. 149 (4). Counsel for the Crown did not press the point, but I desire to reserve any opinion on it.

I therefore propose that the appeal should be dismissed with costs, and that the order of the Court of Appeal should be affirmed subject to the variation above suggested.

LORD ROCHE: My Lords, I am requested by my noble and learned friends, LORD ATKIN and LORD MACMILLAN, to express their concurrence

in the opinion which I have just read, and with the reasons for arriving at the conclusion which is proposed. For myself, I also desire to express my concurrence in the result and in the reasons.

LORD RUSSELL OF KILLOWEN : My Lords, I also concur.

Appeal dismissed with costs. Order of Court of Appeal varied.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Stooke-Vaughan & Taylor* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

SCOTT AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **October 19, 20, November 27, 1936.**]

Estate duty—Property passing on death—Purchase of contingent life estate—Settlement on discretionary trusts—Life estate falling into possession—Finance Act, 1894 (c. 30), s. 1.

By two settlements dated July, 1889, certain estates were settled to the use of A. for life with remainder to the use of B. for life with remainder to the use of B.'s sons successively in tail male and in default of such issue to the use of C. for life, and after his decease to the use of his sons successively in tail male with remainders over in default of such issue. In 1893, C.'s contingent reversionary life estate was purchased by A., and in 1894 was conveyed by A. to trustees and settled upon trust that, in the events which happened, the trustees should hold the settled property upon discretionary trusts for the benefit of C., his wife and children and accumulate the surplus (if any) and should apply the accumulations towards the payment or satisfaction of any debts or incumbrances for the time being charged upon the premises, and, subject thereto, should hold the said accumulations for the trusts and purposes of one of the said settlements dated 1889. B. died in 1908, and his only son died in 1910, an infant and unmarried. A. died in 1915, and C. died in 1933. On C.'s death, the settled property vested in C.'s eldest son as tenant in tail. Estate duty was claimed upon the death of C. in respect of the property comprised in the settlements on the footing that such settled property passed upon the death of C. within the meaning of the Finance Act, 1894, s. 1 :—

Held : as the settled property as a whole did actually change hands upon the death of C., with the result that C.'s eldest son became entitled to receive the whole income of the estate which immediately before the death of C. was primarily applicable for the benefit of the objects of the discretionary trust, there was a passing of the property within the meaning of the Finance Act, 1894, s. 1, and estate duty therefore became payable upon C.'s death.

[EDITORIAL NOTE.] This is a question of the passing of property on death for the purposes of estate duty. The same person was interested in the property both before and after the death. Before the death he was one of the objects of a dis-

cretionary trust, under which he could receive the whole income. After the death he became tenant in tail in possession of the property. In these circumstances it was held there was a passing of the property on the death. The case of *Burrell v. A.-G.* (reported p. 758. *post*), where the death intervened between two discretionary trusts, should be considered with this case.

AS TO PASSING OF PROPERTY ON DEATH, see HALSBURY, Hailsham Edn., Vol. 13, pp. 233-237, paras. 223-226 ; and FOR CASES, see DIGEST, Vol. 21, pp. 7-10, Nos. 21-42. FOR THE FINANCE ACT, 1894, ss. 1, 2 AND 7, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, pp. 120, 121, 128.]

Cases referred to :

- (1) *A.-G. v. Beech*, [1899] A.C. 53 ; 21 Digest 7, 26.
- (2) *Adamson v. A.-G.*, [1933] A.C. 257 ; Digest Supp.
- (3) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382 ; Digest Supp.

APPEAL from an order of the Court of Appeal (LORD HANWORTH, M.R., ROMER and MAUGHAM, L.JJ.) dismissing an appeal by the appellants from an order of BENNETT, J. The facts are set out in the judgment of LORD RUSSELL OF KILLOWEN.

Fergus Morton, K.C., and *Wilfrid M. Hunt* for the appellants : None of the items in question passed on the death of C. within the meaning of sect. 1 of the Act of 1894, and consequently estate duty is not payable in respect of them. So as to "pass," the property must pass beneficially from some person to some other person, and it is submitted there was no alteration in the beneficial interests of C.'s son on the death of C. In the legal sense, therefore, these items did not pass to C.'s son upon the death of C. [Counsel referred to *A.-G. v. Beech* (1) ; *Adamson v. A.-G.* (2).]

The Attorney-General (Sir Donald Somervell, K.C.), *The Solicitor-General (Sir Terence O'Connor, K.C.)*, and *J. H. Stamp* for the respondents.

LORD RUSSELL OF KILLOWEN : My Lords, the question in dispute in this case is whether estate duty became payable on the death of the sixth Earl Cadogan, in respect of property comprised in two settlements which were executed respectively on July 26 and 27, 1889.

It will, I think, be sufficient if I state the facts relating to the Cadogan freehold estates situate in Chelsea and elsewhere in the county of Middlesex, which were comprised in the settlement of July 26, 1889. Immediately before the execution of that deed, they stood limited (subject to certain charges) to the fifth Earl Cadogan for his life, with remainder to such uses as the fifth Earl and his eldest surviving son Henry Arthur Viscount Chelsea should by any deed or deeds jointly appoint. By the settlement of July 26, 1889, the fifth Earl and his eldest son exercised their joint power of appointment, and appointed that the estates should (but subject to the fifth Earl's life interest and all interests having

priority over their joint power) be and remain from and after the decease of the fifth Earl to the use of Henry Arthur Viscount Chelsea for life, with remainder to the use of his sons successively in tail male, and in default of such issue to the use of Gerald Oakley Cadogan (the fifth Earl's second surviving son) for life with remainder to the use of his sons successively in tail male, with remainders over. In the year 1893, the fifth Earl bought the life interest of his son Gerald under the settlement. This life interest was then of small value, being a life estate which could only become an interest in possession on the deaths of his father and elder brother and the default or failure of the latter's male issue. The purchase included his life interest in all the property comprised in both settlements. The life interest so purchased was subsequently settled by the fifth Earl by an indenture dated June 18, 1894. The terms of that deed are important and require attention ; but before examining them let me indicate the events which subsequently occurred, and which have given rise to the problem which we are called upon to solve. The unexpected happened. In the year 1908 and during the lifetime of the fifth Earl, his eldest surviving son, Henry Arthur Viscount Chelsea, died. Two years later, the latter's only son died an infant, and unmarried. On Mar. 6, 1915, the fifth Earl died, with the result that his son Gerald succeeded to the title as sixth Earl, and his life estate became an estate in possession. It was vested in the trustees of the indenture of June 18, 1894, upon the trusts thereby declared. The sixth Earl died on Oct. 4, 1933, and was succeeded by his only son, who thus became the seventh Earl and tenant in tail male in possession of the estates. The question is whether the property passed on the death of the sixth Earl within the Finance Act, 1894, s. 1.

I now turn to the provisions of the indenture of June 18, 1894. It is made between the fifth Earl and two trustees, and it recites that the fifth Earl was desirous of making a provision for his son Gerald and his wife and issue (if any) in the event of his expectant life interest falling into possession in manner thereafter appearing. By it the fifth Earl conveyed to the trustees the settled property to hold the same unto and to the use of the trustees, their heirs and assigns for all the life of Gerald but upon the trusts and with under and subject to the powers and provisions thereafter contained concerning the same. The first trust declared by the deed never came into operation, owing to the fact that Gerald was adjudicated a bankrupt in the year 1911. The relevant trusts which became operative were as follows :—viz., that the trustees should enter into possession or receipt of the rents and profits and manage the estates (with power to maintain "Chelsea House") and pay all annual sums and interest charged on the estates and should during the remainder of the life of the sixth Earl or any shorter period or periods as the trustees should think fit pay all or any part of the net rents and

profits of the said premises after making the payments thereinbefore authorised, unto or apply the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the persons therein mentioned, viz., the sixth Earl, his wife (if any), his children or remoter issue (if any) and the other persons for the time being interested in remainder in the premises thereby conveyed as the said trustees or trustee should in their or his absolute discretion think fit, and should during such period and at such discretion as aforesaid permit all or any of the said persons to occupy all or any of the said premises, and subject to the said discretionary trust or power should accumulate the surplus (if any) and invest the same and should hold such accumulations and the investments thereof upon trust as and when the said trustees or trustee should in their or his discretion think fit to realise the said investments or any part thereof and apply the proceeds thereof in or towards the satisfaction and discharge of any debts or incumbrances for the time being charged upon or affecting the estates or any part thereof, or if there should be no such debts or incumbrances or the same should have been fully paid or satisfied, then the said trustees or trustee should hold the accumulations then made or thereafter to be made under the trust or power in that behalf thereinbefore contained, as if the same were capital moneys arising under the Settled Land Acts, provided always that in the event of the sixth Earl surviving the fifth Earl for more than 21 years the accumulation of any surplus income should after the expiration of such 21 years cease, and such surplus should be thenceforth paid to the person or persons who would for the time being be entitled to the income of the estates if the sixth Earl were dead or should permit the said premises to be occupied and enjoyed by such person or persons.

It will be seen that the result of this disposition by the fifth Earl of the life estate of the sixth Earl was that immediately before the death of the sixth Earl the income of the property had to be applied in payment to or for the benefit of all or any of the objects of the discretionary trust, or (in so far as not so applied) in accumulation and the payment off of incumbrances. The persons beneficially interested in the income of the property at that moment were therefore the various persons who were objects of the discretionary trust and the persons who might ultimately benefit by the accumulations and discharge of incumbrances. Immediately after the death of the sixth Earl the only person interested in the income was the seventh Earl as tenant in tail male in possession. Did the property pass to him, within the meaning of the Finance Act, 1894, s. 1, on the death of the sixth Earl? If there had been no purchase of the sixth Earl's life estate, the property would clearly have so passed. If there had been no settlement of the purchased life estate by the fifth Earl, and someone (not the seventh Earl) had enjoyed the estate *pur*

autre vie as a devisee from the fifth Earl or as a purchaser from his executors, again no question could have arisen. On the death of the sixth Earl the property would have so passed from that tenant *pur autre vie* to the seventh Earl. It is said, however, that it is possible to have such a dealing with a life estate under a settlement that on the death of the tenant for life the property will not so pass, and for this proposition is cited the case of *A.-G. v. Beech* (1), in which the tenant for life had surrendered her life estate to the remainderman in fee, with the consequent result that, upon the merger which ensued, the remainderman had long before the death of the tenant for life become a tenant in fee simple in possession. In those circumstances it was obviously impossible that the property could have passed on the death of the tenant for life. It was, however, argued by the appellants that the dealing with the sixth Earl's life interest was equally of such a nature as to prevent the property from passing on his death. It was said that, in order to constitute a passing of property on death, there must be a passing beneficially from some person or persons to another person or persons; that no beneficial interest existed in a person whose only interest was his chance of participating as an object of the discretionary trust; that the only person who could be said to be beneficially interested in the property during the period which elapsed between the deaths of the fifth and sixth Earls, was the seventh Earl in respect of his estate in tail male in remainder, and in respect of the trusts for accumulation, and payment off of incumbrances; and that accordingly there could not on the sixth Earl's death have been any passing beneficially from some person or persons to another person or persons. BENNETT, J., and the Court of Appeal have reached the conclusion that on the death of the sixth Earl the property did pass to the seventh Earl, and in my opinion their decision was correct.

On the death of the sixth Earl, the seventh Earl's estate in tail male became, instead of an estate in remainder, an estate in tail male in possession. He became entitled to receive the whole income of the estate, which immediately before the death of the sixth Earl was primarily applicable for the benefit of the objects of the discretionary trust. That, in my opinion, was a change of hands in the beneficial title or possession of the property as a whole, occurring on the death of the sixth Earl, which constituted a passing of the property on that death within the meaning of sect. 1 of the Finance Act, 1894. In the Court of Appeal, ROMER, L.J., pointed out in detail the contrast between the beneficial enjoyment of the property before and after the death of the sixth Earl, and I agree with him when he says that on that death the beneficial enjoyment passed to the seventh Earl from the class of objects of the discretionary trust, and none the less because the seventh Earl was himself a member of the class. As MAUGHAM, L.J., expresses it, the

seventh Earl had himself during the sixth Earl's life no interest in any defined slice or portion of the property (his only interest being the possibility of benefit under the discretionary trust); but on the death of the sixth Earl the discretionary trust ended and the seventh Earl became entitled in possession to the property as a whole.

Reference was made in the course of the argument to the *Adamson* case (2). I agree with BENNETT, J., that that decision has no relevance to the present case. LORD TOMLIN, in the *Lloyds Bank* case (3), and MAUGHAM, L.J., in the present case, have stated the grounds upon which the majority based their decision that no property passed under sect. 1. They can have no application to the matters now in debate. I would like, however, as one of the majority in that case, and in view of observations recurring (if not concurring) elsewhere, to state in fuller detail the foundation of that decision. The fund under consideration was the fund as it existed at the moment of the settlor's death, viz., the original capital increased by accumulations of so much of the income as had not been paid or applied under cl. 4 of the settlement, but less so much capital as had been applied under cl. 3 of the settlement. The question to be answered was, had *that* fund passed on the death of the settlor? To answer that question a comparison must be made between the persons beneficially interested in *that* fund the moment before the death, and the persons so interested the moment after the death. The only persons beneficially interested in *that* fund immediately before the death were the son and the daughters, though their interests were liable to be altered or defeated by some act of the settlor, or by the happening of some event in his lifetime. His death merely rendered any such act or event an impossibility. The son and daughters remained beneficially interested in the same shares and to the same extent as before, but their interests were no longer subject to alteration or defeat. They claimed under the same title as before. There was no changing hands. Therefore the fund in question did not pass on the death.

My Lords, I have only dealt with the question whether the Chelsea estates passed under sect. 1 on the death of the sixth Earl, and I have no doubt that they did. The same question also arose as to other properties, or items of property, described in the originating summons herein under the letters (B), (C), (D), (E) and (G). I do not trouble you with any remarks thereon, beyond saying that it was not disputed that the items (B), (C), (D) and (E) also passed on the death, if the Chelsea estates so passed; and as to item (G) it was conceded by the appellants in the course of the argument before this House, that that item passed on the death and that estate duty was payable in respect thereof. In my opinion this appeal should be dismissed with costs.

My Lords, I am authorised to say that my noble and learned friends,

LORD ATKIN, LORD THANKERTON and LORD MACMILLAN, concur in the opinion which I have expressed.

LORD ROCHE : My Lords, I also concur.

Appeal dismissed with costs.

Solicitors : *Lee & Pembertons* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

Reported by MICHAEL MARCUS, ESQ., *Barrister-at-Law.*

of LORD RUSSELL OF KILL-
at p. 764, applied. HALDANE
KFORD. [1948] 2 All E.R. 622.

Distinguished. COMR. OF STAMP
DUTIES OF NEW SOUTH WALES v.
WAY. [1952] 1 All E.R. 198.

BURRELL AND ANOTHER *v.* ATTORNEY-GENERAL (ON BEHALF OF HIS MAJESTY).

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **October 22, 23, 26, 27, November 27, 1936.**]

Estate Duty—Settled property—Discretionary trusts of income before and after death of deceased—Whether property passed on death—Finance Act, 1894 (c. 30), ss. 1, 2 (1) (b), 7 (7).

By his will the testator who died in 1918 created a trust which conferred on the trustees a discretionary trust to pay out of the net rents and profits to his son H. (the deceased) during his life, and thereafter to other persons specified in the will, a yearly allowance of such amount and by such instalments as the trustees should in their uncontrolled discretion think fit. At the time of the testator's death there was a class of seven persons (including H.) who were possible objects of the trustees' discretion. By the death of H. a new discretionary trust came into being in favour of a class of five persons, some of whom were members of the former class of seven persons. The testator's heir-at-law and next of kin were the persons entitled by operation of law to any part of the said income not applied by the trustees in their discretion in payment of the said allowances. Upon the death of H. in 1931, estate duty was claimed in respect of the whole principal value of the settled property passing to the second class of five persons (as a new group of individuals different from the first group of seven persons) either under the Finance Act, 1894, s. 1, or under sect. 2 (1) (b) as property deemed to pass on such death:—

HELD : (i) having regard to the limitations of the testator's will and to the remote and negligible interests of the heir-at-law and next of kin, it was fair to say that the settled property as a whole, or the title thereto, changed hands upon the death of the deceased.

(ii) estate duty therefore became payable upon the death of the deceased in respect of the whole principal value of the settled property under sect. 1 of the Finance Act, 1894, as property passing on such death.

[EDITORIAL NOTE.] The case of *Scott v. Inland Revenue Comrs.* (reported p. 752 *ante*) has dealt with the position where a discretionary trust is operative before the death in respect of which estate duty has to be paid. In the present case there is a discretionary trust in operation both before and after the death of the deceased, and some of the objects of the first discretionary trust are also objects of the second. The real point at issue in each case is whether in the case of a dis-

cretionary trust any object of the trust has any beneficial interest in the property or fund. In the case of all the trusts in question, the trustees had full discretion at any time to exclude any one or more of the objects of the trust entirely, and it was therefore argued that no object had a beneficial interest in the property. This argument was rejected and the property held to attract duty under the Finance Act, 1894, s. 1.

AS TO PROPERTY PASSING ON DEATH, see HALSBURY, Hailsham Edn., Vol. 13, pp. 233-237, paras. 223-226, AND FOR CASES, see DIGEST, Vol. 21, pp. 7-10, Nos. 21-42. FOR THE FINANCE ACT, 1894, ss. 1, 2 AND 7, see HALSBURY'S COMPLETE STATUTES OF ENGLAND Vol. 8, pp. 120, 121, 128.]

Cases referred to :

- (1) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198 ; 21 Digest 7, 27.
- (2) *De Trafford v. A.-G.*, [1935] A.C. 280 ; Digest Supp.

APPEAL from an order of the Court of Appeal (LORD HANWORTH, M.R., ROMER and MAUGHAM, L.J.J.), dismissing an appeal by the appellants from an order of FINLAY, J., whereby it was declared that upon the death of the deceased estate duty became payable under sect. 1 of the Act of 1894 in respect of the whole principal value of the said settled property ; but at the same time varying (by a majority, ROMER, L.J., dissenting) the said order of FINLAY, J., by declaring that on the deceased's death estate duty became payable in respect of the said settled property as property deemed to pass under sect. 2 (1) (b) of the said Act (as distinct from property passing under sect. 1 of the same Act).

The facts and the arguments are set out in the judgment of LORD RUSSELL OF KILLOWEN.

W. P. Spens, K.C., and *D. Ll. Jenkins* for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.), and *J. H. Stamp* for the respondent.

LORD RUSSELL OF KILLOWEN : My Lords, this appeal raises a question which, in view of the conflict of judicial opinion which has arisen, is obviously one of difficulty. It arises in consequence of the settlement of his property made by a testator, by a will drawn in an unusual form. The main question is (i) whether on the death of the testator's son Harry the whole property passed under sect. 1 of the Finance Act, 1894, or must be deemed to have passed under sect. 2 of the same Act, or (ii) whether the whole property did not so pass, or is not to be deemed to have so passed. If the latter view should prevail, further questions arise in regard to portions, charges, and other subsidiary matters, which do not arise if the first branch of the main question is answered in the affirmative.

Upon an information filed by the Crown against the trustees of the will, FINLAY, J., held that the whole property passed under sect. 1 of the Act. On appeal, the late LORD HANWORTH, M.R., and MAUGHAM, L.J., held that the property did not pass under sect. 1, but must be deemed to pass under sect. 2 (1) (b) of the Act. ROMER, L.J., on the other hand,

agreed with FINLAY, J., and was of opinion that the property passed under sect. 1. This difference of opinion made no difference in the result, for it was decided that estate duty was payable on the principal value of the whole property, and the appeal was dismissed with costs. The trustees have appealed to your Lordships' House. They contend that both views are wrong, and that neither was there a passing under sect. 1, nor can the property be deemed to have passed under sect. 2, with the result, gratifying to them but disappointing to the Exchequer, that no estate duty is payable at all.

The testator made his will on May 30, 1912. He had then four sons living, viz., James (his eldest son and heir-at-law), Harry, Reginald, and Algernon. The testator made no disposition of any kind by his will in favour of James. His name is never mentioned. By his will the testator made a strict settlement of his real estate and bequeathed his residuary personal estate upon trust to be invested in the purchase of freehold hereditaments to be settled to the uses upon the trusts and subject to the powers and provisions to upon and subject to which they would have been held if they had been purchased with capital money arising from a sale of his settled real estate. The real estate was (with one important modification to be referred to in detail later) settled in favour of Harry, with remainder after his death in trust for his sons successively in tail male, and in default of such issue in favour of Reginald with remainder after his death in trust for his sons successively in tail male, and in default of such issue in favour of Algernon with remainder after his death in trust for his sons in tail male; and in default of such issue, the testator declared trusts in favour of a named cousin, and after his death in favour of the living sons of that cousin successively, with remainder in each case in trust for the son's sons successively in tail male, with remainder in trust for the sons of the cousin thereafter born successively in tail male, with an ultimate remainder to the use of the testator's own right heirs.

The important modification to which I have referred was that no life interest was conferred upon the testator's sons, nor upon his cousin, nor upon the living sons of his cousin. In each case a trust was declared in identical terms, of which I can quote the trust in relation to Harry and his issue as an example of all. It runs thus:

I declare that the said trustees shall hold the said real property and the net rents and profits thereof in trust as hereinafter mentioned (that is to say) in trust out of the said net rents and profits to pay to my said son Harry . . . during his life a yearly allowance of such amount from time to time and by such instalments as the said trustees shall in their uncontrollable discretion think fit and after his death in trust for his first and other sons severally and successively according to seniority in tail male.

In the same way the testator cut down the interest of every tenant in

tail male born during his life, not to a life interest, but in manner indicated by the following clause :

Provided always and I declare that if and in every case where any person who under the foregoing trusts would be an equitable tenant in tail male by purchase shall be born in my lifetime the interest hereinbefore conferred on such person shall be excised from this my will and instead and place thereof the said trustees shall hold the said real property and the net rents and profits of the same in trust out of the said net rents and profits to pay to such person during his life a yearly allowance of such amount from time to time and by such instalments as the said trustees shall in their uncontrollable discretion think fit and after his death in trust for his first and other sons severally and successively according to seniority in tail male.

Two further provisions in the will must be noted. One declared that during the life of any person who was to receive a yearly allowance the trustee should from time to time apply all the residue of the rents and profits over and above what might be expended on such allowance to the reduction of capital charges affecting the real property or some part thereof. The other provision ran thus :

Provided also and I hereby declare that it shall be lawful for the said trustees instead of paying any such allowance to the person who under any of the foregoing trusts or provisions would be entitled to receive the same to apply the same for his benefit or for the benefit of any wife, child or remoter issue of his or for the benefit of any person who if he were dead would be entitled to receive the net rents and profits of the said real property or an allowance thereout or for the benefit of any two or more of such several objects as the said trustees may in their uncontrollable discretion think fit.

Having now referred to the relevant provisions of the will, I may state the events which happened and which have given rise to the questions in debate.

The testator died on June 15, 1918, leaving him surviving his said four sons, the wife of his son Harry and three children of Harry, viz., an eldest son William, a second son Michael, and a daughter Gillian. There were then no capital charges on the property. Harry died on Nov. 1, 1931, leaving him surviving his wife, his three children, and a grandchild, the child of Gillian. During the period which elapsed between the death of the testator and the death of Harry (over 13 years) the trustees of the will paid away by way of Harry's allowance, the whole of the net rents and profits, with the exception of a sum of about £1,500 which remained in their hands at Harry's death. By far the larger amount had been paid to or applied for the benefit of Harry, but substantial sums had also been paid to, or applied for the benefit of, his wife and each of his three children. In exercise of a power contained in the will, Harry had charged the property with two portions of £5,000 each, in favour of his children Michael and Gillian ; and on his death those two portions became immediately raisable and payable. Subject thereto, and to a jointure of £1,000 per annum in favour of

his widow, the property became on Harry's death subject to a trust to pay out of the net income during William's life the beforementioned allowance to William, with power to the trustees instead of paying it to William to apply it for his benefit or for the benefit of all or any of any wife, child or remoter issue of his, or any person who, if William were dead, would be entitled to the net rents and profits or an allowance thereout, and (so far as not so applied) to discharge the said £10,000 portions. The question is whether in those circumstances the property passed or must be deemed to pass on the death of Harry.

The appellants contend in the first place that the objects of a discretionary trust have no beneficial interest in the trust property, and that the only persons beneficially interested in the property both before and after Harry's death are the testator's heir-at-law and next of kin, and that consequently the property did not pass on that death. They further say that, even if the objects of a discretionary trust have a beneficial interest, then, since some of the individuals who were objects of the trust during Harry's life were also objects of the trust after his death, there could be no passing of the property as a whole under sect. 1. As regards sect. 2 (1) (b), they argued that the interest contemplated by that provision must be an interest capable of valuation under sect. 7 (7) of the Act, and that therefore the interest (whatever it might be) of an object of a discretionary trust could not be an interest within sect. 2 (1) (b). Their contentions on the main questions may be shortly stated thus : there was no passing of the property at all because no one had a beneficial interest therein except the heir-at-law and next of kin ; or if others had a beneficial interest, there was no passing of the property as a whole owing to the overlapping of interests. The property could not be deemed to pass because the interests (if any) which ceased on the death were incapable of valuation.

My Lords, in order to arrive at a just conclusion on these contentions, it is in my opinion essential to determine in the first place what is the true construction and effect of these peculiar testamentary provisions. The primary trust during Harry's life is to pay him "a yearly allowance" out of the net rents and profits, the *quantum* from time to time depending upon the discretion of the trustees. All the income which accrues during Harry's life is available for this purpose, and is so available during the whole of his life. There is nothing to confine the allowance for one year to the rents and profits of that year ; the unapplied balance of any year could be applied in any subsequent year. Consequently during Harry's life the primary trust is to pay him a yearly allowance and carry forward the balance for future application if the trustees think fit. The balances so carried forward, or any part of them, might be applied in reduction of capital charges, had any existed. Throughout Harry's life there was a power to withhold payment to him

of his allowance, and to apply it for the benefit of Harry and the other persons described, or for the benefit of any one, two, or more of such persons ; but what is applied under this power is still Harry's allowance. On Harry's death, leaving William him surviving, a new trust comes into operation during the life of William. Then the primary trust is to pay to William a yearly allowance out of the net rents and profits which accrue during his life and any balance remaining unapplied at Harry's death. The same remarks apply to this allowance. There is a power to apply it for the benefit of any one, two, or more of a group of persons, viz., William, his wife, children or remoter issue, and the person who, if William were dead, would be entitled to receive the rents and profits or an allowance thereout. But so long as the £10,000 portions remain unpaid the trustees would, I think, be bound to apply any balance not appropriated to providing William's allowance in paying off the portions. If those portions were paid off during William's life, they would be entitled to carry over unapplied balances so as to be available in subsequent years for William ; and unless the entail had been barred (an event which would destroy the possibility of anyone else ever becoming entitled to an allowance under the trusts of the will) they would be entitled to carry over the unapplied balance, if any, remaining at William's death, so as to be available for the benefit of a future allowancer.

It will thus be seen that the interest of the testator's heir-at-law and next of kin in the property extends only to the balance, if any, of the net rents and profits accruing during the periods in which allowances are payable, which are not applied by the trustees in providing the allowances, and which remain after the £10,000 portions and any other portions which might be charged by other allowancers and all other capital charges, if any, have been paid off. Even this balance they could not claim to have paid to them until either all the people who might be entitled to receive an allowance were dead, or, the entail having been barred, someone had become entitled to the property for an estate in fee simple in possession. The heir-at-law and next of kin had no interest in corpus. Such interest as they had was no doubt vested in them at the testator's death, but the value and importance of it could be effectively gauged at the death of Harry. At that date all the net rents and profits which had accrued since the death of the testator (nearly £115,000) had been applied in providing Harry's allowance, save and except a sum of £1,500 which then became available for William's allowance, and for reduction of the portions charge. In my opinion the state of affairs which prevailed at Harry's death is sufficient to show that the beneficial interest of the heir-at-law and next of kin in the property was microscopic. So far from their being the only persons beneficially interested in the property before and after Harry's death,

their interest is so minute and so remote that it may for our present purpose be ignored. But the actual facts mentioned above only show that the trustees in fact carried out the intention of the testator as evidenced by his will, in which he speaks of the allowancers as persons "entitled" to receive an allowance, and from which all reference to his eldest son is carefully excluded.

What then happened at Harry's death? In order to test whether it can be said that the property passed on his death, one must compare the position as regards the persons beneficially interested in the property immediately before the death with the position immediately afterwards. Immediately before Harry's death, the persons beneficially interested in the property were primarily Harry, as the person entitled to an allowance, and secondarily, by way of substitution in respect of that allowance, a group consisting of Harry, his wife, his three children, William, Michael and Gillian, and Gillian's child. It is true that no one of them could claim to be beneficially interested in any defined share of, or to any defined extent in, the property; but the six together constituted the only people who could, while Harry was alive, obtain any benefit from the property or have any beneficial enjoyment of the property. The heir-at-law and next of kin could not. They could no doubt realise, for what they might be worth, their interests, which I have already described and analysed; but they could not claim to receive any of the net rents and profits. Immediately after Harry's death, who were the persons beneficially interested in the property? Primarily William, as the person then entitled to an allowance, and secondarily, by way of substitution in respect of that allowance, a group consisting of William, his wife, and his brother Michael, so long as no son was born to William. Similarly, this group of three persons constituted the only people who, immediately after Harry's death, could obtain any benefit from the property or have any beneficial enjoyment thereof. True it is that the group so entitled is susceptible of change. Thus, owing to the subsequent birth of a son to William, the son has joined the group and Michael has left it; and the births of other children to William would increase the number of members of the group, or again, the death of William's infant son would bring Michael back into the group again. But for our purpose the essential thing to see is who was beneficially interested immediately after the death of Harry. It was a new group, becoming interested under a new trust, and fulfilling a new qualification as a condition of membership.

It so happens that William is a fixed member of both groups, in the one case as a child of the allowancer, in the other case as the allowancer; and that Michael, who was a fixed member of the first group as a child of the allowancer, became on Harry's death a precarious member of the second group, as the person who would be entitled if William were dead.

It is said that the fact that certain individuals were members of both groups shows that part of the beneficial interest in the property resided in the same individuals immediately before and immediately after Harry's death, and that therefore it is impossible to say that there was on Harry's death a change of title in the property as a whole, and that therefore there was no passing under sect. 1. I do not agree. The mere fact that a person who becomes entitled to the beneficial enjoyment of property on a death has already, before that death, been beneficially interested in the property, does not prevent the property passing under sect. 1. Instances of this are to be found in the *Cowley* case (1), and the *De Trafford* case (2), in each of which cases a former beneficial interest ceased with the death and a new beneficial interest arose on the death under a different right. In the present case the beneficial interest of the first group ended with Harry's death, and thereupon the beneficial interest of the second group arose under a different trust; and so, too, as to each member of the first group, his interest as a member of that group ended with Harry's death, and if (but only if) he fulfilled the qualification required for membership of the second group, a new and different beneficial interest then arose in him under a different trust. And that this was a different interest is shown in the case of Michael by the fact that whereas his interest during Harry's life was indefeasible except by his own death, his interest during William's life was precarious, and would cease if and so long as there was in existence a son of William.

If there is a trust during A.'s life of the income of a property for a group of persons fulfilling certain qualifications, the persons who are to share from time to time and the amounts which they respectively take being in the discretion of the trustees, followed on A.'s death by a similar discretionary trust during B.'s life of the income of the property for a group of persons fulfilling different qualifications, I would say that the title to the beneficial interest in the property as a whole changed hands on the death of A. and passed on his death under sect. 1; and that notwithstanding that one or more persons fulfilled both sets of qualifications.

The late LORD HANWORTH, M.R., and MAUGHAM, L.J., with some doubts preferred to treat the case as falling under sect. 2 (1) (b), although in some respects their reasons appear to me to point rather to a passing under sect. 1. Thus LORD HANWORTH, M.R., after stating that the class in favour of which the trustees could exercise a discretion after Harry's death was a different class from the class in favour of which the discretion was exerciseable before that death, said:

It is cut down to five, and although some of them are the same the class is not altogether the same, and there has been a passing over from the entity, if I may so call it, before the death of Harry to a different entity.

And in considering sect. 7 of the Act he used the following language :

On the facts, as I have stated them, that there has been a change of the persons entitled to receive moneys . . . then what has passed ? Well, it is the whole of the interest which has passed.

MAUGHAM, L.J., after stating that there was an interest in the whole of a composite class which ceased on Harry's death, said :

In my opinion a benefit has accrued or arisen, by reason of the cesser of the interest to which I have referred, for the benefit of the new class. . . . The new class is a different class, the benefit which accrues to members of the new class, discretionary I agree, is yet a benefit which accrues to them by reason of a different trust and a different relationship to the original testator. These considerations would no doubt lead me to say that the property passed within sect. 1 if it were not for the doubt I have whether it can fairly be said that the property as a whole changed hands.

My Lords, for myself I agree with the views expressed by ROMER, L.J., viz., that the property here passed under the Finance Act, 1894, s. 1. I think that under this will, framed as it is, and in view of the remote and negligible interests of the heir-at-law and next of kin, it can fairly be said that the property as a whole changed hands, or that the title to the property as a whole changed, on the death of Harry. I would accordingly vary the order of the Court of Appeal by striking out the declaration therein contained. The effect of this will be to restore the declaration contained in the order of FINLAY, J. With this alteration in the order appealed from, the appeal should be dismissed with costs.

In the view of this case which I have expressed, it is neither necessary nor desirable to express any opinion on the subsidiary questions, nor upon a point which was discussed, viz., the extent to which the various subsections of sect. 1 of the Settled Land Act, 1925, are incorporated into the definitions contained in sect. 22 (1) (h), (i) of the Finance Act, 1894.

My Lords, I have been requested by my noble and learned friends, LORD ATKIN, LORD THANKERTON and LORD MACMILLAN, to say that they concur in the opinion which I have expressed.

LORD ROCHE : My Lords, I concur.

Appeal dismissed with costs. Order of Court of Appeal varied so as to restore the declaration contained in the order of FINLAY, J.

Solicitors : *Raymond-Barker, Nix & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

Re A JUDGMENT DEBTOR (No. 1539 OF 1936),
THE JUDGMENT DEBTOR *v.* THE JUDGMENT CREDITOR.

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **November 27, 1936.**]

Bankruptcy—Notice—Substituted service—Bankruptcy Rules, 1915, rr. 143, 156.

A judgment debtor against whom a bankruptcy notice had been issued left the country, intending to fly to the Antipodes. His solicitors informed the solicitors for the creditors of all the facts and stated that the debtor was obliged by contract to attempt a record flight and would probably return in 3 weeks. The creditors' solicitors, however, applied to the court for an order for substituted service. They did not allege evasion. The registrar ordered that notice should be served by registered post addressed to the debtor's place of business and also c/o his solicitors. The debtor appealed:—

HELD: this notice could not possibly have been an effective notice to the debtor, and the order must be set aside.

[EDITORIAL NOTE.] The fundamental principle of English law is that any person sued in our courts shall have effective notice of the proceedings instituted against him. Substituted service can only be resorted to where there is a practical impossibility of actual service, and the method of substituted service will in all reasonable probability be effective to bring the proceedings to the notice of the defendant or person to be served. In the present case of a flight by air in record time it is clear these conditions could not obtain, and it being the intention of the person to be served to be back in this country in a short while, there was no case for substituted service.

AS TO SUBSTITUTED SERVICE, see HALSBURY, 1st Edn., Vol. 23, Practice, p. 117, para. 207; AND FOR CASES, see DIGEST, Practice, pp. 329-336, Nos. 481-546; and see YEARLY SUPREME COURT PRACTICE, 1937, pp. 73-79.]

Cases referred to:

- (1) *Porter v. Freudenberg*, [1915] 1 K.B. 858; Digest, Practice, 329, 481.
- (2) *Adler v. Benjamin* (1885), 1 T.L.R. 308.

APPEAL against an order made by MR. REGISTRAR KEAN on Sept. 24, 1936, refusing to set aside an order for substituted service by registered post of a bankruptcy notice upon a judgment debtor.

A debtor had judgment given against him in the King's Bench Division on July 27, 1936, for £2,842 as the acceptor of two bills of exchange which had been deposited with moneylenders as security for the debt of another. On July 30, a bankruptcy notice was issued against him, and on the same day he started on a flight to Australia in an attempt to lower the existing record. The creditors' solicitors were therefore unable to serve him with the notice on that day. Correspondence followed (which is quoted in detail by SLESSOR, L.J., in his judgment), and the debtor's solicitors explained that the flight had been in preparation for a considerable time and he was bound in contract to proceed with it at the first opportunity, and that he would be back in 3 weeks, when he could be served personally. The creditors' solicitors expressed the

opinion that he had gone abroad with the object of delaying and defeating his creditors. They applied to the court for substituted service of the notice by advertisement in the *London Gazette* and the *Daily Telegraph*, but refrained from alleging that he had gone abroad in order to evade service. An order was made on Aug. 25 for substituted service by registered post at the debtor's office and c/o his solicitors. On Sept. 24, the debtor moved the court to set aside this order, and filed an affidavit swearing that he had left England on July 30, in pursuance of arrangements long contemplated for a reliability flight to Australia to be carried out in the shortest possible time, and had intended to be back within 3 weeks, that in the circumstances he had left no address for communications to be forwarded, and that he had had no knowledge that a bankruptcy notice or petition had been issued until his return on Sept. 16. The learned registrar dismissed this application, and the debtor appealed.

Serjeant Sullivan, K.C., and *Neil Lawson* for the appellant.

C. N. Tindale Davis for the respondents.

Sullivan, K.C.: A bankruptcy notice requires compliance within 7 days, and default constitutes an act of bankruptcy. An order cannot properly be made if the debtor will be unable to comply with it. In *Adler v. Benjamin* (2), the defendant, a stockbroker, went abroad for pleasure saying that he would be back in April, and left an address where communications could be sent to him, and he also left a power of attorney with his brother. The plaintiff served a writ of summons on the brother and asked the court for an order allowing him to proceed on this service. The Divisional Court would not make the order, even though there was no probability that it would be oppressively used. It is a fundamental rule of justice that a defendant shall know what case he has to meet. In *Porter v. Freudenberg* (1), the landlord of a tenant of business premises, who had been an alien enemy on the outbreak of war in 1914 and had gone to Berlin, applied at chambers for directions as to the manner of serving a writ claiming arrears of rent. SCRUTTON, J., gave liberty to issue a concurrent writ against the defendant and serve notice of the writ upon him in Berlin. The plaintiff appealed, asking for substituted service of notice of the writ upon the defendant's agent in England. The appeal was heard with several others by a Court of Appeal consisting of LORD READING, L.C.J., LORD COZENS-HARDY, M.R., and five Lords Justices. LORD READING, L.C.J., delivering the reserved judgment of the court, dealt at length, *inter alia*, with the principles governing substituted service. There must be a practical impossibility of actual service, and the method of substituted service asked for by the plaintiff must with all reasonable probability be effective to bring the knowledge of the writ or the notice to the defendant. "Constructive" service, by public notices or advertisements, whereby a defendant may be condemned unheard because he has had no knowledge of the proceedings

against him, is not permitted. In the present case the debtor could have been served personally on his return, and there was no probability that the substituted service would bring knowledge of the notice to him.

Davis : The Bankruptcy Rules, 1915, r. 156, give the registrar discretion to determine whether, in the circumstances indicated by the affidavit in support, an order can be made for substituted service. The affidavit in this case sets out all the facts and exhibits the correspondence, which indicates the debtor's position. The learned registrar, in the exercise of his discretion, decided that this was a case in which prompt personal service was impossible. This court will not interfere with his discretion unless he has exercised it on some wrong judicial principle. An order may be made irrespective of whether it can be brought to the notice of the debtor.

GREENE, L.J. : Then whenever a creditor can show that he cannot obtain prompt personal service, the registrar can make an order of a perfectly farcical nature which is no more effective than if it were at once destroyed.

Davis : Yes, if the application is a perfectly honest one.

SLESSER, L.J. : The honesty of the application is not material. The question is whether the defendant is effectively given notice, so that he may know what his rights and liabilities are. The notice, if it means anything, is for the protection of the person who may suffer something to his prejudice.

Davis : If the notice comes to the knowledge of the agent of the person to whom it is addressed, it is an effective notice.

SLESSER, L.J. : Here, if the debtor does not do something within 7 days, certain consequences will follow. That thing cannot be done for him by his agent.

SLESSER, L.J. : This is a case which raises a very important question with regard to the rights of a debtor, who may be liable to have pronounced against him an act of bankruptcy, to receive adequate service of notice of the intention of the creditor to proceed against him. The facts of the case, so far as they are to be gathered from the affidavits and from the correspondence thereto annexed, are these. The debtor appears to have made himself liable in an action in the King's Bench Division for a certain sum of money, and in relation to that liability a letter was sent to his solicitors on July 30, 1936, to the effect that the creditors' solicitors had issued on behalf of their clients a bankruptcy notice against the debtor based upon the judgment which they had received :

We beg to give you notice that we have issued a bankruptcy notice against your client, and we shall be glad to hear from you with an early appointment to serve him with a copy thereof.

In reply to that letter, the solicitors for the debtor wrote to the solicitors for the creditors, acknowledging the letter and adding :

As you will doubtless have seen in the newspapers, the debtor left on his Empire flight yesterday, and is now, we hope and believe, well on his way to the Antipodes. In these circumstances we fear that it is really impossible for us to arrange an appointment for you to serve him with the bankruptcy notice which you have seen fit to issue. We believe, however, that he will be back in this country in about 3 weeks' time, when doubtless something can be arranged.

Then follows, on Aug. 1, a letter from the solicitors for the creditors, which I think calls for severe condemnation, because it makes, without any reason whatever, a very severe charge against the debtor, based, so far as I know, on no grounds at all. It is in the following terms :

We have yours of the 31st ult., and note that your client has left the country. We shall have to consider as to applying for substituted service by advertisement or to put in a petition alleging that your client has left the country with intent to defeat and delay his creditors.

I may say that, though that entirely reckless allegation appears in that letter, no attempt was made at any time subsequently to support it, and Mr. Tindale Davis has very frankly stated that such an allegation never formed, and does not now form, any part of his case, which makes the allegation the more regrettable. The letter goes on :

You must be perfectly well aware that a debtor is not entitled to leave the country for his own pleasure, when he has a judgment against him, without making provision for payment of same. We do not understand what you mean when you say he will be back in 3 weeks' time when doubtless something can be arranged. Our clients require payment of the whole amount.

Why they do not understand it, I do not know ; the language seems quite clear on the face of it. Then on Aug. 5 the solicitors for the debtor reply :

You must, of course, take whatever steps you think fit. If you can satisfy the court that the debtor has left the country with intent to delay and defeat his creditors, you will, we venture to think, be rather fortunate. Apart from the suggestion being entirely unjustified, the debtor has no intention whatever either to delay or defeat his creditors, and, as you must well know, his Australian flight has been in contemplation and preparation for some considerable time, and he was bound to proceed with it at the first available opportunity. The whole object of the flight was to establish a record run to Australia and back, which alone evidences his intention to return to this country at the earliest opportunity. We are, moreover, instructed that the debtor is making arrangements to meet his obligations. Precipitate and violent measures will only have the result of frustrating his efforts. Might we suggest that your clients exercise a little patience ?

On Aug. 6 the solicitors for the creditors write :

Your client was not bound to make the flight, as he was under no contract, as far as we know, to do so. Our clients will not wait for payment of the money, it

being represented to the court that the debtor was a wealthy man and could pay directly he was asked for the money. We shall take whatever steps we are advised in regard to this matter. We intend to proceed forthwith.

On Aug. 7 the solicitors for the debtor reply :

We really do not propose to argue with you about it, except to point out that it is quite untrue to state that any representation was made by or on behalf of the debtor as to his wealth or his ability to pay. . . . You must, of course, take such steps as you are advised, but you may be assured that any attempt to get an order for substituted service by advertisement when the debtor's whereabouts are well known, or to put in a petition containing such allegations as you suggest in your letter of Aug. 1 or in the following letters, will meet with the strongest resistance. We think that the motive of your clients—for we cannot believe that these suggestions were made otherwise than on their instructions—in making these threats is a reprehensible one.

Then on Aug. 13 the solicitors for the creditors say :

Are you prepared to give us a date when the defendant will be in England so as to enable us to serve him with a bankruptcy notice ? If not—

and then follows a repetition of this offensive remark—

we can only assume that the defendant is remaining out of England with intent to delay and defeat his creditors, as you will bear in mind that you informed us that the defendant, at the time of going away, would be back in England within 3 weeks.

On Aug. 17 there is yet another letter, but I do not think it carries the matter any further. The next stage in the case was this : an affidavit was sworn on Aug. 24 by a Mr. Albert Edward Nicholls, a clerk to the creditors' solicitors, to say :

That having been instructed by my principals to serve the debtor with the bankruptcy notice herein I did on July 30, 1936, attend at Sardinia House, Kingsway, London, W.C.2, the debtor's place of business and I saw a lady who said she was his secretary and that she believed he was then on his way to Australia. She said she was not certain whether he had commenced his flight that day or whether it was to take place the next day. I asked her if she had had any instructions about the debtor's letters and she said, No, she had not heard the whole of that day from the debtor.

Then he says that his principals caused two letters to be written, one addressed to the debtor, of which the effective part was as follows :

Our representative attended upon you at the above address for the purpose of serving you with a copy of the bankruptcy notice issued against you herein, but was unable to meet with you. This is to give you notice that he will again attend at the above address on Tuesday, Aug. 4, at 2.15 p.m., for the before-mentioned purpose. If this appointment is inconvenient to you, please make another. Should you fail to keep this or such substituted appointment as made by you, we shall have no alternative but to apply to the court for an order for substituted service in such manner as the court may direct.

and a similar letter addressed to his solicitors, to say :

We beg to give you notice that we have issued a bankruptcy notice against your

client, and we shall be glad to hear from you with an appointment to serve him with a copy thereof.

Then the letters to which I have referred were exhibited, and finally there is this paragraph :

The judgment upon which the bankruptcy notice was issued was obtained on July 27, 1936, and the debtor was in court at the time when judgment was given against him, and he was fully aware that the judgment was entered and that he had to pay the same.

Then follows this request to the court :

Under the circumstances, I ask the court to grant an order for substituted service of this bankruptcy notice by advertisement in the *London Gazette* and the *Daily Telegraph*.

On Aug. 26 a letter was written to the solicitors for the debtor, saying :

We beg to give you notice that we have issued an order for substituted service of the bankruptcy notice by registered letter post addressed to your client at Sardinia House, Kingsway, and also addressed to him c/o yourselves. The order has to-day been drawn and letters posted in accordance with the same.

That was a true statement of what had been done : there had been drawn an order for substituted service on the *ex parte* application in accordance with the provisions of the Bankruptcy Acts.

But the matter did not end there, because subsequently an application was made for the setting aside of the order for substituted service on grounds which were substantially those which Serjeant Sullivan has argued before us this morning, and therefore it is not necessary to mention them as they were placed before the registrar, because I shall deal with them as the arguments which were addressed to us. But as a result of that hearing the order for substituted service was not suspended, and it is from that order, whereby Mr. REGISTRAR KEAN dismissed the motion of the debtor to set aside an order for substituted service made on Aug. 25, that this appeal is brought. It only remains to say that the order for substituted service which was made, dated Aug. 26, was not in the form which had been sought in the affidavit of Mr. Nicholls—namely, by advertisement in the *London Gazette* and the *Daily Telegraph*—but took the following form :

It is ordered that the sending of a sealed copy of the above-mentioned bankruptcy notice, together with a sealed copy of this order, by registered post, addressed to [the debtor] at Sardinia House, Kingsway, London, W.C.2, and also by registered post addressed to [the debtor] c/o Messrs. — in the County of London, shall be deemed to be good and sufficient service of the said bankruptcy notice on the said [debtor] on the day of completing such posting as aforesaid.

Now, it is true that the Bankruptcy Act contains provisions giving a considerable discretion to the registrar in the matter of service. It is provided in the Bankruptcy Rules, r. 143, that “a bankruptcy notice

shall be served, and service thereof shall be proved in like manner as is by these rules prescribed for the service of a creditor's petition ; " and the relevant provision dealing with the substituted service of a creditor's petition is r. 156, which is in the following terms :

A petition shall be served upon the debtor by an officer or bailiff of the court, or by the creditor or his solicitor, or by some person in their employ ; provided that if personal service cannot be effected, the court may extend the time for hearing the petition.

And then follow these material words :

or if the court is satisfied by affidavit or other evidence on oath that the debtor is keeping out of the way to avoid such service, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business, or by registered letter, or in such other manner as the court may direct, and that such petition shall then be deemed to have been duly served on the debtor.

There are words almost similar in effect to these words in R.S.C., Ord. 9, r. 2 ; but for my part I do not think it necessary, at any rate in the first place, to consider the exact language of these rules at all. In my opinion, the right way to look at this case is to consider in the first place what are the rights of the person on whom the notice is to be served, generally, arising out of recognised principles of law. The general position of a person to whom notice is addressed that legal process may be made against him which may result in consequences prejudicial to him and which in certain circumstances he may be able, by performing certain acts, to avoid, and the position even more generally, is discussed in the case of *Porter v. Freudenberg* (1), and more particularly considered in the judgment of LORD READING, L.C.J., speaking on behalf of the whole court and expressing the judgment of the court, at p. 888. LORD READING, L.C.J., was there considering the conditions under which substituted service might be permitted, a problem which had become particularly acute at the outbreak of the recent war by reason of the fact that service was sought against persons who had thereby become alien enemies ; but the observations of the court are of general application. At p. 889 LORD READING, L.C.J., lays down in general terms what are the considerations which should move a judge in chambers before whom an application is made for a substituted service of a writ, and he says this :

(a) to satisfy himself that there exists a practical impossibility of actual service. . . .

That matter does not here arise ; clearly here, on the evidence of this case, there was not a practical possibility of actual service, seeing that the debtor, by common agreement, was at the time out of the realm. Next :

(b) To satisfy himself . . . that the method of substituted service asked for by

the plaintiff is one which will in all reasonable probability, if not certainly, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant.

Then follow these extremely important words :

Our English procedure has hitherto been laudably superior to the continental in not permitting that which may be called "constructive service," such as, e.g., by public notices or advertisements, whereby a defendant may be condemned unheard because he has had no knowledge of the proceedings against him.

Those later words indicate clearly to my mind that the Court of Appeal in *Porter v. Freudenberg* (1) were considering not only the important problem which was there raised, for the reasons which I have stated, but were considering the general principle of law : that the defendant shall not by defective notice be condemned unheard because he has no knowledge of the proceedings against him. In such a case as the present, one has to consider—and indeed, it may be, in dealing with all instruments which call upon a party to answer a claim at law—what exactly the notice which is to be given calls upon the person noticed to do, and what rights it gives him. In the case of an act of bankruptcy, which is a matter of the most serious public consequence, involving, if it be followed ultimately by a declaration of bankruptcy, deprivation both of public and of private civil rights, disallowing the debtor to serve in public capacities or in either House of Parliament, disabling him from performing public functions, and interfering with his ordinary rights as a citizen to make such contracts as he will, the court should be if anything more careful than it might in ordinary legal process resulting, perhaps, in damages or some other legal consequences. Perhaps one need not say "more careful," because complete care is necessary in every case. In so far, however, as Mr. Tindale Davis has argued that some distinction is to be made in favour of the creditor in dealing with the Bankruptcy Rules in contradistinction to the Rules of the Supreme Court, I say that, if any distinction is to be made, it ought to be made in favour of a more rigorous interpretation of the Bankruptcy Rules, which are in their very nature of a penal or semi-penal character. In point of fact, the principles which are stated in *Porter v. Freudenberg* (1) are of entirely general application.

In the case under consideration, this notice gives, under the law, certain rights to the person against whom the act of bankruptcy is alleged to save himself from the consequences thereof within a certain period, if he performs certain acts. The order says that within 7 days he must pay to the creditors, and if he does so pay within those 7 days he may be acquitted of all the consequences which might flow from a failure to pay. We must therefore have regard to this fact : that he is first of all given notice of the fact, and he is also given notice that within 7 days he has a *locus poenitentiae* and may avoid the consequences which might

otherwise flow. There could not be a case, in my opinion, where it is more essential that he should be given his full rights.

In my view, both in relation to an act of bankruptcy and in relation to a petition, such a case is carefully safeguarded by the Bankruptcy Rules, r. 156, which sets out certain grounds on which substituted service may be allowed, such as the delivery of the petition to an adult inmate at his usual place of business, or by registered letter, both of which, in my view, are means devised for the purpose of seeing that the debtor does not lose his rights for want of effective notice of what is being done. Then follow the words: "or in such other manner as the court may direct." Here there is no question of service upon an adult inmate at his usual or last known residence or place of business, and there is no question of a registered letter. The service is to be done "in such other manner as the court may direct." As I have pointed out, that "other manner" was laid down, not by advertisement, as was stated, but by registered post addressed to the debtor at a certain house in England where it was known to all persons that he was not, nor could possibly be within 7 days, and c/o his solicitors at a certain address in London. In the circumstances of this case, it seems to me entirely impossible that such a notice by registered post to him in London on Aug. 26, which was the date when the notice was actually sent, could possibly, in his then situation, have been an effective notice to him giving him his necessary rights under the Bankruptcy Act. The same view applies to a notice sent to his solicitors. Mr. Tindale Davis has argued that the notice to his solicitors was a notice to him as his agents. My first comment upon that argument is that it is not to be, under the order, a notice to the solicitors, but a notice to the debtor c/o his solicitors, which is no more than another way of giving him notice at a different address. In any event, the solicitors clearly cannot be a sufficient agent for this purpose. Within 7 days the debtor has to decide whether he will or will not pay the debt. His solicitors have no authority from him that can possibly here be gathered to pay that debt for him. It is he and not his solicitors who has to decide whether he will pay the debt.

For all those reasons, I think that there is not, and that there cannot be, in this case a proper notice by registered letter; nor is the manner which the court has directed one which gives the debtor such a notice as satisfies the Bankruptcy Rules, r. 138. It follows, in my judgment, that the debtor has had no notice lawfully served upon him at all, and that he is in the position of a person who has received no notice of service either by substitution or otherwise. Consequently, this appeal must succeed.

ROMER, L.J.: It is a fundamental principle of English law that a person shall have effective notice, if it be possible, of any process instituted

against him in our courts, and certainly none the less because that process is a bankruptcy process. It is plain from the review of the facts which has just been made by my Lord that in this case that fundamental principle has been disregarded. The appeal must be allowed.

GREENE, L.J. : I agree.

Appeal allowed, with costs in both courts.

Solicitors : *Donald W. Plunkett* (for the appellant) ; *Woolfe & Woolfe* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

FARNHAM v. FARNHAM otherwise DANIELS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **November 20, 1936.**]

Divorce—Nullity—Impotency quoad hunc—Birth of child to respondent—Evidence by petitioner of non-access—Admissibility.

The petitioner and the respondent went through a ceremony of marriage in Apr., 1933, and separated in Sept., 1933. In Aug., 1935, the respondent gave birth to a child. The petitioner sought to have the marriage annulled on the ground of the respondent's incapacity. The question arose whether, having regard to the rule enunciated in *Russell v. Russell* (1), the petitioner could be heard to say that the marriage had not been consummated, when the effect of such evidence would tend to bastardise the child born after the celebration of the marriage :—

HELD : the husband's evidence as to non-access was admissible.

[EDITORIAL NOTE.] The question here is whether the rule in *Russell v. Russell* (1), which makes inadmissible evidence tending to bastardise living issue born in wedlock, applies to nullity cases, where the alleged incompetent party has become the parent of a child. It is held that the majority in the House of Lords in that case intended that nullity cases should be an exception to the rule and that the rule, therefore, does not apply in such a case.

AS TO THE RULE in *Russell v. Russell*, see HALSBURY, Hailsham Edn., Vol. 2, pp. 562, 563, para 772, AND FOR CASES, see DIGEST, Vol. 3, pp. 364-368, Nos. 54-97.]

Cases referred to :

- (1) *Russell v. Russell*, [1924] A.C. 687 ; Digest Supp.
- (2) *Goodright d. Stevens v. Moss* (1777), 2 Cowp. 591 ; 3 Digest 365, 58.
- (3) *The Poulett Peerage*, [1903] A.C. 395 ; 3, Digest 366, 76.

PETITION by a husband for a decree of nullity on the ground of incapacity. The parties went through a ceremony of marriage on Apr. 15, 1933, and separated in September of that year. On Aug. 5, 1935, the wife gave birth to a child of whom the husband denied paternity. The case was not defended. The case on the evidence was a clear one of

impotence *quoad hunc*; but as the fact of the birth of the child was a matter for the attention of the court at the hearing, the petitioner found himself in evidentiary difficulties in presenting the true position, by reason of the rule in *Russell v. Russell* (1) with regard to the giving of evidence of non-access by a spouse tending to bastardise living issue born in wedlock.

R. J. A. Temple for the petitioner.

LANGTON, J. : This is an undefended nullity case. It has had an unfortunate history. It came on for trial on Apr. 24 this year, but on that day the petitioner was not in court. It transpired that he had waited throughout the previous day, and I allowed his evidence to stand over rather than that the case be struck out. It is a suit brought under the Poor Persons' Rules, and Mr. Temple, who appeared for the petitioner, told me with perfect frankness that there was strong ground for believing that the respondent had given birth to a child. Mr. John Cook, managing clerk to the petitioner's solicitors, gave me evidence concerning the inquiries he had made. The medical inspector of the court who had examined the petitioner also gave evidence, and the case then stood over until Oct. 19. At this hearing a letter was produced, in the handwriting of the respondent, stating in the clearest and most emphatic terms that she was the mother of a child born at Southlands Hospital, Shoreham, Sussex, on Aug. 6, 1935, and giving the name of the father. A birth certificate confirming these facts was also before me. In the circumstances I cannot doubt that the respondent, Mrs. Beatrice May Farnham, did in fact give birth to a male child on Aug. 9, 1935.

The ceremony of marriage between the petitioner and the respondent took place on Apr. 15, 1933. In Sept., 1933, Mrs. Farnham left the petitioner, and although returning two days afterwards, left again and has not returned. If it be assumed that all the evidence before me is admissible in law, I find the material facts to be : That the marriage between George Frederick Farnham and Beatrice May Daniels celebrated in Edmonton on Apr. 15, 1933, has never been consummated; that it has not been consummated because the woman Beatrice Daniels is *frigida ad hunc* in regard to the petitioner, or in other words is incapable of performing the act of intercourse with this man; and that, nevertheless, she has given birth on Aug. 5, 1935, to a male child. It now falls to be considered whether any, and if so, how much, of the evidence adduced before me must be excluded by reason of the rule of law affirmed and enunciated in the case of *Russell v. Russell* (1). I have read and re-read the speeches of the five members of the House of Lords who addressed the House upon that case, and I conceive that, however much I might personally be swayed by the dissenting opinions, I am bound strictly and entirely by the opinions of the majority. The original expression

employed by LORD MANSFIELD, C.J., in *Goodright d. Stevens v. Moss* (2), at p. 592 was :

declarations of a father or mother cannot be admitted to bastardise the issue born after marriage.

Without the guidance of the majority opinions in the *Russell* case (1), I feel sure that for my own part I should have interpreted the expression here used as excluding only such declarations as were tendered with the object of bastardising, and not as excluding such as were tendered for some other object, the attainment of which would not have any actual legal effect upon the legitimacy of the child. But I cannot shut my eyes to such an expression as this from the EARL OF BIRKENHEAD, at p. 704 :

the rule as laid down by LORD MANSFIELD, and other great judges, is a general rule to be applied, in the full generality of its scope, to all cases which it is wide enough to cover ;

or, clearer still, VISCOUNT FINLAY, at p. 706 :

There is no ground for the suggestion that it is confined to cases in which it is sought to establish legitimacy or illegitimacy as a matter of status by proceedings in the nature of proceedings *in rem*. It applies in every case in which, for any purpose, it becomes necessary to determine the question whether a child born of the wife during the marriage is the child of the husband.

It is true that in later passages, notably at the bottom of p. 711 and the top of p. 712, he lays stress upon the point that the evidence is intentionally directed to the point of illegitimacy of the child :

The whole object of the evidence in the present case is to bastardise the child so as to prove the adultery. The respondent's argument on this point rests on the misapprehension of the meaning of the term "bastardise" employed by LORD MANSFIELD in *Goodright d. Stevens v. Moss* (2), to which I have adverted in commenting on that case. The term covers all cases in which the evidence is given to prove the illegitimacy of the wife's child born during the marriage.

Also, at p. 713, he says :

The rule does not exclude evidence by husband and wife of non-access universally ; what it does exclude is such evidence given to prove the illegitimacy of a child born during the marriage. It has never been held that its applicability is confined to "legitimacy cases"—it applies to every case in which legitimacy is in dispute.

And later on the same page :

The rule applies to all evidence by husband and wife of non-access in order to show that a child born of the wife after marriage is illegitimate. As the Master of the Rolls said, the evidence which the husband and wife may give is subject to all legal restrictions, and one of these is that they cannot be called to disprove intercourse so as to bastardise the child.

And again, at p. 716 :

In the present case, the charge of adultery rests solely upon the birth of a child ;

which is said to be bastardised by the husband's proof of non-access. It falls within the very terms of the rulings of LORD MANSFIELD and LORD ELLENBOROUGH. This evidence is given directly for the purpose of bastardising the child, and is the only evidence of the adultery.

As I will point out hereafter, these passages may suggest a line of distinction between the *Russell* case (1) and the present case, but in view of the earlier formal and explicit pronouncements, the broad line of distinction that the legitimacy of the child is not the primary issue in the case and is not affected in law by the result of the suit is not open to me here. Indeed, in dealing with an argument which had been adduced in respect of nullity suits, VISCOUNT FINLAY went even further at the bottom of p. 718, and used the following language :

We have been referred to the practice of admitting the evidence of the husband and wife in nullity suits, and in suits for cruelty as between husband and wife. Such suits have no relevance to the present question. In them there is no question of paternity, or of bastardising issue. It is immaterial with what object such evidence is given, but, unless there is a child, and the evidence is to show that that child is not the child of the husband, the rule never comes into play at all.

This passage gives much food for reflection in conjunction with the present case, and I will return to it later, but for the moment it is significant to note the phrase : " It is immaterial with what object such evidence is given." So far as I can trace it, this represents the high-water mark in width of statement to be found in any of their Lordships' opinions. LORD DUNEDIN argues the question with characteristic closeness on pp. 724-25 :

Now the two facts give rise, not to one, but to two logical and proper inferences ; they lead, as I have already said, to adultery, but they also lead to illegitimacy of the child that is born. Is there any real difference, then, between this case and the cases of settlement, as to legitimacy being the true issue ? In both cases it is the solution of the underlying question, whether the legal father is the real father that determines the issue. In the one case the result is to declare a certain status, in the other it is to affirm a certain fact. I confess that, so far as I am concerned, I see no real difference between the two cases, so that, according to my thinking, the *dictum* of LORD MANSFIELD applies in terms.

This is far less wide than VISCOUNT FINLAY, for he is arguing only for the inclusion of adultery cases within the literal terms of the rule laid down by LORD MANSFIELD, C.J. When I pass from the original *dictum* of LORD MANSFIELD, C.J., to the restatement of the rule by the EARL OF HALSBURY, L.C., in the *Poulett Peerage* case (3), at p. 399 :

My Lords, I can only say for my own part, as regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be inquired into in any court of law, it would be a gross perversion of that principle to say that, under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events, and to prove that he had not induced the woman whom he was afterwards to make his wife to be guilty of the sin of fornication,

I must confess that at first sight the ambit of the rule seems to be widened rather than narrowed. This seems to be the view of at least some of those who spoke in the House of Lords in the *Russell* case (1). If the purpose of the rule was to "protect the sanctity of married intercourse," to use the words of the EARL OF HALSBURY, L.C., himself, the rule must certainly be wide enough to cover evidence directed to other objects than the proof of illegitimacy, and no better example of such other objects could be given than a case of alleged adultery such as the *Russell* case (1). But if the two statements of LORD MANSFIELD, C.J., and the EARL OF HALSBURY, L.C., should be read together as being each a statement of the rule, in perhaps alternative language, as I understand to be the ruling and intention of the majority judgment in the *Russell* case (1), a new field of inquiry seems to open when one is called upon to decide whether the rule contained in these statements is applicable to a nullity case such as the present suit.

Let us first see how the matter stands so far as direct authority is concerned. It is, I believe, true that up to date there is no recorded instance of an application of what I will call for the sake of convenience "the *Russell* rule" to a nullity suit. In the nature of things it is hardly likely that opportunities for its application could often arise. Indeed, VISCOUNT FINLAY, as I have pointed out, says in terms at p. 718, that nullity suits :

have no relevance to the present question. In them there is no question of paternity, or of bastardising issue.

and LORD DUNEDIN with even greater emphasis at pp. 728 and 729 :

No proof of conduct or want of conduct which shows nullity . . . has the remotest reference to the point of legitimacy of issue.

Both the learned Lords were in fact sweeping away the argument that it was permissible at times to invade the sanctity of married intercourse by receiving evidence from the spouses, as for example in nullity suits, by the rejoinder that in such cases no question of bastardising issue could ever arise. From these statements it is fair at least to infer that whatever else may have been in the minds of the majority in the *Russell* case (1), at least the circumstances of the present suit were not present to them, and were indeed very far from their imagining. There is thus no direct authority upon this subject at all, and my task is strictly limited to determining whether the *Russell* rule should be read as applying not only to cases where the birth of an illegitimate child is relied on as proving adultery, but to the yet wider sphere of cases in which, although no reliance whatever is placed upon the fact of such a birth, and the fact is indeed a very awkward obstacle in the path of the petitioner, proof of non-access would nevertheless, as it were by accident, tend to bastardise a child born after the celebration of the marriage. If the original phrase

of LORD MANSFIELD, C.J., stood alone in this matter, the evidence of the petitioner in this suit would appear to me to be plainly excluded. It is a "declaration" which "bastardises issue born after marriage." But if one is to take with this phrase its interpretation by the EARL OF HALSBURY, L.C., in the *Poulett Peerage* case (3), the matter takes a different complexion. Whilst approving and restating the general doctrine, the EARL OF HALSBURY, L.C., is in fact citing it for the purpose of distinguishing the case under his consideration from the true limit of the rule. In the *Poulett Peerage* case (3), as in the present suit, the issue had been born after marriage, and the effect of the declaration in dispute was to bastardise such issue. Nevertheless, the declaration was admitted. The reason given by the EARL OF HALSBURY, L.C., for admitting the declaration seems to me to point to the proper ground of decision in the present case. He says at p. 399 :

It would be a gross perversion of that principle to say that, under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events, and to prove that he had not induced the woman whom he was afterwards to make his wife to be guilty of the sin of fornication.

But if an exception to the rule should be made in order to allow a man to assert his own virtue, is there not a far stronger case for an exception when the wife has already confessed her adultery, and the husband is claiming only the most elementary of his rights, namely, to prove that his marriage had never been a marriage and that, to use the EARL OF HALSBURY'S phrase, there has never been any "married intercourse" at all? For be it observed that in the present instance there is no evidence properly so-called, no legal history, as it were, of a child in the case, until the mother's confession of adultery and ascription of the paternity of the child to another man is admitted. This confession forms no part of the petitioner's case in the present suit. It is before the court only because the court requires and is entitled to expect the utmost frankness from those who come to seek its assistance. If the petitioner had happened to be ignorant of the fact that his wife, who had been long separated from him, had borne a child, he could not have brought evidence of this, to him, inconvenient fact. His case would have proceeded along normal lines without any difficulty as to admissibility of evidence. Indeed, it even falls to be considered whether his evidence of non-access could have been shut out if it had been offered in order of time before the court was made aware of the existence of a child. In any case one is bound to ask oneself whether the admissibility of evidence can possibly be made to depend upon such accidents of chance—or perhaps the question would be better stated as whether a man's rights in law can ever be taken from him by a mishap of this character. Stated quite plainly and fairly, the result of applying the *Russell* rule in the present instance would be that a man would be prevented from

proving that his marriage was never consummated by the fact that his wife had borne an illegitimate child. If the robust mind of the EARL OF HALSBURY, L.C., rejected with just indignation the notion that any rule of evidence, however wise in itself, could prevent a man from proving his own virtue, it certainly seems to me that it must be right to recoil from the far greater injustice of taking from the petitioner in the present case his elementary right of proving that his wife was never able to consummate the marriage with him, solely because she has given birth to an illegitimate child. If exceptions to the *Russell* rule are to be admitted, this case would surely appear to be *a fortiori* to the exception allowed in the *Poulett Peerage* case (3).

Returning now to the majority views in the *Russell* case (1), I cannot think that a decision in favour of the petitioner here does any violence to these opinions. As I have pointed out already in considering these views in detail, VISCOUNT FINLAY, although using language of a wide character at a later stage, stresses at p. 716 the fact that the evidence, although not perhaps primarily concerned with the legitimacy of the child, is given,

directly for the purpose of bastardising the child, and is the only evidence of adultery.

Similarly LORD DUNEDIN, at p. 725 in the passage I have quoted above, puts as the basis of his reasoning that :

it is the solution of the underlying question, whether the legal father is the real father that determines the issue.

There is no such underlying question here. The suit is a suit for nullity, not for divorce. The issue of adultery or no adultery is not an issue in the case. It is true that if the first issue in the suit, namely, non-consummation, be established, it will follow logically that in the circumstances as we now know them adultery must have been committed, and bastardisation of the child born to the mother also follows. But not only is this not the fault of the petitioner, which is perhaps *nihil ad rem*, but it is not the natural or necessary result of his suit for nullity, nor do these consequences ensue from any part of his evidence which is necessary to the success of his suit. To my mind they are extraneous to his suit, and are regrettable but irrelevant results which accidentally happen to follow from the decision of an issue which is in its nature quite independent thereof. Furthermore, it is clear that the *Russell* rule was arrived at with a full consciousness of the practice in nullity suits, and with a plain belief on the part of those who declared it that they were in no way departing from that practice or attempting to change or minimise the rights of parties to such suits. I have not arrived easily at the conclusion which I have reached, and it is only upon very detailed examination both of the majority opinions and of the foundations upon

which they are based that I have come to this decision. If I had reached an opposite conclusion I have little doubt that the petitioner here could have obtained a divorce without much difficulty. Neither have I been tempted by the merits of the petitioner to strain the law in his favour. But having reached the view which I have expressed, I cannot think that it would be right to apply the *Russell* rule to this case, and thus put upon the House of Lords the responsibility for a seeming injustice which they certainly never contemplated, and which they would assuredly have desired to avoid.

Accordingly the present suit succeeds and the petitioner will be granted a decree *nisi*.

Solicitors : *Durrant Cooper & Hambling* (for the petitioner).

[*Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.*]

PELSTER v. PELSTER AND SAMUEL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
November 10, 1936.]

Divorce—Costs—Taxation—Witnesses—Irrelevant inquiry—Cross-examination as to adultery—Counsel's fees—Registrar's discretion—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.

In the taxation of costs of a divorce suit in which a husband petitioner was granted a decree, the registrar allowed, *inter alia*, certain items in respect of (i) witnesses who were intended to prove that the co-respondent to the suit was the same person who had been co-respondent in an entirely disconnected suit some ten years before, and (ii) fees for leading counsel and junior counsel amounting to three figures. The suit had been defended and serious countercharges made against the husband, but at the hearing the case was no longer contested :—

HELD : (i) a witness can only be cross-examined on the subject of adultery with regard to adultery which he has chosen to deny. Unless, therefore, the co-respondent had voluntarily given evidence in disproof of the alleged earlier adultery, he could not have been cross-examined with regard to that adultery, and the items ought not to have been allowed.

(ii) the test, with regard to the counsel's fees, was not the time occupied at the hearing, but the time which might have been occupied and the gravity of the issues which would have been contested if the wife and co-respondent had contested the suit. In the circumstances of the case the registrar's discretion ought not to be interfered with.

[EDITORIAL NOTE.] The principle is, of course, that the registrar's discretion in a matter of taxation of costs will not be interfered with unless he has proceeded upon a wrong principle in allowing the costs. This case illustrates this principle very clearly and, apart from this, is of importance and interest in the particular matters dealt with.

AS TO TAXATION OF COSTS IN DIVORCE CASES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 811-814, paras. 1295-1299; AND FOR CASES, see DIGEST, Vol. 27, pp. 538-540, Nos. 5859-5896.]

Cases referred to :

- (1) *Re Catlin* (1854), 18 Beav. 508 ; 42 Digest 216, 2423.
- (2) *In the Estate of Ogilvie, Ogilvie v. Massey*, [1910] P. 243 ; 42 Digest 216, 2430.
- (3) *Slingsby v. A.-G.*, [1918] P. 236 ; 42 Digest 150, 1483.

SUMMONS adjourned into court.

This was an appeal on behalf of a co-respondent from a registrar's taxation of costs. Down to the hearing the suit in which a husband was petitioning for divorce had been defended, but at the trial it was not contested.

L. Lewis for the co-respondent.

Walter Frampton for the petitioner.

SIR BOYD MERRIMAN, P. : This is an objection to the taxing of a bill of costs by the taxing registrar. It raises two distinct points, the first relating to a group of items connected with the issuing of *subpœnas* to, and the expenses of, certain witnesses, and the other relating to counsel's fees.

Nothing is more clearly settled with regard to the taxation of costs than that the taxing master is supreme in all questions of amount, and unless some question of principle is involved it is not for a judge to interfere with his discretion. As long ago as 1854, in *Re Catlin* (1), SIR JOHN ROMILLY, M.R., said, at p. 509 :

It is admitted, on both sides, that this court can only be called upon to determine on the propriety of allowing or disallowing items which involve some principle, and not where a question only of *quantum* arises.

In *In the Estate of Ogilvie, Ogilvie v. Massey* (2), at p. 244, COZENS-HARDY, M.R., quoting that sentence with approval, added :

I should be very sorry if any doubt were cast on that, for I can scarcely imagine a tribunal more unfit than a judge of the High Court to deal with questions of *quantum* on the taxation of costs.

I accordingly re-echo those words, but with the qualification which was introduced by another Master of the Rolls, then SWINFEN EADY, L.J., when in the *Slingsby* case (3), he said this at p. 239 :

The decision of the taxing master is not absolutely final even on a question of *quantum*. For instance, a large sum might be allowed, but from the very fact of the amount the court might see that the master, in arriving at so large a sum, must have acted on a wrong principle, or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the court, but exceptional cases do occasionally arise.

Now, I propose to be guided in my decision in this case by the opinions thus expressed by three separate Masters of the Rolls. As regards the items relating to the witnesses, in my opinion a question of principle does

arise. The witnesses, the cost of obtaining whose evidence was sought to be charged on behalf of the husband, the petitioner, were witnesses who were intended to prove that the co-respondent to the suit was the same person who had been co-respondent to another entirely disconnected suit, one involving no connection with the parties or the circumstances of the suit under discussion, and which, if I remember rightly—I hope I shall be corrected on a point of detail if I am wrong—had been tried in this court some 10 years before. In the course of discussion, learned counsel for the husband made it quite clear that the object was this : it was expected that the co-respondent might conceivably deny that he had been that particular party involved in that particular suit, and it was therefore desired to confront him with witnesses who could say he was the party concerned. Upon discussion, I think everybody agreed, and I am certainly going to hold, that this was based upon a misconception. I can scarcely imagine any case in which counsel appearing for the co-respondent would ask him whether he had been guilty or not guilty of adultery entirely unconnected with the suit in question. It is perfectly plain that until he had been asked that question by his own counsel nobody else could possibly have asked him any question about it at all, and, speaking for myself, even if his own counsel had sought to ask him that question, I should have given the very strongest possible warning to him that he was under no sort of obligation to answer it, and I should have pointed out to his own counsel that the relevance of the question, even if it was asked, seemed to me to be questionable. But it appears to have been thought that if once the co-respondent gave evidence in denial of the adultery with which he was charged in the present suit, he could then be cross-examined about any adultery of which it was possible to bring evidence during his life. Now, I think that involves a complete misconception of the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 198. I have always held, and shall continue to hold until somebody says I am wrong, that the meaning of that section is this : that if, after a proper warning, a witness voluntarily gives evidence in disproof of any particular adultery, he may then be cross-examined about that adultery; but because he gives evidence in disproof of the adultery which is charged against him, and which is the matter in issue, it does not follow, and indeed in my opinion it is directly contrary to the section, that he may then be cross-examined about other adultery not charged in the proceedings. The question turns on the wording of the section. It will probably be well if I read the section, or the material parts of it :

The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show

that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

Now, the only possible question turns upon the meaning of the words "the alleged adultery." It is, of course, conceivable that they may mean the adultery alleged in the petition, or they may mean the adultery alleged in the question. To my mind there cannot be any doubt which they mean. The section is directed to the protection of a witness, whether a party or not. It is quite clear that a witness who is unconnected with any part of the history which is being dealt with in the suit cannot, in all human probability, be guilty of the alleged adultery if the alleged adultery means the adultery alleged in the petition. In my opinion, it is quite clear what the section is directed to, viz., to prevent any cross-examination on the subject of adultery, except with regard to adultery which the witness has chosen to deny. It is not necessary to enter into any refinements with regard to the parties in the suit, as to whether he offers himself or herself to cross-examination, or the extent to which he offers himself or herself to cross-examination, by a limited denial of the class of adultery which is charged in the petition. It is not necessary to examine that further; that can be dealt with in the circumstances of each case. It is quite clear to my mind that a party who is in court to defend himself from a charge of adultery with A, and who deals with that issue in his evidence, which is the only issue before the court, cannot be by his denial cross-examined to show that he has been guilty of adultery on some other and entirely disconnected occasion with B. That being so, it is quite plain that these expenses, these items, were incurred under a misconception, and I think that with regard to them a question of principle does arise, though the amount involved is small. I am saying nothing whatever about the proper attitude to be taken on a taxation as between solicitor and client. I must not be taken to be saying that they are solicitor and client items, but I am clear that they are not party and party items, and, that being so, those items must be disallowed.

I now come to what, from the point of view of figures, is a much more important item. Leading counsel and junior counsel were briefed, and their fees, the precise amount of which I need not mention, but which in the case of the leader ran into three figures, were marked and allowed. It is purely a question of amount, nothing else, no question of principle involved, with one possible exception, which I will mention in a minute. The case was one in which there was a great deal of difficulty in bringing the charge home to the parties. The wife and the co-respondent were extremely elusive, and a great deal of evidence would have been necessary in order to bring the matter home to them if it had not been that in open court, when the case was called on, they both intimated they were no longer prepared to contest the matter. But that is not all; the wife made serious counter-charges against her husband, which he

had to be prepared to deal with, and it is quite clear that they were of so serious a nature that, had they been persisted in, and had they succeeded, he might very easily have been deprived of his right to a decree, even though he had succeeded on the other issue. In those circumstances, I am quite satisfied it was a proper case for the briefing of two counsel, counsel of experience, and nothing but the fact that the parties eventually ran away from the issues prevented the case being one hotly contested and of considerable length. In fact, I think it only took some 3 or 4 hours, but that is not the test. The test is what is the time which might have been occupied and the gravity of the issues which would have been contested if the wife and co-respondent had not run away from the issues they had raised. In those circumstances, it is eminently a case in which the principles which I have indicated apply, and I do not propose to interfere with the taxing registrar's discretion, based upon a full consideration of all the materials which were before him.

This I must add : that in so far, if at all, as the instructions for brief, or the fees to counsel—because the two items hang together—I did not specifically mention the instructions to brief before) in so far as those items were, in the taxing registrar's judgment, increased by the introduction of the past history of the co-respondent, some reduction should be effected in those two items. But it is for the taxing registrar, and for him alone, to say whether in any real sense of the word there was any increase in the amount of either of those items owing to the introduction of this particular element into the question. That will be a matter entirely for him, and if he thinks that the items were swollen to any extent by that particular matter, then I think a question of principle would arise, and he ought to give effect to it by whatever he thinks is the appropriate reduction. If it is necessary, I shall send the matter back to the taxing registrar for that particular point to be dealt with.

Solicitors : *Goodwins* (for the co-respondent) ; *S. Myers & Son* (for the petitioner).

Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.

LYONS v. COLLINS (INSPECTOR OF TAXES).

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), November 24, 25, 26, 1936.]

Income Tax—Schedule A—Valuation by person of skill—Rack rent—Examination of person of skill—Income Tax Act, 1918 (c. 40), s. 138—Finance Act, 1923 (c. 14), s. 26.

(i) In Feb., 1928, alterations were made to certain leasehold premises which made such a change of the premises that it became necessary to re-ascertain the annual value. Valuation was made in accordance with the Income Tax Act, 1918, s. 138, by a "person of skill," his estimates of the annual value being below the rent reserved under the lease, which the commissioners held to be a rack rent:—

HELD: the commissioners were bound to accept the valuation put forward by the "person of skill," unless it could be impeached as bad in law on the face of it.

(ii) The estimate of the person of skill was higher for the years 1928 to 1932 than for the year 1927/1928. It was contended that in so far as the person of skill had taken account of the alteration in the nature of the property between Apr. 5, 1927, and Apr. 5, 1928, he had no power thereafter to vary the annual value at any rate until Apr., 1931:—

HELD: the person of skill had power under the Finance Act, 1923, s. 26, to vary the annual value as he had done.

Semble: the only matter which can be required of the person of skill to be delivered upon oath under the Income Tax Act, 1918, s. 138 (1), is the verification of his valuation and not a justification of it, nor a clarification of the means whereby he arrived at his conclusion. When a person of skill has completed his valuation he is *functus officio*, and the commissioners are only entitled to ask him to explain some ambiguity in his statement.

[EDITORIAL NOTE.] The Income Tax Act, 1918, s. 138, provides for the valuation of property for the purposes of property tax—i.e., income tax Sched. A—by a "person of skill." If this is done, the valuation of the "person of skill" is final unless it can be shown to be wrong in law on the face of it. The position under the section is here examined in detail. The judgments also consider how far the valuation of property is fixed by the provision in the Finance Act that the valuation for one year shall be adopted as the valuation for the next. By this procedure the valuation has now been to some extent fixed for quinquennial periods under Finance Act, 1930, s. 27, subject to the provisions of Finance Act, 1923, s. 26, the effect of the latter being here considered.

AS TO VALUATION BY A PERSON OF SKILL, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 348, 349, para. 706; FOR THE INCOME TAX ACT, 1918, s. 138, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 496; and FOR THE FINANCE ACT, 1923, s. 26, see *ibid.*, pp. 652, 653.]

Cases referred to:

- (1) *Stewart v. Lyons* (1934), 19 Tax Cas. 79; Digest Supp.
- (2) *R. v. London County JJ.* (1889), 24 Q.B.D. 341; 30 Digest 41, 323.
- (3) *Williams v. Sanders*, [1927] 2 K.B. 498; 11 Tax Cas. 673; Digest Supp.
- (4) *Re Howes, Ex p. Hughes*, [1892] 2 Q.B. 628; 4 Digest 96, 871.
- (5) *Turner v. Carlton*, [1909] 1 K.B. 932; 5 Tax Cas. 395; 28 Digest 7, 25.

APPEAL from a judgment of LAWRENCE, J., delivered on May 11, 1936 (reported in [1936] 2 All E.R. 292), allowing an appeal by the

owner of business premises against his assessment to income tax under Sched. A.

Mr. S. H. Lyons, the owner, demised business premises to Alexandre, Ltd., for 5 years from Dec. 1, 1923, at a yearly rent of £1,250. From Feb. 1, 1928, he demised them to Swears & Wells, Ltd., for £2,000 a year. These lessees by consent of the lessor sub-demised part of the premises to Etam, Ltd., for £750 a year. It was common ground that certain alterations made such a change in the property that it was a different property from what it had been before; that it was therefore necessary to ascertain the annual value of the property as altered without considering the annual value before the alteration; and that the premises constituted a building assessable and chargeable as one entire house and tenement under the Income Tax Act, 1918, Sched. A., No. VII, r. 8 (c). Alexandre, Ltd., did not supply any books, lists of customers, or introductions to customers, nor did Swears & Wells, Ltd., take over any of their managerial staff, but they retained the name of Alexandre et Cie, which appeared on the building on the date of the demise and of the division. Mr. Lyons was the principal shareholder and governing director of Alexandre, Ltd. The premises occupied by Swears & Wells, Ltd., were rated at £885 gross and £734 rateable, and those occupied by Etam, Ltd., were rated at £334 gross and £275 rateable, making a total gross annual value of £1,219, and a total net value of £1,009, and were assessed under Sched. A for the years 1927 to 1931 at £2,500, and for 1931/32 at £2,000 net. Mr. Lyons appealed against these assessments.

At the first meeting of the general commissioners held on Aug. 30, 1931, Mr. Lyons required the commissioners to direct him to cause a valuation to be made by a person of skill under the Income Tax Act, 1918, s. 138. They thereupon named a valuer, who reported on Oct. 15 that the annual value for the 5 years from Apr. 5, 1925, to Apr. 5, 1932, had been £1,200, £1,400, £1,400, £1,400 and £1,330. On examination he deposed on oath that this valuation was true and accurate to the best of his knowledge and belief, and had been made on the basis of superficial areas and rates per square yard which he specified. He also deposed that he had not known the exact annual rent payable by each occupier, but if he had known it he would not have altered his opinion. He had heard and understood that the rent payable was in the region of £2,000 per year. He also stated that although he had read through the income tax provisions relating to the ascertaining of the annual value under the Income Tax Act, Sched. A., he considered that the Income Tax Act, 1918, s. 138, set this aside and provided for a completely independent valuation. The commissioners decided that the annual valuation must be determined in accordance with Mr. Hollis's valuation, and reduced the income tax accordingly.

The inspector of taxes required a case to be stated, and this appeal was heard by FINLAY, J., and dismissed by him on July 13, 1934. On appeal by the inspector of taxes, the Court of Appeal on Nov. 27, 1934 (*Stewart v. Lyons* (1)), reversed the decision of the learned judge, set aside the determination of the commissioners, and ordered that the case stated be remitted to them for them to ascertain the annual value strictly in accordance with the rules of the Income Tax Act, 1918, Sched. A., and the judgment of the court. On Feb. 22, 1935, Mr. Lyons required the commissioners to direct him to cause a valuation to be made by a person of skill, and they accordingly named Mr. Arthur Mosley, whose report they considered on May 9. This valuer estimated the annual values from Apr. 5, 1927, to Apr. 5, 1932, as £1,290, £1,365, £1,365, £1,365, and £1,365. At this meeting Mr. Lyons by his solicitor addressed the commissioners and contended on a preliminary point that it was not competent for the commissioners or either party to examine the person of skill, nor was it necessary, inasmuch as the annual value must be determined in accordance with that valuation. The respondent contended on the contrary, that the person of skill should be examined on the principles he had adopted in arriving at these valuations, in order to ascertain, *inter alia*, (a) that he had strictly followed the provisions of the Income Tax Acts relating to the ascertainment of annual value and (b) what adjustments, if any, the commissioners ought to make in determining the annual value in accordance with his valuation under sect. 138. No questions were put to the person of skill by the commissioners or either party, and the commissioners did not require the person of skill to verify his valuation on oath. They came to the conclusion that the rent of £2,000 reserved under the lease dated Feb. 1, 1928, was a rack rent and that the rules of the Income Tax Act, 1918, Sched. A, required the annual value to be based on the rack rent, and they therefore reduced the Sched. A assessments to £2,000 for each of the 5 years. Mr. Lyons required a case to be stated, and the commissioners did so as follows :

Whether the commissioners were bound to accept the valuation put forward by the person of skill in view of the fact that his estimates of annual value were below the rent reserved under the lease dated Feb. 1, 1928, which they held to be a rack rent.

LAWRENCE, J., who heard the appeal on May 11, 1936, held that it was not open to the commissioners to review the valuation of the person of skill unless fraud or invalidity on the face of the valuation were shown.

The owner appealed.

The Solicitor-General (Sir Terence O'Connor, K.C.), and *Reginald P. Hills* for the appellant.

A. M. Latter, K.C., and *Cyril King* for the respondent.

The Solicitor-General : (i) There is an error on the face of the report

of the valuer, in that he has attached a different value to the premises for the year 1927/28 from that which he has attached to them for the year 1928/29 and the succeeding years ; this is not in accordance with the Finance Act, 1928, s. 15 (4) ; (ii) the valuer's report disregards the rent reserved by the lease ; (iii) it disregards the subdivision of the premises ; (iv) the valuer did not make it clear whether he had aggregated the rent of the two tenements ; (v) sect. 138 does not bind the commissioners to adopt the valuation of the valuer, who ought to be treated merely as a witness.

Where new premises arise during the currency of a year, the tax and not the annual value is apportioned. The annual value of these premises would be the old value up to the alteration, and the new value thereafter. The change, if any, would be in the tax chargeable. The valuer has to find the annual value, and this is not different in each of the years succeeding that in which the first valuation was made. He merely has to comply with sect. 15 (4). Here he has not done so, and his valuation is bad on the face of it. There is nothing in the present case to show that the valuer has borne in mind the principle that he must value each tenement separately and add the values together : see *Williams v. Sanders* (3). Sect. 138 contemplates in the first instance an appeal against an assessment if any dispute arises as to the annual value—a term of statutory importance.

By subsect. (1) three steps must be taken : a valuation, a verification, and an assessment—a final determination. The commissioners have not adopted the valuation. The annual value is determined, not by the valuation of the person of skill, but in accordance with his valuation : *Stewart v. Lyons* (1). His valuation is one of the ingredients in the ultimate determination at which the commissioners arrive, perhaps the chief ingredient, but it is not in itself conclusive or binding on the commissioners. The person of skill is in the position of a witness. His position is analogous to that of the court expert under R.S.C., Ord. 37 A.

SLESSER, L.J. : In *Re Howes, Ex p. Hughes* (4) and in other authorities the phrase “ in accordance with ” is given a somewhat severe construction. To accord means to agree.

The Solicitor-General : It is not in accordance with the structure of the whole Sched. A machinery that the commissioners must agree with the valuer. They can deal with an ineffective valuation as they think fit ; they may apply their own judgment and need not state in their case that they have ignored the valuation.

GREENE, L.J. : Cannot the valuation, then, be further discounted by calling other witnesses ?

The Solicitor-General : This procedure is similar to arbitration procedure. The subject has the right, where there is a dispute, to call on them to nominate a person of skill, and the commissioners ought to have

the right to test what the person of skill puts forward, and require him to show the footing upon which he carried out his duties.

Hills, following for the appellant: The question whether a lease has commenced within 7 years may be a highly intricate question of law. The legislature did not intend to place the skilled person in a position where his views on law overrode those of the commissioners or of a court of first instance. It intended that the commissioners should themselves determine the annual value after satisfying themselves that the valuer had followed the principles laid down by the statutes and rules. Sect. 138 does not prevent or absolve them from satisfying themselves that his valuation is a proper one and in accordance with the Act. Sect. 138 (3) provides that the costs and charges of the valuation shall abide the final determination of the commissioners. If they were merely bound to accept the valuation, there would be no need for those words. Subsect. (2) is intended to save the commissioners from the necessity of waiting indefinitely if the appellant decides not to proceed with his appeal; it does not add to their powers. Verification means showing that the valuation is correct: verifying the facts stated in the valuation.

Latter, K.C.: The valuation is good on the face of it. The commissioners accepted the valuation but interpreted the words "in accordance with" as meaning "having regard to," and then determined the value for themselves. If they were wrong, that disposes of the case. The section only operates if the appellant does not do his part and cause a valuation to be made. If he requires the commissioners to nominate a person of skill, the matter must proceed according to the valuation of the person of skill, until a valuation has been produced which is a valuation in accordance with the Act. The appellants might proceed by *mandamus* or cross-appeal to compel the commissioners to give them a valuation in accordance with the Act—e.g., by appointing another skilled person—but the commissioners have no power to make a valuation themselves. Their powers under sect. 138 (2) have never arisen and therefore the figure at which they have arrived cannot be supported. The fact that the estimate of the person of skill was below the least rent which the commissioners held to be a rack rent does not justify them in departing from his valuation. The object of the section would be completely defeated if the person of skill had to submit to an examination in recent cases in income tax law where the final examiners were the House of Lords. For reasons of economy, he is constituted the judge of fact. The person of skill in this case was right in putting before the commissioners a figure for each year separately. He is not bound to take the approved figures of any previous year, but can take each year by itself and value it without regard to the provision of the Finance Act that in the first instance the figures of the preceding year are to

be taken. The matter is left year by year entirely at large. [Counsel referred to *Turner v. Carlton* (5).]

Hills : The continuation clause applicable to the second year lays down unequivocally that the annual value adopted for the first year shall be adopted for the second year.

SLESSER, L.J. : It is amended by the Finance Act, 1923, s. 26 (1).

Hills : This is not a case where the annual value has been adopted from the previous year and the owner is appealing. It is a case where the valuer has fixed a different value as between the two first years. The value for the first year having been determined by the valuer property, as he thought, must control the value for the next three years. He must assess that value in accordance with this rule. The valuer must consider, not the law applicable to rating, but the law of income tax. There may be a need for legislation to give the commissioners power to review the findings of the valuer, but they do not at present possess that power.

SLESSER, L.J. : On Aug. 13, 1931, Mr. Lyons, the owner of premises known as 39 and 40, Commercial Street, Leeds, appealed against assessments under the Income Tax Act, 1918, Sched. A, for the years 1927 to 1931 of £2,500 net and for 1931/32 of £2,000 net. By a lease dated Feb. 1, 1928, the respondent demised the premises to Swears and Wells, Ltd., and, on that date, the lessees sub-demised a part of the ground floor and the basement. The rent of the respondent's demise was £2,000 per year and of the sub-lease to Etam, Ltd., £750 per year. Before Feb. 1, 1928, from Dec. 1, 1923, the premises had been demised by the respondent on a yearly tenancy to another company, Alexandre, Ltd., for £1,250 per annum. Between Feb. 1, 1928, and Mar., 1928, with the permission of the respondent, the ground floor had been divided by a partition shutting off internal communication between the portion occupied by Etam, Ltd., and the remainder of the premises. From 1923 to 1928, inclusive, the net assessment had been £1,107, but it was not disputed that the alterations which made the premises two separate portions made such a change of property that it was a different property from that which existed previously, and, consequently, it became necessary to re-ascertain the annual value ; the premises being, nevertheless, a building assessable as one entire house under Sched. A, No. VII, r. 8 (c).

The respondent availed himself of the Income Tax Act, 1918, s. 138, and required the commissioners, in accordance with the provisions of subsect. (1), to direct him to cause a valuation to be made by a person of skill, and a Mr. Hollis was duly appointed by the commissioners. On Oct. 15, 1931, the commissioners met to receive Mr. Hollis's valuation, which was as follows : Apr. 5, 1927/28, £1,200 ; Apr. 5, 1928/29, £1,400 ; Apr. 5, 1929/30, £1,400 ; Apr. 5, 1930/31, £1,400 ; and Apr. 5, 1931/32,

£1,330. Mr. Hollis stated that, although he had read through the income tax provisions relating to ascertainment of annual value, he considered that the Income Tax Act, 1918, s. 138, set these aside and provided for a completely independent valuation. The commissioners, having examined on oath Mr. Hollis, came to the conclusion that under sect. 138 the annual value must be determined in accordance with Mr. Hollis's valuation, and they reduced the assessments. From this decision the Crown appealed to FINLAY, J., who upheld the commissioners, but in this court on further appeal on Nov. 27, 1934, the appeal was allowed in favour of the Crown on the ground that, as I read the judgments of the majority, the admission of Mr. Hollis that he had considered that sect. 138 set aside the provisions relating to the ascertainment of the annual value, so vitiated his conclusions that there really had been in effect no legal valuation by him at all binding upon the commissioners. Thus, ROMER, L.J., in *Stewart v. Lyons* (1), at p. 92, says :

Valuation must, in my opinion, mean the ascertainment of the annual value in accordance with the rules laid down in the rules to the schedule.

And, at p. 90, I say that I am of opinion that Mr. Hollis, in the circumstances, never made a valuation at all. LORD HANWORTH, M.R., at p. 88, appears to have been in favour of allowing the appeal, upon the ground that, FINLAY, J., having come to the conclusion that Mr. Hollis's valuation was conclusive, he did not agree, and thought that the valuation which is made by the person of skill will contain data which may enable the commissioners upon their own responsibility to determine what the annual value is to be. On the case being remitted, on Feb. 22, 1935, Mr. Lyons again required the commissioners to direct him to cause a valuation to be made by a person of skill, and the commissioners accordingly named a Mr. Arthur Mosley to make a valuation. His valuation, called by him an estimate, differed from that of Mr. Hollis, and was as follows : Apr. 5, 1927/28, £1,290 ; and 1928/32, £1,365 annually. At this hearing, the appellant, by his solicitor, took the preliminary point that it was not competent for the commissioners, appellant, or respondent to examine Mr. Mosley ; the respondents contending that Mr. Mosley should be examined as to the principles adopted in arriving at the valuation in order to ascertain (a) that he had strictly followed the provisions of the Income Tax Acts relating to annual value, and (b) what adjustments, if any, the commissioners ought to make in determining the annual value in accordance with the valuation. In the result, we are told, no questions were put to Mr. Mosley by the commissioners nor on behalf of either party to the appeal, and the commissioners did not require the valuation to be verified by Mr. Mosley on oath. The commissioners stated that they then considered the estimates of the annual value put in by Mr. Mosley, the rent reserved under the lease of Feb. 1, 1928, all the surrounding circumstances, and their local

knowledge of the property, and, being of opinion that the rent reserved of £2,000 was a rack rent, and that the rules of Sched. A of the Income Tax Act required the annual value to be based on the rack rent, reduced the original assessment to £2,000 from Apr., 1927/32, thereby increasing the estimates of annual value given by Mr. Mosley. The Crown do not appeal from this decision, but Mr. Lyons does, asking the court to say that the assessment should be the values put forward by Mr. Mosley. LAWRENCE, J., has come to the conclusion that the contention of Mr. Lyons is correct, and I am of the same opinion. In my view, once it is established that the person of skill has given a valuation which cannot be impeached as bad in law on the face of it, that is to say, a valid valuation, the words of sect. 138 (1) are decisive that the annual value shall be determined in accordance with that valuation. I find myself unable to agree with the opinion expressed by LORD HANWORTH, M.R., in *Stewart v. Lyons* (1), that the annual value is one which is to be determined by the commissioners upon their own responsibility. I do not think that the majority of the court in that case founded themselves upon any such consideration. ROMER, L.J., at p. 92, says :

If the valuer observes the rules, and, applying the figures in accordance with the rules, arrives at a certain figure as being the annual value, I doubt whether the commissioners would be justified in going behind that valuation—

and I give as the only reason why the commissioners were not bound by the purported valuation the reason that there never was any valuation within the meaning of the section at all. Now that the question has come up for determination, I must say that I entertain no doubt about it. To determine the value in accordance with the valuation of the person of skill is to be contrasted with the case where, either because the commissioners do not think it necessary, or are not required by the appellant effectively to cause a valuation to be made, they have to determine the annual value to the best of their judgment: subsect. (2). In either case, either through the person of skill or through their own judgment, as the case requires, respectively, the annual value is determined, and thereafter there remains the final determination of the commissioners as to the assessment, which they must deal with as provided by sect. 137 (4), (5). This view is fortified by a consideration of the provisions which were consolidated in sect. 138 from the Income Tax Act, 1842, s. 81, as amended by sect. 47 of the Act of 1853. In the earlier section, it was provided that it should be lawful for the commissioners to make an assessment according to the valuation of the person of skill, but in sect. 47 of the 1853 Act this language is significantly varied, and reads :

Upon such valuation being verified on the oath of the person making the same, the assessment shall be made according thereto—

a mandatory provision, which would have been otiose if the discretion

contended for by the Crown in such case had still been intended to continue. The only essential difference in the present section is that the verification on oath is now at the option of the commissioners, but the requirement that the annual value shall be made in accordance with the valuation is not otherwise in meaning and intendment altered, and the words: "the assessment shall be made according thereto" in sect. 47 of the 1853 Act, though slightly varied, in effect stand. At most, it may be said, as was the view of the court in *R. v. London County Justices* (2), that a phrase, as "in accordance with the plans", may mean "'in substantial accordance' with the plans": per MATHEW, J., at p. 345. But this points only to some trivial variation. In the present case I find it quite impossible to hold that the substitution of entirely different figures for those given by the valuer, and a corresponding assessment, can be said to be an annual value determined in accordance with his valuation.

The only other matter which is strictly in issue in this case is the validity of the valuation itself. It was contended that in so far as Mr. Mosley had taken account of the alteration in the nature of the property between Apr. 5, 1927, and Apr. 5, 1928, he had no power thereafter to vary the annual value at any rate until Apr., 1931, because the Finance Act of each year up to, but excluding, 1932, provided that:

the annual value of any property which has been adopted for the purpose of income tax under Scheds. A and B for the year 1927/28 shall be taken as the annual value of that property for the same purpose for the year 1928/29—

see Finance Act, 1928, s. 15 (4)—and so thereafter until the Finance Act, 1932, and that therefore his increase in 1928 of the valuation from £1,290 to £1,365 was bad on the face of it, and bad for the later years, at any rate until Apr. 5, 1931. The answer, however, is to be found in sect. 26 of the Finance Act, 1923, which, dealing with appeals against Sched. A, in terms gives to the general commissioners power to hear and determine the appeal, and confirm or amend the assessment as if the matter were one not determined by the previous year's assessment, and such a provision must of necessity extend to the valuation upon which the assessment is to be made. Doubtless, in this case, in giving a lower annual value for 1927/28, Mr. Mosley had regard to the fact that the alterations were made between February and March in the year 1928, and the section to which I have last referred enabled him to give expression to this fact in his valuation.

These findings determine the case in favour of the respondent, but a question was raised during the hearing as to the powers of the commissioners or the parties to question the person of skill on the principles upon which he proceeded in his valuation. In the present case, it is not possible to say whether the reason why no questions were asked was because the commissioners thought that they had no power to ask them,

or whether because they did not think that the answers would have assisted their determination; but since the matter has been canvassed I would express the view that the only matter which can be required of the person of skill to be delivered upon oath is the verification of his valuation, which is not, as has been suggested, a justification of it, or a clarification of the means whereby he arrived at his conclusion, and that, as regards other powers of questioning, whether by the commissioners or the parties, I can find nothing in the section whether they are to be by oath or otherwise. I think that, when the person of skill has completed his valuation, he is *functus officio*, and that the most that the commissioners are entitled to do is to ask him to explain some ambiguity in his statement, for which purpose the valuation may in appropriate cases be remitted to him, but otherwise, when the valuation is, on the face of it, a good one, and clear as to the matters submitted for valuation, the commissioners must accept it and determine their final assessment accordingly.

ROMER, L.J. : I agree, and have very little to add. It will be noticed that the provisions of the Income Tax Act, 1918, s. 138, only come into play when there is a dispute on an appeal against an assessment under Sched. A or Sched. B as to the annual value of any lands, tenements, hereditaments or heritages, and that where that is the case the general commissioners may, if they consider it necessary, and are obliged to, if required by the appellant, direct the appellant to cause a valuation to be made by a person of skill named by them. The valuation that is to be made by the person of skill plainly is not a valuation of the lands, tenements or hereditaments. That is made plain, if it is not already plain by the words of subsect. (1), by subsect. (3) which provides :

the costs and charges of any such valuation shall abide the final determination of the commissioners, and, if the value so found exceeds the value alleged by the appellant, the commissioners may order him to pay the costs and charges of the valuation—

that is to say, if it is obvious that the value alleged by the appellant to be the value of the hereditaments is not the true amount of the annual value of the lands, tenements or hereditaments. The position, therefore, is this, when the provisions of the section are brought into play : The appellant is saying, " I have been assessed as though the annual value of my premises were such-and-such a sum ; I say that that is too much." The person of skill has to determine what is the annual value. It is the only question that is referred to him, and he determines that the annual value is such-and-such a sum ; it may be the same sum as the appellant has urged ; it may be the same sum as already appears in the assessment appealed against ; it may be a different sum ; but, whatever the sum may be, unless the commissioners determine that that is the

annual value of the hereditaments for the purposes of the Income Tax Acts, I cannot understand how it can be said that the annual value has been determined by the commissioners in accordance with that valuation. If they determine that some sum other than that ascertained by the person of skill is the annual value, they are not determining the annual value in accordance with the valuation. But then it is said by Mr. Hills that though that may be the effect of the language of the section if construed in accordance with its usual meaning, yet it leads to such ridiculous results that the court ought not to attribute that meaning to the words used. The ridiculous results to which Mr. Hills says this section leads, if construed in accordance with the ordinary meaning of the words employed, are apparently that the taxpayer is deprived of the privilege of going, or being dragged, to the House of Lords. It is perfectly true that, if the language of a statute, when given its ordinary meaning, leads to an absurd result, the court will, if possible, put upon the language employed a meaning that does not lead to the absurd result; but for myself I cannot think that the result that has been indicated by Mr. Hills is so absurd that the court should, even if it were possible (and I do not think it is), place upon the words "in accordance with the valuation" a meaning which those words do not *prima facie* possess.

Upon the other points which have been dealt with, namely, the question whether the valuation by the person of skill was bad on the face of it, and the question as to the rights of the commissioners or of the parties to the appeal to question the person of skill, I have nothing to add to what has fallen from SLESSER, L.J., and what was said upon those subjects by LAWRENCE, J., whose decision, in my opinion, on all points that he dealt with, was correct.

GREENE, L.J.: I agree. I wish to add only a few observations with regard to the position of the valuation made by the person of skill. The first observation is this: the Income Tax Act, 1918, s. 138, owes its origin to the Income Tax Act, 1842, s. 81, as amended by the Income Tax Act, 1853, s. 47. I do not propose to examine those sections in detail, but I call attention to the fact that the Act of 1918 was a consolidating Act, and it is not to be assumed that it was intended, in a matter of this kind, to alter the law as it previously existed. When those earlier sections are examined, it will, in my opinion, appear quite clearly that the duty of the commissioners, where a valuation was made by a person of skill, was to make their assessment in accordance with that valuation. The language of sect. 47 was this: "the assessment shall be made according thereto." It appears to me to be quite impossible to construe those words as meaning that the commissioners are merely to have regard to the valuation with the right to depart from it if they

think fit to do so. In the present section the words are, "the annual value shall be determined in accordance with that valuation." I am quite unable to find, in that change of language, any change of intention. The finding of the annual value is merely a preliminary step to the assessment, and, in my opinion, the commissioners are bound to find the annual value, and, in consequence, to make the assessment in accordance with the valuation. It is worth noticing that, in the two earlier sections to which I have referred, the place in the section where the provisions as to costs are found removes what might have been a difficulty in the present sect. 138 (3). All that has been done in sect. 138 is that the arrangement of the provisions of the earlier sections has been recast and the form of the section is accordingly different; but the effect of it, in my judgment, is the same.

The next thing I wish to say is that the words "in accordance with" appear in other sections of the Income Tax Act, 1918. In the sections which I have happened to notice, or to which the attention of the court has been called, it is quite obvious that the words "in accordance with" are used as meaning "in strict accordance with," that is to say, following, and not merely having regard to. The sections which have been noticed are sect. 121 (5), sect. 133 (1) (a), and sect. 149 (4); and there may be others.

The next point is this: If there is a right in either party, or in the commissioners, to go behind the valuation, by cross-examination of the person of skill with a view to establishing that his valuation is not a proper one, I cannot myself find anything in the section which would prohibit the calling of evidence to displace or to confirm his findings. It is only by construing the section in such a way as to make the valuation final that it is possible to exclude what is the *prima facie* and ordinary right of both parties on an appeal to call evidence. It seems to me to be quite impossible to construe the section as leading to a sort of half-way position in which the valuation is not conclusive, but can be attacked or modified, not by direct evidence, but by cross-examination, and, as in this case, by the use by commissioners of their local knowledge. Such a result appears to me to be not only a very inconvenient one, but one at which it is quite impossible to arrive from the construction of the section, because, as I have already said, if the valuation is not to be conclusive, there is nothing in the language of the section to take away the pre-existing right to call evidence on one side or the other.

Lastly, Mr. Hills drew an alarming picture of the consequences that might result, a picture of the person of skill confronted in the course of his duties by the alarming complexities and difficulties of Sched. A; and he said that it was essential that there should be power to ask the person of skill questions, in order to see whether his mind had been directed to some particular point of law when he made his valuation.

This picture may reflect the fears that oppress the less resolute minds of the inland revenue authorities ; it leaves me quite undisturbed. It appears to me that, in the ordinary case in which this section would fall to be applied, the matter to be determined would be a perfectly simple question of fact. That, in some cases, difficulties of construction may arise and difficult questions of law may be involved is, of course, undoubted ; but it is perhaps worth noticing that this provision was inserted in the Act of 1842 at a time when the legislature may reasonably have supposed that its legislation was simple and clear and comprehensive. The fact that subsequent experience has brought out, and continues to bring out, difficulties and complexities, does not appear to me to justify us in construing words, which come from as far back as 1842, in such a way as is suggested for the reason put forward by Mr. Hills. Further, I may say that it seems to me that the section contains ample powers within itself to enable such difficulties to be surmounted. The power or the obligation of the commissioners is one to direct the appellant to cause a valuation to be made by a person of skill. The person of skill must, of course, be instructed as to what the valuation is which he is to make, and I can find nothing in the section which would prevent the commissioners, when they direct the appellant to cause a valuation to be made, specifying in their direction what the nature of that valuation is, and the basis on which it ought to be made. If the valuation is one which is likely to touch upon some difficult or disputed question, the commissioners would have the assistance of the parties in framing the instructions to the person of skill. If the matter touches upon something which has two possible meanings, there is nothing to prevent the person of skill being instructed to make his valuation upon two alternative hypotheses. The matter seems to me to be a perfectly simple thing to deal with, and if, in any case, these difficulties and doubts on questions of law are apparent, the remedy appears to me to be one which is readily available ; but, in the ordinary case where no difficulties arise and there is a pure question of fact, the matter will settle itself.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Gisborne & Co.* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

TRINIDAD PETROLEUM DEVELOPMENT COMPANY, LTD.
v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **November 24, 1936.**]

Income Tax—Payable wholly out of profits brought into charge—Losses brought forward greater than net profits for year—Whether brought into charge—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 19—Finance Act, 1926 (c. 22), s. 33.

The appellants company in the year 1933/34 made a net profit of £69,908, but was entitled under the Finance Act, 1926, s. 33, to bring forward from the years 1927/28 and 1928/29 losses of £82,085, and it therefore paid no tax in respect of that year. It had paid £46,032 in respect of interest, the payment being made less tax, and the revenue authorities claimed the tax retained by the company. It was contended that where accounts are taken according to the income tax requirements and a net profit is shown, such profit is brought into charge although no tax is for other reasons payable:—

HELD: in order that profits may be brought into charge it is necessary that tax be actually paid upon them, and the profits having been set off against losses and no tax paid upon them, the company could not retain the tax deducted from the payment of interest.

[EDITORIAL NOTE.] The discussion here is whether the Finance Act, 1926, s. 33, makes profits, which are only profits in an accounting sense, profits brought into charge within All Schedules Rules, r. 19. The argument is that there being profits upon which tax could be assessed but for the fact that, by the provisions of the above section, certain past losses can be set off against them, these profits are therefore brought into charge. It is clearly laid down, however, that unless tax is actually paid upon the profits in question, they are not brought into charge.

AS TO PROFITS BROUGHT INTO CHARGE, see HALSBURY, Hailsham Edn., Vol. 17, p. 242, para. 489; and FOR THE CASES, see DIGEST, Vol. 28, pp. 73, 74, Nos. 392-397. FOR THE FINANCE ACT, 1926, s. 33, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 672.]

Cases referred to:

- (1) *A.-G. v. Metropolitan Water Board*, [1928] 1 K.B. 833; 13 Tax Cas. 294; Digest Supp.
- (2) *Central London Ry. Co. v. Inland Revenue Comrs.*, [1936] 2 All E.R. 375; Digest Supp.
- (3) *London County Council v. A.-G.*, [1901] A.C. 26; 4 Tax Cas. 265; 28 Digest 73, 392.
- (4) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.
- (5) *Sugden v. Leeds Corpn.*, [1914] A.C. 483; 28 Digest 74, 397.
- (6) *Luipaard's Vlei Estate & Gold Mining Co., Ltd. v. Inland Revenue Comrs.*, [1930] 1 K.B. 593; 15 Tax Cas. 573; Digest Supp.

APPEAL by the Trinidad Petroleum Development Company against a judgment delivered by LAWRENCE, J., on May 18, 1936, and reported in [1936] 2 All E.R. 449, dismissing their appeal against a decision of the Special Commissioners for the Income Tax Acts.

For the year 1933/34 the company paid £46,032 interest under deduction of tax to the British Controlled Oilfields, Ltd. Its profits, computed

for purposes of income tax for the year to July 31, 1932, to which date its accounts in the year previous to 1933/34 had been made up, less wear and tear, were £69,908. The company claimed under the Finance Act, 1926, s. 33 (1), to carry forward losses of £26,473 and £55,612, attributable to the years 1927/28 and 1928/29 respectively, and to set such losses off against profits on which it might be assessable under Sched. D for subsequent years. The commissioners of inland revenue assessed the company under the Income Tax Act, 1918, All Schedules Rules, r. 21, in the sum of £46,032 in respect of interest paid out of profits and gains not brought into charge. The company appealed to the special commissioners contending :

(1) That the amount of profits or gains on which the company was assessed under Sched. D for the year 1933/34 was £69,908 ;

(2) That the fact that the company had a right under the Finance Act, 1926, s. 33, to have losses of previous years deducted from or set off against the amount of the profits on which it was assessed for the year 1933/34 did not prevent such profits from being brought into charge to tax ;

(3) That £69,908 was the amount of the company's profits or gains brought into charge to income tax for the year 1933/34 ;

(4) That, as the company's profits or gains brought into charge to tax exceeded the amount of the interest paid, such interest was wholly payable out of profits or gains brought into charge and was not assessable under the General Rules All Schedules, Income Tax Act, 1918, r. 21.

The commissioners contended :

(1) That the interest in question came within r. 21 ;

(2) That the profits and gains for 1933/34 against which losses had been set off were not profits and gains which had been brought into charge to tax for the purposes of r. 19.

The special commissioners confirmed the assessment and the company appealed by way of case stated to LAWRENCE, J., who dismissed the appeal. The company appealed.

Raymond Needham, K.C., and *J. S. Scrimgeour* for the appellants.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *Reginald P. Hills* for the respondents.

Needham, K.C. : The scheme of the Act is to bring profits into charge and then inquire who is the owner of the profits. *A.-G. v. Metropolitan Water Board* (1) concerned Sched. A, No. III, of which the language is entirely different from that which governs Sched. D, Cases I and II, r. 6 (3). The annual value of a waterworks should be understood to be the profits of the preceding year. This decision is right in regard to Sched. A, No. III, but not in regard to Sched. D, Case I, because in Sched. A, No. III, there is a statutory projection of the profits of the first year into the second year, making them the annual value of the second year. Sched. D does not do that, but imposes a charge on the profits of the second year, the assessment to be computed on the previous

year's profits. In all the cases before the Act of 1926 expressions were used showing that what the legislature had in mind was the payment of tax to the Crown. At that time there was no dissonance between the amount of tax that would be paid and the amount of the assessment. The Act of 1926, s. 33, introduced a wholly different conception. The essential purpose of the machinery is not the collection of tax, but the dividing up of income and the fixing of the measure of liability, each Finance Act fixing the rate of tax. The basic Act deals with the conception of what is income brought into charge. There is only one method of getting rid of the income brought into charge for any year, and that is to discharge it. The Crown can, for purposes of its own, declare that it will not collect tax on that amount. If it does so without reducing the amount of profit brought into charge, that amount remains in charge. There is a conflict of statutory provisions. Sect. 33 does not fit either r. 19 or r. 21. The fact that a taxpayer has some consideration shown to him in the year 1933/34 by reference to his financial position in an earlier year does not prevent these profits from having been brought into charge by proper assessment, or create a state of affairs in which they may be said not to have been brought into charge. The deduction which the taxpayer is entitled to make has nothing to do with the measure of his profits for the year. If he does not make that deduction for one year, he may still make it for subsequent years. The term "profits brought into charge for tax" is interpreted as a matter of principle and not with reference to the amount of tax which has reached the revenue. In *Neumann v. Inland Revenue Commissioners* (4) the House of Lords drew a clear distinction between the amount of profit made by the company and the amount distributed in dividends. It is necessary to consider, not what tax reaches the revenue, but whether the assessing machinery has dealt fully with this amount of profit. The operation involved in sect. 33 is not equivalent to computing the assessable profits for 1933/34 with reference to losses sustained for previous years. These losses are not to be treated as if those years were to be brought in the average for the purpose of computing the assessment for the year 1933/34. In this case it is not material to consider the ingredients of the assessment for the year under appeal. In all the cases where relief is granted under the Act, what is done is in effect to reduce the assessment for the year, or the amount upon which tax is chargeable for the year.

GREENE, L.J. : The interest which was paid was the income of a limited company. If it had been the income of an individual, the gross amount of interest would have formed part of his total income for surtax purposes. The sum in question was therefore the income of the recipient. The object of the Act is to tax income once only. If the appellants' contention is right, this income, which is the income of the recipient, never pays any income tax at all.

Needham, K.C. : That is so, but it was established in the *Neumann* case (4) that there might be a *nil* assessment on the company for the year in question and profits received by the shareholder under deduction of tax to an enormous amount, involving him in liability for surtax. By the conjunction of the two sections, and the fact that he has been deprived of this valuable credit, the payer has put himself at a great disadvantage, so much so that the Crown has said that it will not claim any actual tax, because it has applied his past loss in reduction of his present liability.

The Solicitor-General : The interest is the income of a particular recipient, who makes a claim for rebate for family or personal allowance on account of that income. In order to do so he must present a certificate that tax has been paid upon the amount of his income ; but the appellants could not do so, or show that the tax had ever been paid upon the income. If the contention of the appellants is true, the subject is being taxed by somebody other than the Crown. In this case the tax is being collected by the appellants. So far as the taxpayer does not pay out of money consisting of profits or gains brought into charge, Sched. D, r. 21, applies, and he has to deliver an account of the payments he has made. The machinery that the sections establish is that he either recoups himself for the tax he has paid, or collects tax for the Crown. This position is not new, but dates from the early tax cases : see *L.C.C. v. A.-G.* (3) ; *Sugden v. Leeds Corpn.* (5). The general considerations expressed by LORD HANWORTH, M.R., in the *Metropolitan Water Board* case (1) are binding on this court. The case of *Luipaard's Vlei Estate & Gold Mining Co., Ltd. v. Inland Revenue Comrs.* (6) is the converse of the present case, and the reasoning is equally applicable.

Needham, K.C., in reply : Neither r. 19 nor r. 21 contains any provision concerning the tax which is being paid. In the *Metropolitan Water Board* case (1) LORD HANWORTH, M.R., said at p. 843 :

The section makes it clear that the collector for the Crown will have to pass on the sum collected, either by means of his profits and gains brought into charge, or by rendering an account of the sum deducted which will not be subjected to charge in the collector's hands.

That is an express statement that either in one way or in the other the person who primarily pays the tax may satisfy his responsibility. The fundamental point is whether this loss, incurred in the past year, was an ingredient in the making of the assessment for 1933/34. If it is not, and the trader, in consideration of being relieved from the payment of tax in the year 1933/34 is surrendering a valuable right—as indeed he is—then he is surrendering something which is a statutory equivalent of the payment of tax. There is all the difference between something done for the purpose of finding the assessable profit of the year itself, and something done after that figure has been ascertained.

It is wrong in principle to say that a gain is made here : there is a loss—the surrender of a valuable statutory right. The trader is therefore not liable for tax.

SLESSER, L.J. : In this case a company, the Trinidad Petroleum Development Co., Ltd., appeal against an assessment which has been made upon them under the Income Tax Act, 1918, All Schedules Rules, r. 21, as amended by the Finance Act, 1927, s. 26, in respect of a sum of £46,032 odd which was the sum on which the company for the year 1933/34 paid interest under deduction of tax to another company, the British Controlled Oilfields, Ltd. Now, the question which has to be decided in this case is whether this payment comes under r. 21 or r. 19 of the General Rules to which I have referred. It is argued by Mr. Needham that the proper view is that r. 19 applies to this case which, so far as concerns the material words which have here to be considered, is as follows :

(1) Where any yearly interest of money . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest . . . but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due.

Now, it will be observed that r. 19 (1) is dealing with a yearly interest of money payable wholly out of profits or gains brought into charge to tax, and the first question which has to be considered is the meaning of the words “brought into charge” in that connection. In my view, having regard to the decision of this court in the case of the *A.-G. v. Metropolitan Water Board* (1), and having regard to the opinions expressed by all the learned judges in that case, to which I shall presently refer, it is not possible for us sitting here to take any view but one as to the meaning of that language. Thus, LORD HANWORTH, M.R., at p. 304, considering the meaning of the words in r. 19 “payable wholly out of profits or gains brought into charge to tax,” says this :

[They] do not mean payment out of a fund that may be brought into charge, or is, or will be, a factor for the purpose of charge, but refer to a fund brought into charge out of which tax is payable and to be paid.

And SARGANT, L.J., at p. 307, says this :

In my opinion the words “brought into charge” are more naturally and satisfactorily satisfied by the meaning placed on them by the Crown. The past participle “brought” naturally refers to something that has been completed in the year in

question, if not by actual payment at any rate by accrued liability to pay. It is only in a looser sense that it can be applied to a payment or liability to pay in respect of a succeeding year.

LAWRENCE, L.J., deals more particularly perhaps with the matter we have here to consider, and he, following LORD HANWORTH, M.R., says, at p. 311 :

I have arrived at the conclusion that the expression "profits or gains brought into charge to tax" in r. 19 means the taxable and not the actual profits or gains in the year of assessment.

Now, if that view so expressed is applied to the present case, and, as I have said, I think it must be applied, we have to have regard to its effect upon the Finance Act, 1926, s. 33, which has brought the present problem before the court. The fact is that though the profits of the company during the year 1932, the assessable profits in 1933/34, amounted to £69,908, there had been as regards the years 1927/28 and 1928/29 losses to the extent of £82,085; so that the balance loss was £12,177. Now, under the Finance Act, 1926, s. 33, it is provided that :

(1) Where a person has in any trade . . . sustained a loss . . . he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set off against the amount of profits or gains on which he is assessed under Sched. D in respect of that trade.

Now, therefore, it follows from sect. 33, that although there were originally profits to be assessed for the year 1933/34, when the losses are taken into consideration as provided in sect. 33, the difference is a balance loss of £12,177, and if the test which, as I say, has to be applied is applied in the present case, I think it is impossible to say that there was during that year any sum at all of profits to be brought into charge to tax. In fact, the result is that the profits computed on the basis of sect. 33 amount to nothing, and when regard is had to the language of this court to the effect that the profits brought to tax refer to the fund brought into tax out of which tax is payable and to be paid, the result is there is no such tax. Now, therefore, applying r. 19 as I say, there is here no yearly interest of money payable wholly out of money brought into charge to tax, because, in my view, there were no profits. That, in my opinion, is sufficient to determine this case in favour of the Crown. Mr. Needham argues, as I understand, that whatever has been said in the *Metropolitan Water Board* case (1), which was dealing with a liability for the year of assessment, cannot apply to sect. 33, but has a more limited meaning, because, he says, the Finance Act, 1926, s. 33, assumes an assessment which in this case would show an assessment on the profit of £69,908, and that it is only after that assessment has been ascertained and, as he says and must say, I think, brought into charge to tax, that the later limb of that section requires that the person assessed may claim that the portion of

the loss may be deducted therefrom, and he contrasts the language of sect. 33 with the language of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 6, which speaks directly of deductions in charging profits where the person is charged and another charge substituted and allowed. In my view it is impossible to apply that requirement to the judgments in the *Metropolitan Water Board* case (1), because I think, as I have already said, that they are of general application. It is true that we have been referred to a case in the House of Lords, the case of the *Central London Ry. Co. v. Inland Revenue Comrs.* (2) in which LORD MACMILLAN in his speech points out the very many difficulties and distinctions which may have to be met in dealing with this rule, but, in my view, it is not necessary here for me to consider how far that case may or may not have thrown light upon the decision of this court. It is sufficient for me to say that I can find nothing in the speech of LORD MACMILLAN which in any way exonerates me from feeling bound by what has been said directly in interpreting r. 19 in this court, and therefore I think that, important as that case may be, it would not be right to allow it to deflect one's judgment as derived from those positive decisions. For those reasons I think that this appeal fails.

ROMER, L.J.: I agree. This case is governed by the decision of the Court of Appeal in the *Metropolitan Water Board* case (1), a case which, in spite of the criticisms to which it has been subjected in the House of Lords and in the case to which my Lord just referred, has never been overruled and is binding upon this court. As I understand that case, the ground of the decision was this: that no one is entitled to retain income tax from which he has deducted the interest paid by him, unless he is in a position to say to the Crown: "I have already paid or become liable to pay this income tax to you, because I have paid or become liable to pay income tax on a sum which includes the interest I have paid, because having regard to the rules for ascertaining profits under the Income Tax Act I was not enabled to deduct that interest from my profits." Now I say that that appears to me to have been the ground of the decision in the *Metropolitan Water Board* case (1), for this reason, that LORD HANWORTH, M.R., after citing the case of the *London County Council v. A.-G.* (3), said this, at p. 305:

Both LORDS MACNAGHTEN and DAVEY intended that the right to retain [tax on deduction from interest] was co-extensive only with the liability to tax of the fund out of which the interest is paid.

LAWRENCE, L.J., at p. 311, said this:

It follows that under the provisions of rr. 19 and 21 no taxpayer can retain against the Crown any more income tax deducted by him in any year of assessment than he has himself paid or become liable to pay to the Crown for that year.

It is true that LORD MACMILLAN, in this case of the *Central London Ry.*

Co. v. Inland Revenue Commissioners (2), in commenting upon that authority, said this at p. 380 :

The general principle of the *Metropolitan Water Board* case (1) may be stated thus : Whenever in any year, the amount of interest paid by the taxpayer does not exceed the amount of his profits or gains as assessed for income tax purposes for that year, then the interest paid in that year is, within the statutory meaning, "payable out of profits or gains brought into charge to tax."

Now, it will be seen LORD MACMILLAN there stated the principle of the *Metropolitan Water Board* case (1) in rather different language from that in which I have ventured to state it myself. It must, however, be remembered that LORD MACMILLAN was contemplating a case in which income tax would in fact be paid on the profits assessed for income tax, and was not thinking of a case like the present, where, the profits of the year having been assessed, no income tax becomes payable in respect of those profits, because the taxpayer is entitled to deduct something from that assessment. For those reasons, I think this appeal fails.

GREENE, L.J. : I agree. Money received by a recipient of interest is treated by the Income Tax Acts as being what it in fact is, namely, his income. That is shown by the fact that, in the return of his total income which has to be made for certain purposes, the gross amount of the interest payable to him must be included as part of his income. That income the Act sets out to tax, as it sets out to tax all other incomes. The way in which it sets out to tax it is by allowing or compelling the payer to deduct the appropriate amount when he makes payment. Now, that amount in the hands of the payer, being, as it is, an amount equal to the tax on that part of the recipient's income, is a sum for which the payer is *prima facie* accountable to the Crown, but he can discharge himself of the liability so to account provided he can show that the payment of interest which he has made is referable to a fund, real or notional, in respect of which he has been charged or is liable to be charged to income tax. The burden is upon him. In the present case, in my opinion, no such fund can be pointed to. Indeed Mr. Needham quite frankly admitted that the effect of his contention was that in the present case this piece of income which is unquestionably income of the recipient will escape payment of income tax altogether. Now, if that is the clear result of the legislation, effect must of course be given to it, but having regard to the circumstance, which I think is clearly established, that these provisions for deductions are in their essence machinery enabling the Crown to obtain payment of the tax payable in respect of the recipient's income, I think that a construction which leads to that result is to be avoided, if the language fairly permits of it. Mr. Needham in the present case attaches very great importance to the circumstance that under the Finance Act, 1926, s. 33, which

is the section which gives rise to the present question, the particular machinery adopted for giving effect to the set-off of previous losses is not one whereby the assessment is reduced; the assessment is made and the assessment stands, but effect is given to the right to set off by what the section calls a deduction from or set-off against profits. Here again he quite frankly admits that if the machinery adopted in the section had been one whereby the assessment was reduced, his argument could not have been sustained. In my opinion, the distinction is much too fine a one. The substance of the matter is that, whether the assessment is reduced or whether the assessment is left standing and the taxpayer is excused tax, the Crown has not been paid tax in respect of any ascertainable fund. That is the result of it, and in consequence it is impossible for the payer of the interest, in a case where sect. 33 applies and to the extent to which it applies, to point to any fund, real or notional, out of which a real or notional payment of tax has ever taken place. The true fact is that as the result of the provisions of the section in the present case no tax falls to be paid at all, and the result of that, as I have already said, is that, if Mr. Needham's contention is correct, this piece of income which is income of the recipient will never pay tax to the Crown at all. The unreal nature of the distinction which he attempts to draw, based on the language of sect. 33, becomes, I think, rather more apparent when one considers that there are in the Income Tax Acts two other provisions dealing with the question of losses and the machinery by which the taxpayer is entitled to relief in respect of them. I do not propose to refer at length to those provisions. One of them is the Income Tax Act, 1918, s. 34, and the other is contained in Sched. D, Cases I and II, r. 13. When these provisions are examined it will be found that the language by which effect is to be given to the relief which the legislature is minded to give to the taxpayer differs from that of sect. 33, which we are now considering, and the machinery is different. The substance, nevertheless, is the same, and I for one am quite unable to draw that fine distinction, based on the nature of the machinery provided, when it is going to lead to a result which in my opinion is contrary to the whole sense and object of the legislation. I agree that the *Metropolitan Water Board* case (1) is really conclusive of the question here, and conclusive for the reason that it is impossible to point to a fund, real or notional, in respect of which tax has been or will be paid. I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal.

Solicitors: *Elvy Robb & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

Re HURDLE, BLAKENEY *v.* HURDLE.

[CHANCERY DIVISION (Bennett, J.), November 19, 1936.]

Will—Codicil—Construction—Trust in favour of persons named in a certain deed to be the trustees of such deed upon the trusts therein declared—Deed never operative.

On Apr. 15, 1935, a testator executed a document in the form of a deed expressed to be made between the testator, his brother, his sister and 7 named persons as trustees, which stated that each of the first three parties thereto covenanted with the others that he or she would execute a will whereby all his or her residuary estate should be given to the trustees upon the trusts therein mentioned, being charitable trusts for the establishment and endowment of a hospital. The instrument was also executed by the testator's brother, but not by his sister or the trustees. On Apr. 25, 1935, the testator by a codicil to his will revoked the gift of his residuary estate contained in his will and directed his executors "to stand possessed thereof upon trust to pay and transfer the same to the persons [naming them] named in a deed dated Apr. 15, 1935, to be the trustees of such deed or the survivors of them or other the persons who are for the time being the trustees of such deed (hereinafter referred to as the 'charity trustees') to be held by the charity trustees upon the trusts in the said deed declared." The testator died and the question arose whether his executors ought to hand over his residuary estate to the persons named as trustees in the instrument of Apr. 15, 1935, to be held by them upon the trusts therein expressed :—

HELD : the testator by his codicil intended to give his residuary estate to the trustees of an operative deed to be held by them upon the trusts of that deed, and as the instrument referred to never became an operative deed, the executors ought not to hand over the testator's residuary estate to the persons named as trustees in that instrument.

[EDITORIAL NOTE. The construction of this will is perhaps more useful as a warning to conveyancers than as stating any specific principle of law. Testators often desire to found a charitable institution by will and it is a matter of considerable conveyancing difficulty to give full and proper effect to such wishes. The present case shows one of the better methods of giving effect to such wishes and is the more useful as showing how by inadvertence or otherwise such a plan may fail to take effect.

AS TO INCORPORATION OF A DOCUMENT IN A WILL, see HALSBURY, Hailsham Edn., Vol. 14, pp. 194, 195, para. 318 ; and FOR CASES, see DIGEST, Vol. 44, pp. 237-245, Nos. 624-712.]

ADJOURNED SUMMONS to determine certain questions arising in the administration of the estate of Arthur Hurdle, who died on Nov. 11, 1935, leaving a will dated Dec. 19, 1934, and two codicils dated respectively Dec. 19, 1934 (not material to the present proceedings), and Apr. 25, 1935, all of which were proved Dec. 16, 1935, by the testator's brother, George Hurdle, and William Ernest Blakeney, the executors named therein. By his will the testator, after appointing executors and trustees thereof and after making certain specific and pecuniary dispositions, gave his residuary estate to his trustees upon trust to sell the same and to stand possessed of the net proceeds of sale (subject to payment of debts, funeral and testamentary expenses, and the legacy and annuity

bequeathed therein or by any codicil thereto) upon trust for the said George Hurdle, his sister Kathleen Annie Hurdle, one William Haydon, and one William Spensley Simey, to be held by them upon certain trusts which he had made known to them and of which they were each well aware. By his second codicil, after reciting the residuary disposition contained in his will, the testator by cl. 3 thereof (which is set out in the judgment herein) revoked the gift of his residuary estate contained in his will, and provided that his trustees should pay and transfer the same to certain persons named as trustees of a deed which was dated Apr. 15, 1935, and was made between the testator, his brother George Hurdle, his sister Kathleen Annie Hurdle, and the said persons named as trustees, to be held by them upon the trusts declared in the said deed, or such of them as should at his death be subsisting and capable of taking effect.

On or about Apr. 15, 1935, the testator had executed a document in the form of a deed, dated Apr. 15, 1935, and expressed to be made between the testator, his brother George Hurdle, his sister Kathleen Annie Hurdle, and the persons named in the testator's second codicil. After reciting that the said George Hurdle, the said Kathleen Annie Hurdle, and the testator were desirous of establishing and endowing a hospital at Topsham in the county of Devon, that instrument stated that each of the said three parties covenanted with the others (but not with the trustees parties thereto of the fourth part) that he or she would execute a will whereby (subject to certain qualifications) all his or her residuary estate should be given to the said trustees upon the trusts therein mentioned being charitable trusts for the establishment and endowment of such hospital as aforesaid. The above-mentioned instrument was also executed by the testator's brother George Hurdle, but his sister Kathleen Annie Hurdle declined to execute it, and it had not been executed by her at the date of the testator's second codicil or of his death.

On or about Sept. 11, 1935, the testator and his brother George Hurdle executed another instrument in the form of a deed which contained trusts similar to those expressed in the earlier instrument, and which recited that George Hurdle and the testator were desirous of establishing and endowing a hospital at Topsham, Devon, and that Kathleen Annie Hurdle had expressed her willingness to abide by the terms of the said instrument but was not willing to be a party thereto.

As a result of the events set out above, the first question to which an answer was asked by the summons herein was whether the executors of the testator ought to hand over his residuary estate to the persons named as trustees in the said instrument of Apr. 15, 1935, to be held by them on the trusts therein expressed, which involved the determination of the question whether or not the testator, when he referred in his codicil of Apr. 25, 1935, to "the deed dated Apr. 15, 1935," was to be taken to be referring to the instrument of that date.

J. Neville Gray, for the plaintiff, William Ernest Blakeney, one of the executors of the testator's will, stated the facts.

Maurice Berkeley, for the testator's brother and sister who were interested in the testator's residuary estate as two of his statutory next of kin, but who did not wish any argument to be advanced on their behalf.

Gerald Upjohn, for the testator's widow.

Hon. Charles Russell for the persons named as trustees in the instrument of Apr. 15, 1935.

A. Andrewes Uthwatt for the Attorney-General.

Upjohn: There must be an intestacy as to the testator's residuary estate. The instrument of Apr. 15, 1935, never had any operation, because Kathleen Annie Hurdle in fact never executed it. It is clear that that instrument was intended to carry out a general scheme to which all the parties were to contribute, and the testator made his codicil on that footing. There is nothing in the codicil to say what the testator's intention would have been if he had known that his brother and sister had not done their part; though if he had wanted to have the trusts of the instrument read into his will, notwithstanding that they might not be valid, he could have said so. But it is clear from his codicil that the testator thought he was bound by the document of Apr. 15, 1935, which he had executed, and that when he is referring to a deed he has in his mind a fully effective and operative deed, and not something which might become a deed if executed by his sister. Therefore the deed referred to in the codicil cannot be identified with the document executed by the testator on Apr. 15, 1935. No deed was in existence when he made his codicil, and it is not possible to incorporate into the codicil a deed which was not in existence at the date when it was made.

BENNETT, J.: But although a piece of paper would not become operative as a deed until it was executed, *non constat* that the testator was not referring to the piece of paper.

Upjohn: To say that would involve the necessity of reading into the piece of paper trusts which were "subsisting and capable of taking effect" at the date of the testator's death. But as the trusts of the deed never came into existence the whole codicil falls to the ground, and there must be a resulting trust in favour of the testator. And there is this further point: that, even if the deed had become operative, any one of the three Hurdles might have revoked it, either wholly or in part, in accordance with the provisions of the deed. If that had happened, the trustees would have held the whole of the testator's residuary estate upon some quite different trusts.

Russell: This is an ordinary case of a reference in a will to trusts contained in another document existing at the date when the testator

made his will. It is wholly immaterial, even if it is correct, to say that there was no deed.

BENNETT, J.: Do you concede that this deed never became an enforceable document?

Russell: Yes, but I am not conceding that it was not a deed. It had been signed, sealed, and delivered by the testator and his brother. If a man signs, seals, and delivers a document it is immaterial that another party to it has not executed it. The execution of the second deed to which the sister was not a party shows that her absence in executing the first deed was quite immaterial. I do not see how either of these deeds could be enforceable, as there is no covenant with the trustees, but it has not been shown that they were executed contingently, and, if a gift is to be considered as being made upon a condition, the condition must be expressed.

BENNETT, J.: But are there any trustees of the codicil? The only persons mentioned in it as trustees are the persons, who are named, who were to be the trustees of the deed.

Russell: The words in the codicil are "the persons named as trustees in the said deed."

Andrewes Uthwatt: Whether executed or not, the deed contains a definite statement that the property is to be held as if in fact it had been transferred to the trustees. It was that kind of document which the testator had in mind when he executed his codicil.

BENNETT, J.: But there never were any trustees of the deed.

Andrewes Uthwatt: The trust is not to pay to the trustees of the deed but to pay to the persons named in that document as trustees. The testator seems to have had in his mind that there may not have been trustees of the deed, and so he referred to those persons by name. He then refers to the position if in fact the deed did become operative, when he says: "or other the persons who are for the time being the trustees of such deed." The whole frame of the codicil is that the testator is incorporating into it the trusts declared in a piece of paper.

BENNETT, J.: I think this case is rather a puzzle. It is possible to find reasons for answering the question either way. The testator in question made his will on Dec. 19, 1934, and by that will he gave, devised and bequeathed all the rest residue and remainder of his real and personal estate upon trust for conversion, and, after payment of his funeral and testamentary expenses and debts and a legacy and annuity, he directed his trustees to stand possessed of the residue of such property upon trust for his brother George Hurdle, his sister Kathleen Annie Hurdle, William Haydon, and William Spensley Simey, to be held by them upon the trusts and for the purposes "which I have made known to them and of which they are well aware." On Apr. 15, 1935, the

testator and his brother George signed, sealed, and delivered a document expressed to be made between George Hurdle, of the first part (that is, the testator's brother), Kathleen Annie Hurdle, his sister, of the second part, himself, of the third part, and seven named persons as trustees of the fourth part. The document recites that the parties of the first three parts were desirous of establishing and endowing a hospital at Topsham, Devon, to be known as the "Hurdle Memorial Hospital, Topsham," for the reception, relief, and cure of sick and poor persons from time to time afflicted by accident or disease, and that in order to carry such desire into effect the parties of the first three parts had agreed to covenant with one another that they, the said parties of the first three parts, should respectively exercise their respective testamentary powers in the manner thereafter named. Then, in cl. 1 of the document, there followed this covenant :

In pursuance of the said agreement each and every of them the said George Hurdle Kathleen Annie Hurdle and Arthur Hurdle hereby so far as the covenants agreements and provisions hereinafter contained are or ought to be performed and observed by him or her covenants with the other of them in manner following that is to say :

Each of them the said parties hereto of the first three parts shall so soon as may be execute a will in due form whereby all the estate and effects of or to which such parties of the first three parts shall be seised possessed or entitled whether in possession remainder or reversion at his or her death shall be disposed of in accordance with the provisions of subclauses (3) and (4) of this clause and not otherwise.

Subclause (3) gives each of them certain limited powers of disposition by will of their property, and subclause (4) provides that :

Subject to the provisions of subclause (2) herein each of them the said parties hereto of the first three parts shall by the said will to be executed as aforesaid and by any and every subsequent will give devise and bequeath the whole of his or her respective estate and effects save and except as aforesaid to the trustees of his or her respective will upon trust to sell the same and subject to the payment of the expenses of sale and of his or her funeral and testamentary expenses and duties and the payment of or provisions for any legacies or annuities bequeathed under the provisions of subclause (3) hereof shall direct the trustees of his or her will to stand possessed of such proceeds of sale upon trust to pay the same to the trustees of this deed to be held by them for the purposes of the said Hurdle Memorial Hospital Topsham upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning such moneys.

Clause 2 of the deed gives power to release, vary, or modify all or any of the covenants and provisions thereinbefore contained with the consent of the three first parties, and cl. 3 contains provisions with respect to the foundation of this Hurdle Memorial Hospital.

The deed was in fact signed, sealed, and delivered only by the testator and his brother George. Neither his sister nor the persons named in the instrument as trustees ever executed it. On Apr. 25, 1935, ten days after the date which the instrument to which I have just referred bears,

the testator made a codicil to his will. It is a second codicil, but the first has no bearing on the question which I have to decide. By this codicil he recites first of all that by his will he has appointed his brother George, and William Haydon to be executors and trustees, and the death of William Haydon, and certain specific dispositions made in his will. By the first clause of his codicil he appoints Mr. Blakeney to be executor and trustee in place of the deceased gentleman Mr. Haydon. By cl. 3 he revokes the gift of his residuary estate contained in his will, and proceeds as follows :

I hereby revoke the gift of my residuary estate contained in my said will and declare that my trustees shall stand possessed thereof upon trust to pay and transfer the same to the persons (parties thereto of the fourth part) named in a deed dated Apr. 15, 1935, and made between the said George Hurdle of the first part my sister Kathleen Annie Hurdle of the second part myself of the third part and William Spensley Simey Mortimer Noel Ford Arthur Brutton Ford Bertram Percy Tucker Eric Featherstonhaugh Morton Richard James Jenkins and the said William Haydon of the fourth part to be the trustees of such deed or the survivors of them or other the persons who are for the time being the trustees of such deed (all such trustees being hereinafter referred to as "the charity trustees") to be held by the charity trustees upon the trusts and with and subject to the powers and provisions in the said deed declared and contained (or such of the same as shall at my death be subsisting and capable of taking effect).

The question asked is whether the executors of the testator ought to hand over the residuary estate to the persons named in the codicil and in the instrument of Apr. 15, 1935. Mr. Upjohn, representing the testator's widow, argues that they ought not to do so, and that by the codicil there has been no disposition of the testator's residuary estate because, so he argues, by the codicil the testator intended that his residuary estate should be held by persons who were in fact trustees of a deed which never became an operative deed. And he argues that the instrument of Apr. 15, 1935, never became operative, because the testator's sister never executed it and the trustees never executed it.

Mr. Russell, representing the persons named as trustees, and Mr. Andrewes Uthwatt, representing the Attorney-General, argue that the residuary estate ought to be handed over to the persons named to be held by them on the trusts of the deed. To my mind, the question really turns upon deciding whether or not, when he made this codicil, the testator intended to give his residuary estate to the persons who were trustees of an operative instrument, or merely intended to incorporate into his will the provisions which are to be found in an instrument which never became an operative one. The question turns entirely, in my judgment, upon the language which the testator has used in the codicil, and upon that language I conclude that he had in his mind the handing over of his residuary estate to the trustees of an operative deed. First of all, he directs his trustees to pay his residuary estate

and to transfer the same to the persons named in a deed, of which he gives the date, and which he expresses to have been made between certain persons whom he names, or to the survivors of those persons, or other the persons who are for the time being trustees of such deed. But there never could have been any trustees of the deed which never became operative. Then he directs that his residuary estate is to be held by those persons "upon the trusts and with and subject to the powers and provisions in the said deed declared and contained (or such of the same as shall at my death be subsisting and capable of taking effect)." The whole language and frame of this codicil in my judgment points to the conclusion that the testator, when he made his codicil, intended his residuary estate to be handed over to some persons who were trustees of an operative deed, to be held by them upon the trusts of that deed. There was no such deed, and in my judgment the trustees ought not to hand over the testator's residuary estate to the persons named in the uncompleted deed, to be held by them upon the trusts expressed in that uncompleted deed.

The rest of the summons will stand over with liberty to amend the summons, and with general liberty to either party to file further evidence. Liberty to restore.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Shelly & Johns*, Plymouth (for the plaintiff); *Field, Roscoe & Co.*, agents for *Ford, Harris, Ford & Simey*, Exeter (for the first and third defendants); *Church, Rendell, Bird & Co.*, agents for *Watts, Anthony & Yeo*, Plymouth (for the second defendant); *Treasury Solicitor* (for the Attorney-General).

[Reported by C. M. YOUNG, Barrister-at-Law.]

LEE v. LUPER.

[KING'S BENCH DIVISION (Singleton, J.), November 24, 25, 1936.]

*Negligence—Innkeeper—Personal injuries—Invitee—Extent of invitation—
Passing along unlighted passage and through door marked "Private."*

The plaintiff went to the defendant's hotel to attend a lodge meeting. While there, wishing to find a water-closet, he passed along an unlighted passage and through a door marked "Private." He then attempted to switch on the light but failed and upon taking a further step forward he fell down some steps and injured himself:—

HELD : the plaintiff was not entitled to recover as it was not the duty of an innkeeper to maintain in a safe condition those portions of his premises where the public are not likely to resort.

[EDITORIAL NOTE. Though there is close resemblance between the facts in this case and those of *Walker v. Midland Ry. Co.* (1), there are several important differences. In the earlier case the plaintiff was a guest staying at the hotel and after entering the room walked some 17 feet into it before meeting with the accident. In the present case the plaintiff was merely attending a lodge meeting at the hotel and he met with the accident immediately after entering the room. Some emphasis is laid in the judgment upon the fact that the door through which he entered the room was marked "Private," but it would not seem to be a deciding factor in the case.

FOR THE DUTY OF INNKEEPERS, see HALSBURY, *Hailsham Edn.*, Vol. 18, pp. 148-150, paras. 206, 207 ; and FOR CASES, see DIGEST, Vol. 29, pp. 9, 10, Nos. 116-127.]

Cases referred to :

- (1) *Walker v. Midland Ry. Co.* (1886), 55 L.T. 489 ; 29 Digest 9, 118.
- (2) *Wilkinson v. Fairrie* (1862), 1 H. & C. 633 ; 36 Digest 13, 38.

ACTION for damages for personal injuries.

The plaintiff, a member of the Royal Antediluvian Order of Buffaloes, went on the night of Jan. 22, 1936, to the defendant's hotel, because the lodge of which he was a member was asked to meet the members of another lodge. On arriving upon the premises, he desired to go to the water-closet. For this purpose he proceeded to walk along a passage which was not intended to be used by persons other than the hotel staff. Having seen a door apparently open, he felt for the light-switch, tried to switch it on, but no light came. He then took another step forward and fell down some steps, whereby he sustained very serious injuries.

Martin O'Connor and *F. G. Paterson* for the plaintiff.

W. A. Fearnley-Whittingstall for the defendant.

SINGLETON, J. : [His Lordship stated the facts.] Certain authorities have been cited to me, and that of *Walker v. Midland Ry. Co.* (1) is the most in point. In that case a guest who was staying in the hotel took a room, and in the middle of the night left his room with the intention of going to the water-closet. There were no candles in the room, and the gas in the corridor was turned down, making it difficult to see clearly.

The guest mistook the door of a service-room for that of the water-closet, and, having walked some 17 feet into the room in the dark, fell down the well of the lift and was killed.

It is to be noticed that the man killed had gone through a door and walked 17 feet. Mr. Lee had not gone so far. It seems to me that, applying that case to this present case, it cannot be reasonably supposed to be likely that any guest would go down this passage. Even if some one might go down, he would not be likely to do so after seeing a notice marked "Private" on the door, and I find as a fact that it was put on. Even if there had not been such a notice, I cannot think that it is the duty of the innkeeper to expect people to wander down dark passages, as the plaintiff did, when they do not know what is before them. That was the decision of the House of Lords in *Walker v. Midland Ry. Co.* (1). Before that case, in *Wilkinson v. Fairrie* (2), the plaintiff was non-suited, as it was held that the accident resulted from his own negligence, and if he could not see his way he ought not to go without a light. If the plaintiff desired to know where the lavatory was, he could have asked anyone, and he would have been told where it was. The plaintiff went along, took a risk, and met with these disastrous injuries. I am bound to say both on the facts and in law the plaintiff is not entitled to succeed

Judgment for the defendant.

Solicitors: *Darracotts* (for the plaintiff); *Wm. Easton & Sons* (for the defendant).

[Reported by I. M. NOORDIN, ESQ., Barrister-at-Law.]

PORTMAN v. J. LYONS & CO., LTD.

[CHANCERY DIVISION (Bennett, J.), **November 24, 1936.**]

Landlord and Tenant—Lease—Covenant to give notice of assignment or underlease—Term derived out of underlease—Application of covenant.

By a lease of certain premises, the lessees covenanted that they would "within 2 calendar months next after the execution of every assignment or underlease (except in connection with lettings or assignments of such lettings of flats for terms not exceeding 7 years . . .) of the demised premises or any part thereof produce or cause to be produced such assignment or underlease or the counterpart thereof . . . to the lessor or his successors in title for the time being entitled in immediate reversion on the term hereby granted . . . and will permit a docket or minute of every such assignment or underlease . . . to be made and retained by or for the use of the lessor or his successors in title entitled as aforesaid." The lessees demised the premises to M. and on the same day M. sub-let part of the demised premises to the lessees. The lessees objected to produce this sub-lease in accordance with the above-mentioned covenant on the ground that the covenant did not apply to a sub-term which was not derived immediately out of the term granted by the head lease:—

HELD: the covenant was not limited, as suggested by the lessees, and it applied to the sub-lease in question. The lessees were therefore bound to produce it for registration.

[EDITORIAL NOTE.] This is the first time that this covenant, a very common one in leases, though once held not to be a "usual" covenant, has come before the courts for construction. The form adopted in the lease in question seems for the most part to follow the ordinary practice in this matter, and the decision is of general application.

FOR REGISTRATION OF ASSIGNMENTS WITH SUPERIOR LANDLORD, see HALSBURY, Hailsham Edn., Vol. 20, p. 78, para. 86; and FOR CASE, see DIGEST, Vol. 31, p. 103, No. 2405.]

Case referred to:

(1) *Ellis v. Noakes*, [1932] 2 Ch. 98, n.; Digest Supp.

ADJOURNED SUMMONS, taken out under R.S.C., Ord. 54A, and asking for a declaration as to the true construction of a clause, set out in the judgment herein, in a lease dated Dec. 31, 1934, and made between the plaintiff, the tenant for life of the Portman Estates, as lessor and the defendants as lessees. By the said lease, the material terms of which are set out in the judgment, the plaintiff demised to the defendants the land and premises known as Mount Royal on the north side of Oxford Street in the County of London. By a sub-lease dated Feb. 11, 1935, the defendants demised the whole of the premises comprised in the lease to the Midland Bank Executor and Trustee Co., Ltd., and the counterpart of that sub-lease was duly produced to the plaintiff in accordance with the said covenant. By a sub-lease, also dated Feb. 11, 1935, the Midland Bank Executor and Trustee Co., Ltd., demised a part of

the said premises to the defendants, who objected to produce this sub-lease in accordance with the said covenant on the ground that the covenant did not apply to a sub-term which was not derived immediately out of the term granted by the head lease. The plaintiff therefore issued the summons herein, by which, as amended, he asked for a declaration that the defendants, as his lessees, were bound to produce or cause to be produced to him, as lessor, or to his solicitor or agent, for registration, as provided by the said lease, all assignments and underleases or counterparts thereof affecting any sub-lease, whether derived immediately or mediately out of the term granted by the said lease in the demised premises or any part thereof, except as expressly excepted in the said lease.

R. F. Roxburgh, K.C., and *F. McMullan* for the plaintiff.

Cyril Radcliffe, K.C., and *L. F. Potts* for the defendants.

Roxburgh, K.C.: The only question is whether this clause refers to all assignments and underleases, or whether there is some limitation to be found in the covenant of the class of assignments and underleases affected, and what such limitation, if any, is. In my submission, there is no such limitation. The class of assignments and underleases which require registration is not to be found in the person who executes the document, but in the property to which the document relates. One thing which is manifest is that this sub-lease is an assignment or underlease relating to the demised property or some part thereof, and if a document falls within that definition the obligation to produce it or cause it to be produced is absolute, and it does not matter who the parties to the document are. It is plain from the covenant itself that its application is not to be limited to a document to which the lessees or an assignee of the lessees is a party, because of the words in brackets, containing the provision excepting a sub-lease not exceeding 7 years. If the covenant were not wide enough, but for the exception, to include the excepted documents, there would be no point in having the exception. It is plain that the persons who framed this covenant must have understood and intended it to mean that, but for the exception, assignments and underleases of flats for less than 7 years would be within the ambit of the covenant. The construction for which I am contending will not create any practical difficulties, since all that persons who derive title under the head term, whether they be assignees or underlessees, have to do is to take from the persons deriving title from them a covenant in terms identical with the one which binds them.

Radcliffe, K.C.: What the plaintiff is asking for is a declaration that anyone who grants any sub-lease of any part of Mount Royal, so long as it is not for less than 7 years, is covered by this covenant, although he may, and probably will, know nothing about it. Nor is that all. The plaintiff

says that not only every sub-lease, but also every assignment of any interest created immediately or mediately, however remotely, out of this interest, must be produced and registered. That is an extraordinary canon of construction, and if a less extensive construction is possible, as I say it is, on the *prima facie* meaning of the words of the covenant, it should be adopted, especially as this is a covenant which, if broken, leads to a forfeiture. It should therefore be construed strictly against the person who claims the benefit of it. If there were no words in brackets in the covenant, there could be no doubt that the words of it mean that it is only the lessees themselves, including their assignees, who are to do something. That being the *prima facie* meaning of the covenant, and the words in the brackets being intended to limit what would otherwise be the obligation of the lessees under the covenant, they ought not to be used to extend its ambit. See *Ellis v. Noakes* (1), at p. 105, for the principle that words of extension should not be used as words of limitation, and, conversely, that words of limitation should not be used as words of extension. This is not an impersonal covenant that something shall be done. Every assignment or underlease of the demised premises means either an assignment of the term created by that lease or that of an underlease derived out of that term, and does not extend to a sub-lease derived not out of the term, but out of a sub-lease. That is what is suggested by the term "demised premises." Although the demised premises are a physical object and not an interest, it is not possible to separate the physical object from the interest. There is a confusion of the physical object and the covenants attaching to it. As this is a matter of conveyance, see PRIDEAUX PRECEDENTS IN CONVEYANCING, 22nd Edn., Vol. III, p. 1069, covenant 10. Although there is there a reference to an assignment in unqualified terms, it is assumed that all that is being dealt with is the term or any part thereof. When PRIDEAUX talks of an assignment of demised premises, he is thinking of an assignment which will vest the term created by the lease. I rely also on the change of words when the covenant refers to the case of a deceased assignee. Then the words "cause to be produced" are omitted. Those words are not necessary, because, if the devolution takes place by reason of the death of an assignee or underlessee, the covenant will, for the time being, be binding on his personal representatives to produce the instrument causing the devolution.

BENNETT, J.: On this summons the question which falls to be decided is a question as to the true construction of the lease dated Dec. 12, 1934, and made between the plaintiff of the one part and the defendants of the other part. The plaintiff asks the court to declare that, upon the true construction of the lease of certain property on the north side of Oxford Street in the County of London, known as Mount

Royal, the defendants, as lessees, are bound to produce or cause to be produced to the plaintiff as lessor, or his solicitor or agent, for registration as provided by the said lease, an underlease dated Feb. 11, 1935, and made between the Midland Bank Executor and Trustee Co., Ltd., of the one part and the defendants of the other part. The lease was granted on Dec. 12, 1934, and demised to the defendants a site on the north side of Oxford Street for a term of $88\frac{3}{4}$ years. On Feb. 11, 1935, the defendants demised the same premises to the Midland Bank Executor and Trustee Co., Ltd., for a term of 80 years from June 24, 1932, and on the same day the Midland Bank Executor and Trustee Co., Ltd., underlet part of the demised premises to the defendants for the term of 80 years less one day from June 24, 1932. It is that underlease which the plaintiff says the defendants are bound by the covenant in the head lease to register with their solicitors. The covenant relied on by the plaintiff is in these terms :

The lessees will at the cost and charges of the lessees within 2 calendar months next after the execution of every assignment or underlease (except in connection with lettings or assignments of such lettings of flats for terms not exceeding 7 years of which lettings or assignments the lessees shall from time to time furnish to the lessor forthwith upon request by him full particulars) of the demised premises or any part thereof produce or cause to be produced such assignment or underlease or the counterpart thereof and will within two calendar months after grant of probate or letters of administration in the case of a deceased assignee (other than an assignee of such lettings as aforesaid for a term not exceeding 7 years) produce the same to the lessor or his successors in title for the time being entitled in immediate reversion on the term hereby granted or to his or their solicitor or appointed agent for that purpose and will permit a docket or minute of every such assignment or underlease probate or letters of administration to be made and retained by or for the use of the lessor or his successors in title entitled as aforesaid and will pay to the person making each such docket or minute the sum of one pound one shilling for the cost of making the same.

The only question is whether the underlease of Feb. 11, 1935, granted by the Midland Bank Executor and Trustee Co., Ltd., to the defendants, is an underlease within the meaning of that covenant, and it is sought to say that it is not because it is not an underlease of the demised premises within the meaning of the covenant, that in the covenant demised premises means some physical property tied up by the terms and conditions of the original lease, and that that which is demised by the underlease in question, although it is a demise of part of the physical property, is not a demise of part of it tied up by the conditions of the original lease, but something which is tied up by the conditions of another document. I see no reason for putting that construction upon the covenant, particularly having regard to the exception to registration which is to be found in the covenant, which exception makes it impossible to accede to the defendants' view of the meaning of demised premises.

Therefore I propose to make a declaration that the summons as amended be answered in the affirmative, the plaintiff to have the costs of the summons.

Judgment for the plaintiff with costs.

Solicitors : *Wilde, Sapte & Co.* (for the plaintiff) ; *Bartlett & Gluckstein* (for the defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

ABBOTT v. ABBOTT.

[CHANCERY DIVISION (Clauson, J.), December 2, 1936.]

Partnership—Dissolution—Partnership to continue notwithstanding retirement of one partner—Notice of dissolution by one partner—Partnership at will—Partnership Act, 1890 (c. 39), ss. 26 (1), 32 (c).

By a deed of partnership between a father and his five sons it was provided, *inter alia* : “ 2. The partnership shall commence as from Oct. 11, 1923. The death or retirement of any partner shall not terminate the partnership . . . 10. If any partner shall . . . do or suffer any act which would be a ground for the dissolution of the partnership by the court then he shall be considered as having retired.” One of the sons, claiming that as no term had been fixed for the duration of the partnership it was a partnership at will, gave notice of dissolution and brought an action for a declaration that the partnership had been dissolved, for an account and for an order that the partnership be wound up by the court :—

HELD : (i) upon a proper construction of the deed, the partnership could not be determined by a single partner, although he could determine the partnership as between himself and the other partners.

(ii) the partnership was not a partnership at will, but one to continue, unless dissolved by the court or some other event, so long as two of the partners were still living and had not retired.

[EDITORIAL NOTE.] The points in the agreement for partnership here construed are that no period of duration of the partnership had been fixed, but it was expressly provided that the death or retirement of a partner should not determine the partnership. One partner wishing to retire, he claimed that his retirement would necessitate the dissolution of the partnership between the remaining partners, but the court did not agree with this contention.

AS TO DISSOLUTION OF PARTNERSHIP OTHERWISE THAN BY THE COURT, see HALSBURY, 1st Edn., Vol. 22, Partnership, pp. 85-88, paras. 165-173 ; and FOR CASES, see DIGEST, Vol. 36, pp. 497-503, Nos. 1640-1691. FOR THE PARTNERSHIP ACT, 1890, ss. 26 & 32, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 12, pp. 541-543.]

Cases referred to :

(1) *Moss v. Elphick*, [1910] 1 K.B. 846 ; 36 Digest 498, 1648.

(2) *A.-G. v. Raleigh*, unreported.

ACTION for a declaration that a partnership between the plaintiff and the defendants has been dissolved, for an account, and for an order that the partnership be wound up by the court.

The point at issue was whether, upon the proper construction of the deed of partnership, the partnership was one at will or a partnership which continued as regards the remaining partners on the retirement of one partner. The facts are set out in the judgment.

Sir Gerald Hurst, K.C., and *J. Neville Gray* for the plaintiff.

Fergus Morton, K.C., and *J. Leonard Stone* for the defendants.

Sir Gerald Hurst, K.C. : In the present case the plaintiff asks for the partnership to be dissolved under his statutory rights : see the Partnership Act, 1890, ss. 26 (1), 32 (c). Is it possible to find in the deed any necessary implication that the partnership has been entered into for a defined term or a fixed term ? The partnership is not to be determined in certain events, but there is no definition. The primary rule is that there is a partnership at will unless some agreement to the contrary can be proved. [Counsel referred to *Moss v. Elphick* (1).]

Gray, following on the same side : To enable the defendants to succeed, it is necessary to find in the deed an agreement that there shall be a definite period before which the partnership shall not end. Cl. 2 does not do that, but it cannot be construed as meaning that the partnership shall continue so long as there are two partners. It says that death shall not determine the partnership. Cl. 10 does not state a fixed term. It does not say how long the partnership shall go on. In order that it may not be regarded as a partnership at will, it is necessary to show that it is for a fixed term. The parties were contemplating dissolution by the court and were contemplating putting in some fixed term, but they have not done it. The deed goes no further than to say that if one partner retires the partnership amongst the others is not to be upset. There is nothing to show that this is not a partnership at will and there is nothing in cl. 10 to deprive a partner of his rights upon retirement. To show that a partnership is not at will, there must be a term or some limit of time.

Morton, K.C. : The wording of this deed is inconsistent with a partnership at will, but it is a partnership which is to continue so long as any two partners have not died or retired. If it were held to be a partnership at will, there was a discretion as to whether there should be a sale and in this case there were special circumstances why there should not be a sale. The father had taken his five sons into partnership. The property was the father's. If this is a partnership at will, a younger son could serve a notice of dissolution and say that the whole of this family business should be sold and he would take his share. Cl. 2 is inconsistent with a partnership at will, but the partners have provided that if one retires the partnership shall still go on. One cannot imagine any one who is drawing a deed for a partnership at will putting in any such provision. There is no clause which says in terms that the partnership is to continue so long as two partners are living and have not retired,

but that is the meaning and intention of the deed as a whole. When one considers the circumstances in which the deed was executed, one is helped to come to that conclusion. [Counsel referred to *A.-G. v. Raleigh* (2).]

CLAUSON, J. : It appears, by certain statements which are admitted, that immediately before Mar. 11, 1924, Mr. Charles Abbott, sen., was carrying on business as a farmer in the county of Suffolk with certain assets which are mentioned in cl. 5 of the deed of partnership, to which I need not refer. He had five sons who had been assisting him in carrying on the business. They had received from him no regular wage but, as is common in cases of this kind, had been working in their father's business and had received lodgings and pocket money for themselves and their families and so on. On Mar. 11, 1924, the father and the five sons entered into a deed which contains the following provisions : It is mutually agreed that the parties shall become partners on the terms thereafter contained and the partnership business shall be that of farming. By cl. 2 :

The partnership shall commence as from Oct. 11, 1923. The death or retirement of any partner shall not terminate the partnership.

Cl. 3 states the firm name, cl. 4 states the name of the bankers and who is to sign cheques, and cl. 5 states the capital of the partnership, and provides that the capital for the time being is to be held in the following shares : Charles Abbott, sen., three eighths, and each of the sons one eighth share. There is a provision in cl. 6 for taking accounts in Oct. of each year. Cl. 10 is important. It is :

If any partner shall become physically or mentally unfit to carry out his duties in connection with the partnership or shall do or suffer any act which would be a ground for the dissolution of the partnership by the court then he shall be considered as having retired from the partnership and the other partners shall have the option of purchasing the share of such partner upon the like terms as are set out in the next clause hereof.

Then it is provided :

11. If any partner shall die or retire during the partnership the surviving or continuing partners shall have the option of purchasing the deceased or retiring partner's share in the partnership for the amount at which such share shall stand according to the last annual balance sheet.

12. All disputes which may arise between the partners or their personal representatives whether during or after the termination of the partnership touching the partnership affairs shall be referred to the partnership as a whole and the decision of the majority shall be final.

The plaintiff in this action is one of the sons. He is claiming that the partnership constituted by that deed was what is commonly spoken of as a partnership at will. On Nov. 8, 1934, he gave notice claiming a

dissolution, or that by reason of the issue of the writ in this action the partnership is to be treated as dissolved by reason of its being a partnership at will. The father and brothers say it is not a partnership at will. If one desires to give notice and retire, he has his rights. That is the dispute between the parties, and the sole question I have to consider is whether on the true construction of the deed the plaintiff has the right, which he claims, to put an end to the partnership by notice. I am told that I am entitled to know the circumstances in which the deed was executed, and I have already stated them. The materiality of those circumstances is that *prima facie* it is not very businesslike for a man to throw assets, which belonged to himself entirely, into a partnership, with the result that he becomes the owner of the property as to three eighths only, and one eighth goes to each of his five sons, and that at a moment's notice one son can bring the business to an end and take away one eighth of the assets. The circumstances are as I have stated. What on the true construction of this deed is the fair meaning to be attributed to it? I must read it with great attention and see from the deed as a whole whether the parties have agreed that any one of the sons, or the father, can bring the business to an end at any moment or whether there is some agreement inconsistent with that being done. At one time I had a slight difficulty because of the verbal difficulties of precisely reconciling the terms of the Partnership Act, 1890, s. 26, with the terms of sect. 32 of the same Act. The matter came before the Court of Appeal in the case of *Moss v. Elphick* (1) and it is authoritatively stated in the judgments in that case—I refer to the judgment of FARWELL, L.J., in particular, which I adopt fully—that the statement contained in LINDLEY ON PARTNERSHIP (7th Edn., p. 142) is correct. That statement is that :
the result of a contract of partnership is a partnership at will unless some agreement to the contrary can be proved.

This being an agreement for a partnership, it is an agreement which each partner has a right to bring to an end at any moment, if he so desires, unless I am satisfied that there is some other agreement. The first point is that on reading cl. 2 it is clear that a partner who says "I want to go out of the partnership" does not determine the partnership by doing that. If this were a partnership at will and one partner said, "I am determined to go out of this partnership," the effect would be that the partnership would come to an end as between all the partners, although the others might form some new partnership amongst themselves if they so desired. So there is some limitation upon this character of the partnership; it is subject to the express agreement that a single partner cannot determine the partnership although he can determine it as between himself and the others. This involves the fact that if one intimates his desire to go out, the partnership shall continue among the remaining partners. The next question that I have to decide is how

long and until when is the partnership to continue, and is there any light thrown upon that by the document? *Prima facie*, if two partners agree that they will continue indefinitely in partnership until by agreement they alter that position, that is not a partnership at will. It is a partnership for their joint lives unless they agree to terminate the relationship. That was decided in *Moss v. Elphick* (1). Accordingly, I get this from cl. 2. The partners have agreed that the partnership shall continue, notwithstanding that one partner goes out, and they have also agreed that notwithstanding that one partner dies, the partnership shall continue. That does not mean that the partnership shall continue when all but one of the partners has either died or retired, because there cannot be a partnership with one partner. But the clause seems consistent with the view that so long as there are two partners the partnership is to continue. Cl. 10 seems to contemplate that there may be circumstances in which the partnership might have to be dissolved by the court. That is quite alien from the conception of a partnership at will to which a partner can put an end of his own volition. It is difficult to see in what circumstances the court could decree a dissolution of such a partnership. The court could, of course, determine that the partnership had been duly dissolved. But it never discusses the grounds which justify a dissolution except in the case of a partnership otherwise than at will. That clause seems to indicate that this is a partnership which is not determinable at the will of one partner as between all the partners, but it is a partnership which is to continue until there is a dissolution of it by the court or by some other event, save as against a partner who retires. In these circumstances, it seems clear that sense cannot be made of the document unless it is that this partnership shall not be brought to an end so long as two of the partners are still living and have not retired. In these circumstances, the claim of the plaintiff to dissolve the partnership as between all the partners is one which must fail, and accordingly the action must fail, and it only remains to dismiss it with costs.

Action dismissed with costs.

Solicitors: *J. R. Welch, Son & Algar*, agents for *Turner, Martin & Symes*, Ipswich (for the plaintiff); *Field, Roscoe & Co.*, agents for *Birkett, Ridley & Cox*, Ipswich (for the defendants).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

ALLEN AND OTHERS v. F. O'HEARN & COMPANY.

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Alness, Sir Lyman Poore Duff), **July 21, 23, October 29, 1936.**]

Privy Council—Canada—Stock exchange—Shares bought on margin—Realisation of securities held on the general account when the margin in respect of one transaction insufficient—Action on footing that brokers are trustees for agent and his principals.

C. had a brokerage business in stocks and shares which was conducted through the defendants who had a seat on Standard Stock and Mining Exchange in Toronto and upon other exchanges. C.'s clients gave him orders for the purchase and sale of shares and C. gave the defendants the necessary instructions in his own name, not disclosing the names of his clients. The defendants rendered a broker's contract note to C., and he would render a similar note in his name to his client. The contracts were mostly on margins and subject to terms regulating the rights of the parties. Transactions in one particular company's shares for one client of C. proving disastrous, the defendants, purporting to act under the terms of their agreement with C., realised other shares held as security for other transactions and C. became bankrupt. The trustee in bankruptcy was a co-plaintiff, originally with C., and after his death with his executors. The trial judge held that the defendants were trustees of the shares so realised for C. and his clients and had no right to charge such shares with the deficiency on the worthless shares and made an order for an account to be taken. This decision was reversed on appeal, and upon the further appeal to the Judicial Committee the appellants contended they were entitled to the relief given by the trial judge and asked no variation thereof:—

HELD: the trial judge's order could not be supported. C.'s clients as undisclosed principals of C. would have a right of action against the defendants, and, until they exercised their rights, C. could sue, but these were ordinary legal rights and were not enforceable upon the footing that the defendants were trustees. If the case was looked at as a wrongful dealing with property, apart from privity of contract, still no question of trusteeship of the defendant for the clients of C. arose. The order of the trial judge could not be supported, and, as no variation of the order was asked for, the appeal must be dismissed.

[EDITORIAL NOTE. The only question at issue in this appeal, though many more had been argued in the course of the proceedings, was whether the person contracting with an agent of an undisclosed principal is a trustee for the agent and his undisclosed principal and whether he may be liable to account as such trustee. The rights of the agent are held to be to sue the third party until or unless the undisclosed principal comes in to sue, and whatever fiduciary relationship may exist between the agent and his principal there is no such relationship between the third party and the agent or the undisclosed principal. This being a transaction on margins, the agent was in the position of mortgagor to the brokers, and, viewed in this light, it is well settled that the relationship between mortgagee and mortgagor is not one of trustee and *cestui que trust*, except as to surplus proceeds of sale.

AS TO RIGHTS OF AGENT WHERE PRINCIPAL UNDISCLOSED, see HALSBURY, Hailsham Edn., Vol. 1, pp. 307, 308, paras. 494, 495; and FOR CASES, see DIGEST, Vol. 1, pp. 620-628, Nos. 2457-2525.]

APPEAL from a judgment of the Court of Appeal of Ontario (RIDDELL, FISHER and MACDONNELL, JJ.), dated Apr. 16, 1935, allowing an appeal from a judgment of KINGSTONE, J., dated Dec. 1, 1934.

The facts of the case appear in the judgment of their Lordships delivered by LORD ATKIN.

J. C. McRuer, K.C., and *J. McDonald, K.C.*, for the appellant.

W. N. Tilley, K.C., for the respondent, was not called upon.

LORD ATKIN : This is an appeal from the Court of Appeal of Ontario, who reversed a decision of KINGSTONE, J., in favour of the plaintiffs and dismissed the action with costs. The original plaintiffs were L. S. Clarke, and J. A. Allen, his trustee in bankruptcy. During the proceedings Mr. Clarke died and his executors were added as parties. The defendants are brokers in Toronto and have a seat on the Standard Stock and Mining Exchange in Toronto and upon other exchanges. Mr. Clarke was a civil engineer and engaged in a prosperous lumbering business in Ontario. About 1931 he was induced by a Mr. Bayne to embark in a brokerage business at North Bay which had just closed down, in which Mr. Bayne had been concerned. He started the business and opened two branches, one at North Bay managed by Mr. Bayne, and another at Sudbury. He was introduced by Mr. Bayne to the defendant firm, and his brokerage business in stocks and shares was conducted through the defendants, a firm of good standing and experience. Mr. Clarke's country clients gave orders to Mr. Clarke for the purchase and sale of shares. Mr. Clarke would give the necessary instructions to the defendants in his own name, not disclosing the name of his client. The defendants would render a broker's contract note to Clarke, and he would render a similar note in his name to his client. Most of the transactions were on margin ; and there were terms in the contract notes regulating the rights of the parties and the power of the respective brokers to realise the shares bought and the securities held as margin in case the margin became insufficient. These terms were an important part of the original case for both plaintiffs and defendants, but in their Lordships' view are now irrelevant. Business proceeded on normal lines for some months, until, in Sept., 1932, Bayne, acting in conjunction with one Barkell, began a series of transactions in a company called Peninsular Petroleum, Ltd. (Pen. Petes), out of which arose the trouble which brought Mr. Clarke to ruin. A series of orders were given to the defendants for the purchase of large numbers of these shares. They were low-priced shares which under the rules of the relevant stock exchange could not be dealt with on margin. Eventually Clarke found himself unable to find the cash for the purchases then open ; nor could he find the client for whom the purchases should have been made. Apart from these purchases, the account as between Clarke and his

clients and Clarke and the defendants was apparently in order with sufficient margin. The defendants, purporting to act under powers given them by the contract between them and Clarke, proceeded to sell shares bought and held as security on the general account, which mainly consisted of shares bought on behalf of Clarke's clients, and in this way indemnified themselves against the loss on Pen. Petes. Clarke went into bankruptcy, making an assignment for the benefit of his creditors on Feb. 28, 1933, of which the other plaintiff is trustee. The present action was commenced by writ dated Sept. 27, 1933. The amended statement of claim was delivered Jan. 24, 1934. It is unnecessary to discuss the various forms of relief claimed in this document, for this case has to be decided upon the relief given by the learned judge at the trial, which the plaintiffs, the appellants before this Board, contended was the relief they were entitled to and of which they asked no variation. The learned judge came to the conclusion that the defendants were not entitled to make the sales complained of, and by his formal judgment, dated Dec. 1, 1934, made the following declarations and orders :

2. This court doth declare that the defendants held the securities in the account of the plaintiff L. S. Clarke and sold by the defendants on or after Feb. 7, 1933, in trust for the plaintiff L. S. Clarke as trustee or the plaintiff J. A. Allen as trustee, for the clients and customers of the plaintiff L. S. Clarke, and that the defendants had no right to charge the said securities with the purchase price of 300,000 shares of Peninsular Petroleum stock referred to in the plaintiffs' statement of claim herein, and the plaintiffs, as joint trustees for these customers and clients, are entitled to damages for the wrongful sale and disposal of the securities belonging to the said customers and clients and sold by the defendants on or after Feb. 7, 1933, and doth adjudge the same accordingly.

3. This court doth order and adjudge that this cause be referred to the local master at North Bay to determine the amount of damages, if any, that the defendants ought to pay for the said wrongful sale and disposal of the same, and who are the customers and clients so entitled, and the amount due to each of such clients and customers for damages accordingly.

4. This court doth further direct that the defendants do pay to the plaintiffs the amount, when so ascertained, and that the same constitute a special trust fund to be distributed among the parties entitled as the customers and clients of L. S. Clarke for whom the said securities were sold and doth adjudge the same accordingly.

Their Lordships are of opinion that this judgment cannot stand. So far as the rights of the parties depend upon contract, either Clarke's customers were undisclosed principals of Clarke in relation to the defendants, and had the contractual rights of such principals, or they were not. If they were, they had the right of suit for breaches of contract, or, alternatively, until they exercised their rights Clarke could sue ; but these are ordinary legal rights. The supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal. He has no claim against the other party in the

capacity of trustee ; and though there have been countless actions in which an agent for undisclosed principals has sued in his own name, there appears to be no precedent for such an agent suing as trustee for his principals. What happens to the proceeds of a successful claim by such an agent is another matter. By virtue of his fiduciary relation to his principals, he may have to account to them for what he receives ; but this is not the concern of the other party.

If the case is looked at as a wrongful dealing with property apart from privity of contract the result is the same. As far as the shares agreed to be bought are concerned, if there is nothing due from the undisclosed principal either he or the agent must sue. No question of trusteeship arises. As far as the shares deposited as margin are concerned, the agent is in the position of mortgagee with a right to sub-mortgage ; a mortgagee is not a trustee ; and if the shares are improperly dealt with by the submortgagee, the mortgagee can sue in his own right, or the mortgagor may under proper conditions sue to protect his property ; but the mortgagee cannot sue as trustee for the mortgagor, for he is not trustee. In the case in question, either Clarke's rights passed to the trustee, or Clarke's customers alone could sue. Neither Clarke nor the trustee could sue as trustee for the customers, and clearly they were not joint trustees as they have been declared to be by the judgment. It appears, therefore, to their Lordships, that the judgment was properly set aside by the Court of Appeal, and as no other relief was asked for by the plaintiffs the action was properly dismissed. The decision of the Court of Appeal appears to have been based principally on consideration of the question whether the customers could be considered as undisclosed principals of Clarke so as to affect the defendants' dealings with the shares in question. On this matter their Lordships have not thought it necessary to express an opinion, and the opinions of the learned members of the Court of Appeal upon this question and on the construction of the contractual documents must not be treated as forming any part of the grounds of the present decision. FISHER, J.A., in addition to other grounds, clearly indicated the view that has been maintained in the foregoing reasons. Their Lordships are of opinion that this appeal fails, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors : *Lawrence Jones & Co.* (for the appellants) ; *Blake & Redden* (for the respondents).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

Re NICHOLSON'S WILL TRUSTS, ORTMANS v. BURKE.[CHANCERY DIVISION (Bennett, J.), **November 20, 25, 26, 1936.**]

Trusts and Trustees—Administration of trust—Annuity fund—Annuity never payable—Capital of fund payable to legatee—Appropriation of investments to satisfy legacy—Discretion of trustees.

A testator by his will gave the residue of his property upon trust for his wife for life or so long as she should continue his widow. In the event of her remarriage, the testator directed that his trustees should set apart from the trust funds a sum sufficient to secure to the wife an annual income of £300. The principal of that sum was to be paid after the wife's death to the testator's step-daughter absolutely. The testator died in 1892, and was survived by his wife. Upon a summons to determine questions arising upon the will, it was held, *inter alia*, that in the event of the widow's death without marrying again a fund sufficient when invested to produce on the date of the widow's death £300 a year would devolve upon the step-daughter absolutely. The testator's widow died in 1934 without having remarried, and the step-daughter claimed that the sum due to her, subject to adjustment in respect of advances made during the widow's lifetime, should be provided by the trustees raising and paying to her such capital sum as, if invested in $2\frac{1}{2}$ per cent. consols at the date of the widow's death, would have produced an income of £300 :—

HELD: the trustees had a discretion under the will to appropriate for the purpose of the widow's annual income of £300 such of the investments authorised by the will as they should think fit, and as that discretion had not been surrendered, they should be at liberty, subject to adjustment in respect of advances, to appropriate, for the purpose of constituting the fund payable to the step-daughter, investments forming part of the funds subject to the trusts of the will.

[EDITORIAL NOTE.] The position here is that a fund might have had to be set aside to provide an annuity for a widow upon her remarriage. In fact she never remarried, and upon her death, the capital of the fund then passing absolutely to a legatee, the question arose how the obligation of the estate to the legatee should be discharged. It is held that any investments authorised by the will may be properly appropriated to discharge the obligation so long as they produce the amount of the annuity in a year.

AS TO APPROPRIATION BY TRUSTEES, see HALSBURY, 1st Edn., Vol. 28, Trustees, p. 141, para. 294; and FOR CASES, see DIGEST, Vol. 43, pp. 918-920, Nos. 3585-3592.]

Cases referred to :

- (1) *Re Hollins, Hollins v. Hollins*, [1918] 1 Ch. 503; 43 Digest 777, 2175.
- (2) *Harbin v. Masterman*, [1896] 1 Ch. 351; 23 Digest 400, 4714.
- (3) *Prendergast v. Lushington* (1846), 5 Hare 171; 43 Digest 930, 3677.

ADJOURNED SUMMONS to determine questions arising in the administration of the trusts of the will, dated Sept. 22, 1892, of Henry Armstrong Nicholson, who died on Oct. 13, 1898. The main question to be decided was whether a beneficiary under the will, whose interest fell into possession on the death of the testator's widow, was entitled, on the happening of that event, to have raised and paid to her such a capital sum as, if invested in $2\frac{1}{2}$ per cent. consols at that date, would have produced the

amount to which she was entitled, or whether the trustee of the will was entitled to appropriate for the purpose of constituting the said fund investments forming part of the testator's trust funds.

By his will the testator, after making certain specific bequests, gave the residue of his property upon trust for his wife for life or so long as she should continue his widow. In the event of her remarriage, the testator directed that his trustees should set apart a sum sufficient to secure her an annual income of £300, the principal of which, on the death of his widow, should be paid to his step-daughter Mathilde Cæzarine Elaine Wade, who subsequently married, and became Mrs. Burke. Subject to the above-mentioned provisions, the testator directed that all moneys to which he was entitled should be divided among his brothers and sister, the children of any who were deceased, with the exception of one named nephew, to take their parent's share. The testator was survived by his wife, Mrs. Edith Nicholson, who, in the events which happened, did not marry again, and who died on June 21, 1934. The testator's will was duly proved by the executors therein, who, being in doubt as to the proper construction to be put upon some of its provisions, took out an originating summons, which came on for hearing before STIRLING, J., in 1900. One of the questions raised by that summons was as to the rights of the testator's step-daughter, subsequently Mrs. Burke, on the death of his widow, to the fund directed to be set apart for the widow's use on her remarriage, in the event of no such remarriage taking place. STIRLING, J., answered that question by directing that, in the event of Mrs. Edith Nicholson dying without having remarried, a fund sufficient when invested to produce at the date of the death of Mrs. Nicholson £300 a year, would devolve upon Mrs. Burke for her absolute use and benefit, and that she took a vested interest in such fund as from the date of the testator's death. The order further directed that the executors and trustees of the testator's will were to be at liberty upon the death of Mrs. Nicholson, without having married again, to apply in chambers for directions as to the investments which ought to be appropriated to provide such fund. That order, not having been appealed against, bound all the parties to the proceedings in which it was given, amongst whom were included all the parties to the present summons except the last defendants, who were entitled to the interest in the testator's estate passing to his brother Proctor Nicholson, and in order to preserve their right of appeal against the order of STIRLING, J., if they should so desire, his order was incorporated by the learned judge in his order in the present proceedings. After the testator's death, the trustees of the will paid the income from his residuary estate to his widow until her death in 1934, and in the course of the years 1933 and 1935, with the consent of the widow, so far as related to advances made before her death, the trustees advanced to Mrs. Burke out of the capital

of the fund held upon the trusts of the testator's will sums amounting to £2,150. On the death of the tenant for life, Mrs. Burke claimed that the remainder of the sum due to her under the testator's will should be provided by the trustees raising and paying to her such a capital sum as, if invested in $2\frac{1}{2}$ per cent. consols at the date of the death of the testator's widow, would have produced an income of £300 per annum. On behalf of the rest of the persons entitled under the testator's will, it was contended that the trustees of the will had a discretion to appropriate for the above-mentioned purpose such of the investments authorised by the will as they should think fit.

G. P. Slade, for the plaintiff, the present trustee of the testator's will, stated the facts.

R. R. A. Walker, for the first defendant, the testator's step-daughter, Mrs. Burke: When a legacy or bequest is made of a sum of money to be calculated by reference to the income to be produced, the court has a fixed rule that that sum is to be calculated by reference to a fixed sum of consols: see *Re Hollins*, *Hollins v. Hollins* (1). There is no half-way house between consols and the trustees having a discretion to set aside any of the investments authorised by the will, which are of a widely varied character. There might be a discretion in the trustees to do that if all they had to do was to set aside a sum in cash, but such a proceeding would not be a sufficient performance of the trust in this case, where the fund must be such as to secure a constant income. Therefore the trustee has no discretion, and the principle in *Re Hollins*, *Hollins v. Hollins* (1) applies. There is no difference between that case, where the gift was of the income of a fund, and this case, where the direction is to set aside a fund to secure an annual income of £300, which is equivalent to a gift of an annuity. See also *Harbin v. Masterman* (2), at pp. 361-62.

BENNETT, J.: But LINDLEY, L.J., did not there lay down a test for a case such as we have here. Is there any authority as to what is the duty of a trustee who has got to provide an annual sum of £300 as regards appropriating securities by the income of which he is going to meet it? What about *Prendergast v. Lushington* (3)?

Walker: That was a case where the trustees surrendered their discretion to the court, and the court clearly said that the proper basis was consols. If the trustee in this case has a discretion it must be found in the words of the will, since the statutory powers of appropriation apply only to executors, and there is no indication of such a discretion in the will.

A. Andrewes Uthwatt, for the fourth defendant, the trustee in bankruptcy of Henry Nicholson, son of a deceased brother of the testator: All that the will directs is that investments shall be set apart from the testator's trust fund sufficient to secure the annual income of £300. In

terms the trustee is given all the trust funds from which to make his selection.

BENNETT, J. : By that, do you mean that the trustees could set apart an investment which had paid a dividend in the year preceding the date when the appropriation was made of £300, although in the previous year it produced nothing ?

Andrewes Uthwatt : The investments authorised by the will are the area within which the trustee's selection must be made, but within that area he must exercise a proper and honest discretion. All investments which do not carry a fixed rate of interest would on their face be not proper to be appropriated.

BENNETT, J. : Is there any definition of trust funds in the testator's will ?

Andrewes Uthwatt : STIRLING, J., in answer to question 2 in the summons before him, held that, as a matter of construction of the will, the trustees were by the will authorised to retain investments of which the testator died possessed. The whole face of the will and the order of STIRLING, J., is that a selection is to be made, from property comprised in the trust funds, of a certain amount.

As to the cases which have been cited, *Harbin v. Masterman* (2) has nothing to do with this case. See p. 360 for the whole point of that case. In *Re Hollins*, *Hollins v. Hollins* (1), it is clear from the opening words of the judgment of SWINFEN EADY, L.J., that the whole of that case is based upon the fact that it is the court which is acting.

J. Neville Gray, for the third defendant, a son of the testator's sister, who survived the testator and died before the date of the summons herein : I am in the same interest as *Andrewes Uthwatt* and adopt his argument. It is assumed by WIGRAM, V.-C., in *Prendergast's* case (3) (see *Re Hollins*, *Hollins v. Hollins* (1), at p. 512), that, subject to any question of construction of the will, the trustees could have decided any way they pleased, if they had not surrendered their discretion. So here, the trustee not having surrendered his discretion, the only question which can be argued is that, under the will, he never had a discretion. The will does not direct the trustees to set aside a sum of money for the widow, but to set aside "sufficient to secure, etc.," which must mean such investments as will, in their discretion, reasonably guarantee £300 a year for the rest of her life. Moreover, this something which is to be set aside is the only express gift in the will, since Mrs. Burke got no express gift in the event of the widow not remarrying. Her gift in that event depends upon the decision of STIRLING, J., and what he said she was entitled to was a sum which, being set aside at the widow's death, was sufficient to produce £300 a year. But that is quite a different gift from the one given to the widow, the object of which was to secure that she should have £300 a year for her life. Mrs. Burke's rights,

therefore, depend upon the order of STIRLING, J., which says quite clearly that the trustees have a discretion, but that if they feel any difficulty in exercising it they can come to the court. So it is impossible to say that the trustee has no discretion.

Hon. Charles Russell for the last defendants, who were interested in the share of the testator's estate which was given to his brother Proctor Nicholson: I am in the same interest as *Andrewes Uthwatt* and *Neville Gray*. I agree that the gift to Mrs. Burke is to be implied from the order of STIRLING, J., and therefore one can look at that order only, and not at the will. There is nothing in that order to suggest that what is to be set aside must be consols. It is reasonably plain that the trustees can appropriate any authorised investments, and it is immaterial what the nature of those investments is. Provided that they have for a few years past brought in a stated dividend at the same rate, there is no reason why the trustee should not in his discretion take that as being an investment which at a particular date is producing £300 a year.

M. C. Adams, for the second defendant, son of a deceased brother of the testator: I am in the same interest as the last three defendants and have nothing to add.

BENNETT, J.: The question which has to be decided arises on the will of the testator Henry Armstrong Nicholson, made on Sept. 22, 1892. The testator died a good many years ago, and his will has already been considered and an order made by the late STIRLING, J., on Feb. 8, 1900. The testator, after giving a pecuniary legacy and a specific legacy and a pecuniary legacy to his wife Edith Nicholson, devised and bequeathed all his estate and property of every kind whatsoever to his trustees in trust:

to pay the income of the same unto my said wife for her own absolute use and benefit during her life or so long as she shall continue my widow. But in the event of her remarriage I direct and authorise my said trustees to set apart from my said trust funds a sum sufficient to secure her an annual income of £300. And I hereby devise after the death of my said wife or on her remarriage all sums to which I may be entitled not heretofore disposed of to be equally divided between my brothers and sister the children of any of the deceased to take their parent's share with the exception of my nephew George Elliott Nicholson, son of my brother Robert now deceased, who it is my wish shall not participate in any way under this my will and I direct that the sum I have hereby authorised my trustees to set apart to pay to my said wife the annual income of £300 should she remarry shall be free from the control of any husband and I direct and empower my trustees to pay the principal of the same after her decease to my step-daughter Mathilde Cæzarine Elaine Wade absolutely.

That is the material part of the will. The matter was brought before STIRLING, J., on Feb. 8, 1900, on an originating summons, in which the fifth question asked was whether in the event of the death of the said

Edith Nicholson (she was the testator's widow) without remarrying again, a fund sufficient when invested to produce at the death of the said Edith Nicholson, or at any other and what time, £300 a year or any other and what sum would devolve upon the said Mathilde Cæzarine Elaine Wade for her absolute use and benefit; and STIRLING, J., by his order of Feb. 8, 1900, declared in answer to question 5:

that in the event of the death of the defendant Edith Nicholson without marrying again, a fund sufficient when invested to produce on the date of the death of the defendant Edith Nicholson £300 a year will devolve upon the defendant Mathilde Cæzarine Elaine Wade for her absolute use and benefit and that the defendant Mathilde Cæzarine Elaine Wade takes a vested interest in such fund as from the date of the testator's death, and the executors and trustees of the testator's will are to be at liberty upon the death of the defendant Edith Nicholson without having married again to apply in chambers for directions as to the investments or moneys which ought to be appropriated to provide such fund.

Edith Nicholson, the deceased's widow, died on June 21, 1934, without having married again, and a question has arisen between the persons entitled to the residuary estate of the testator and Mathilde Cæzarine Elaine Wade, as she then was, but who is now, because she has married, Mrs. Burke, which is this:

Whether the plaintiff . . . is at liberty (subject to adjustment in respect of advances made to the said defendant as mentioned in sub-para. (3) hereof) to appropriate for the purpose of constituting the said fund investments forming part of the funds subject to the trusts of the said will at June 21, 1934, and producing an income of £300 per annum; or (b) whether the said defendant became entitled on June 21, 1934 (subject to adjustment as aforesaid), to have raised and paid to her such a capital sum as, if invested in $2\frac{1}{2}$ per cent. consols at that date, would have produced an income of £300 per annum or some other and what capital sum.

For Mrs. Burke, it is argued that she is entitled to have raised and paid to her such a capital sum as, if invested in $2\frac{1}{2}$ per cent. consols on June 21, 1934, would have produced an income of £300 per annum, and the argument on her behalf is rested upon the decision of the Court of Appeal in *Re Hollins, Hollins v. Hollins* (1). In my judgment, *Re Hollins, Hollins v. Hollins* (1), is no authority in this particular case. It is only an authority for what the court would do in a similar case, if the trustees of a will had a discretion in the matter as to what they should do and had surrendered to the court their discretion. In those circumstances, where the trustees have surrendered their discretion, there is no doubt whatever, on the authority of *Re Hollins, Hollins v. Hollins* (1), that the court would say there must be appropriated such a capital sum as invested in consols would have produced the stated sum. But in this particular case the trustee has not surrendered his discretion, and the question is what in these circumstances he can, if he chooses, do. I agree with the argument advanced by Mr. Andrewes Uthwatt that the question to a very large extent depends upon the language of the particular

will. Now, what the lady is entitled to, as STIRLING, J., held, is the equivalent of the capital sum or the investments set aside to secure for the widow an annual income of £300. And what the will said the trustees were to do for the purpose of providing an annual income of £300 for the wife was to set a sum apart from the testator's trust funds. Now, STIRLING, J., has held, in answer to a question which he was asked in 1900, that the executors and trustees are at liberty to retain the investments of which the testator died possessed, so long as they should in their discretion think fit, and the testator's trust fund under the terms of the order included in investments so retained, any investments in which the trustees had happened to invest any property of the testator, which they had realised and had invested upon securities in which trustees are by law authorised to invest trust money. The will points out the area within which the trustees may exercise their discretion and in my judgment they are entitled within that area to exercise their discretion. As Mr. Andrewes Uthwatt said, they are bound, in the exercise of their discretion, to act reasonably, and must have regard to the fact that what they have to do is to set aside investments which are to secure an annual income of £300. In doing that, of course, they would not be acting reasonably if they were to select investments of such a nature that the income produced from them would be uncertain in quantity. But I do not think it is necessary for me to decide that the term "proper investments" necessarily excludes all investments which do not carry a fixed rate of interest. The trustees have a discretion which must be exercised reasonably.

In my judgment, therefore, *Re Hollins*, *Hollins v. Hollins* (1), being a decision which only applies to a case where trustees have surrendered their discretion to the court, the answer to the amended question 2 of the originating summons is that the plaintiff is at liberty, subject to adjustment in respect of advances made to Mrs. Burke, to appropriate, for the purpose of constituting the fund, investments forming part of the funds subject to the trusts of the will on June 21, 1934, and producing an income of £300 a year.

Questions 1 and 3 will stand over generally with liberty to amend by adding parties and generally to restore. Extend time for appealing against this order until expiration of four months from to-day. [This part of the order was due to the fact that the last defendants to the summons were living in New Zealand.]

Solicitors: *Stow & Co.* (for the plaintiff and the third defendant); *Randolph & Dean* (for the first defendant); *Mills & Morley* (for the second defendant); *Solicitor to the Board of Trade* (for the fourth defendant); *William Sturges & Co.* (for the last defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

RICHARDS v. GOSKAR.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen and Lord Macmillan), **June 29, 30, July 2, 3, December 3, 1936.**]

Workmen's Compensation—Miner's nystagmus—Disablement—Recovery from disease not complete—Return to former work at higher wages—Cessation of disablement—Workmen's Compensation Act, 1925 (c. 84), s. 43 (1) (a).

A miner obtained a certificate that he was suffering from miner's nystagmus and was thereby disabled as from Jan. 20, 1932, from earning full wages at his work. He was awarded full compensation on the basis of total incapacity until he resumed work. In May, 1933, he returned to work and earned higher wages than before his disablement, and except for a short interval he continued to work until Dec. 1933, when the colliery closed down. Thereupon he claimed compensation on the basis of the certificate of disablement dated Jan. 20, 1932, and contended that he had never recovered from his original disablement :—

HELD : the fact that the appellant was able to return to work and earn full wages, for a period of time after being certified as disabled by an industrial disease, did not debar him thereafter from recovering compensation on it being found that he was still suffering from the disease referred to in the original certificate.

[EDITORIAL NOTE.] The question here has given rise to much discussion and is no doubt one of some difficulty, but it is now fortunately the subject of a unanimous decision of the House of Lords, which however sets aside both the order in the Court of Appeal and that in the county court. The question is whether a workman who has been certified to have been disabled by an industrial disease, and is found to be still suffering from and disabled by that disease, is debarred from recovering compensation because, for some time after the original disablement, he was able to earn full wages at the employment in respect of which he was originally certified. The decision of the House is that the workman is not so debarred.

FOR THE LAW ON THE POINT, see HALSBURY, Supp. to 1st Edn., Vol. 20, Master and Servant, para. 349 ; and FOR CASES, see DIGEST, Supp., Master and Servant, Nos. 3821a-3846c ; see also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 515-519.]

Cases referred to :

- (1) *Timmins v. Brodsworth Main Colliery Co., Ltd.*, [1934] 2 K.B. 361 ; 27 B.W.C.C. 283 ; Digest Supp.
- (2) *Durrant v. British Fibro-cement Works, Ltd.* (1935), 27 B.W.C.C. 460 ; Digest Supp.
- (3) *M'Dougall v. Summerlee Iron Co., Ltd.* (1927), 20 B.W.C.C. 419 ; Digest Supp.
- (4) *Evans (Richard) & Co., Ltd. v. Scahill* (1927), 20 B.W.C.C. 348 ; Digest Supp.
- (5) *Wilsons & Clyde Coal Co. v. Burrows*, [1929] A.C. 651 ; 22 B.W.C.C. 430 ; Digest Supp.
- (6) *Wilsons & Clyde Coal Co., Ltd. v. Flynn*, [1930] A.C. 516 ; 23 B.W.C.C. 159 ; Digest Supp.
- (7) *Connor v. Cadzow Coal Co., Ltd.*, [1932] A.C. 1 ; 24 B.W.C.C. 396 ; Digest Supp.
- (8) *Brown v. William Dixon, Ltd.* (1928), 22 B.W.C.C. 729 ; Digest Supp.
- (9) *Penrikyber Navigation Colliery Co., Ltd. v. Edwards*, [1933] A.C. 28 . 25 B.W.C.C. 303 ; Digest Supp.
- (10) *French v. Archibald Russell, Ltd.* (1934), 27 B.W.C.C. 338 ; Digest Supp.

(11) *McNicholas v. West Leigh Colliery Co., Ltd.* (1933), 26 B.W.C.C. 29; Digest Supp.

APPEAL from an order of the Court of Appeal (SLESSER and ROCHE, L.JJ., and SWIFT, J.) affirming an award made by the county court judge in favour of the respondent in an arbitration under the Workmen's Compensation Acts, 1925-31. The facts and the arguments are fully referred to in the judgments.

Edward W. Cave, K.C., and *T. Jenkin Jones* for the appellant.

Edgar Dale and *Montague Berryman* for the respondent.

LORD ATKIN: My Lords, this appeal raises a question of vital importance in respect of the provision made by the Workmen's Compensation Act for compensation to workmen who suffer from industrial disease. In the present case the workman in 1932 suffered from an industrial disease, miner's nystagmus, and being duly certified received compensation. There has been no further valid medical certificate in respect of him. The county court judge has found that he has not recovered from the disease; but that he has been able to earn, and has earned, full wages. He finds, therefore, that the disability to earn full wages has ceased; and, treating himself bound to hold that such disability is the accident, finds that he is unable to award compensation, though the man is now suffering from the same disease and may now by reason of the disease be wholly or partially incapacitated. Such a result is, of course, impossible under the working of the Act when applied to ordinary accidents. It is common for men to recover so far from an injury by accident that they can earn pre-accident wages and yet to suffer from a recrudescence of the injury caused by the original accident so as to be again incapacitated. In that case they obtain compensation, unless indeed it has been terminated by award. But, where there is a reasonable prospect of recrudescence, no judge does absolutely determine the compensation. The question is whether the position is different in cases of industrial disease. There can be no doubt that the cases of *Timmins v. Brodsworth* (1), and *Durrant v. British Fibro-cement Works* (2), decided in the Court of Appeal, bound the learned county court judge to come to this conclusion. Those cases are founded on what was said in this House in *M'Dougall v. Summerlee* (3), and it must be conceded that there are passages in the opinions in that case which indicate the view that in industrial diseases the effect of the Act is that the certified disability to earn full wages is the accident, and that when such disability ceases compensation is thereafter at an end, though the disease continues. My Lords, I hope to be able to show from the Act itself, from the decision in the House of Lords, and from subsequent decisions in this House that the legal position is not that which has been adopted by the Court of Appeal and the county court judge.

Apart from the decisions, the meaning of the relevant sections seems clear enough. Sect. 43 indicates three conditions on which a workman or his dependants will be entitled to compensation : (i) certificate that the workman is suffering from an industrial disease and that he is thereby disabled from earning full wages ; (ii) suspension under the Factory Acts on account of having contracted such disease ; (iii) death caused by such disease. If any of these conditions is fulfilled and the disease is due to the nature of the employment in which the workman was employed at any time within the 12 months previous to the date of the disablement or suspension, the workman or his dependants :

shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment subject to the following modifications :

(a) The disablement or suspension shall be treated as the happening of the accident.

The principal other modifications are that the compensation is to be recoverable from the employer who last employed the workman during the said 12 months in the employment to the nature of which the disease is due. By subsect. (2) the date of disablement is the date certified by the certifying surgeon, or, if no such date is certified, the date of the certificate. Proviso (b) is important :

Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

One further matter should be mentioned. Modification (e) in subsect. (1) preserves the necessity of notice by providing to whom notice of the death, disablement, or suspension is to be given. By sect. 14 (1), notice of the accident must be given "as soon as practicable after the happening thereof." It was necessary to adapt to industrial diseases the provisions, as the notice and modification (a) are obviously introduced for that purpose, to enable the workman to know of what he is to give notice and from what time. In no other section than 14 (1) is "the happening of the accident" referred to.

The sufferer from industrial disease is to be entitled to compensation "under this Act," and part II of the Act dealing with industrial diseases is obviously intended to be written into part I so that the machinery provided for the relief of workmen injured by ordinary accidents can be applied, with the necessary modifications, to workmen suffering from industrial disease. In the case of ordinary accidents, the sequence of events is clear. Employment, accident arising in the employment, personal injury, or death caused by accident (sect. 1), total or partial incapacity for work resulting from the injury (sect. 9). Shortly, the sequence is accident, injury, incapacity. Now it is to be noted that

the certified "disability" or the "suspension" referred to in sect. 43 does not take the place of or necessarily establish that incapacity for work which measures the compensation. The certificate is only of disability from earning full wages at the work at which he was employed. The county court judge in case of dispute has to decide whether there is total or partial incapacity for work resulting from the injury (sect. 9) either in the work at which the workman was employed or any other suitable work. That it is incapacity from the *injury* that has to be decided is made clear by other sections. I will refer to sect. 9 (4) providing for a workman "who has so far recovered from the injury as to be fit for employment of a certain kind." What the Act by sect. 43, has provided is that industrial disease due to the nature of the employment is equivalent to an injury by accident arising out of the employment. The certificate of "disability," like the "suspension," is necessary to fix the stage at which the progressive disease can reasonably be treated as an injury by accident; and the time of the happening of the accident, for the purpose of notice, and for some purposes of calculating wages, is fixed by the certificate or date of suspension.

But translate disability into "accident" for all purposes, and the scheme falls to pieces. If disability is the accident, what is the injury? And if disability be, as it is, disability caused by disease—the words of the Act are "is *thereby* disabled"—what has the judge to consider when he is determining whether there is incapacity resulting from the injury? He must at this stage disregard the certified disability of the "accident," and revert to the disease. On this construction, disease, which in terms is the injury, and by the statute is an injury caused by accident, has yet caused the accident. The only comparable sequence that occurs to me arose when Alice learned from the White Queen's accident the art of living backwards: first the bandage, then the bleeding, then the pin-prick. It must be noticed that in the case of death there may be no certificate of disability and no suspension; and that modification (a) has no application. Hence presumably even under the construction now being discussed, if a workman dies from industrial disease without being certified, the conception of accident is different from that in cases of certification. Another remarkable result of this construction is that the accident may come into existence when the workman is not employed at all. He may have ceased work in the disease-producing employment for months before he consulted the surgeon, who may not be able to fix a date for disablement which will then be the date of the certificate: as in the case of *Evans v. Scahill* (4). Another result of the present contention, as was very clearly pointed out by ROMER, L.J., in *Timmins v. Brodsworth* (1) is that though a man suffering from an industrial disease recovers compensation as though he had suffered an injury by accident, and though he is still suffering

from the disease, yet when the disability to earn full wages ceases the notional accident ceases its notional existence. I am quite unable to fit into the Act, or even to conceive the idea of an accident continuing or ceasing to exist notionally or otherwise. What happens is not that the accident ceases, but that the injury ceases, and I venture to think that this is true whether you are considering wound or industrial disease.

Now let us consider the question upon authority. As to an ordinary accident, there never has been any doubt that the mere fact that incapacity, even partial, has ceased, and that the workman has been earning pre-accident wages, is no bar to his claim for compensation if he shows that his subsequent incapacity is the result of the old injury. I need only refer to the language of VISCOUNT DUNEDIN in *Wilsons & Clyde Coal Co. v. Burrows* (5), at p. 440, where he says that under sect. 18 it is a relevant inquiry :

whether the injury was of such a character that there was, owing to the injury, some more or less latent disability at the time but which at any time might break out, and which, therefore, would give a reasonable probability of unfitness for employment supervening.

Or, as VISCOUNT SUMNER puts it, at p. 442, it is part of the duty of the medical referee :

to consider the question whether there were any signs of any of those well known liabilities to attract other diseases or further exhibitions of the same disease as an ultimate consequence of the accident, which are noticed from time to time.

My Lords, no trouble seems to have arisen until, in the case of industrial disease, there was more than one certificate of disability. If, after a man has been certified and receives compensation, a certifying surgeon subsequently certifies that he is suffering from an industrial disease and fixes the date of disability as about the date of the new certificate, can the workman rely upon the injury certified in the first certificate? The question is chiefly important as determining the employer who is to pay compensation, where the employers have changed. The difficulty is raised by the terms of the opinions expressed in *M'Dougall v. Summerlee Iron Co., Ltd.* (3), decided on Apr. 1, 1927.

Only about a month before that case, there had been given a considered judgment of this House in *Evans v. Scahill* (4). In that case, a miner had been certified in July, 1923, and Aug., 1924, to have been disabled by nystagmus. In Jan, 1925, the medical referee, appointed on an application by the employers under Sched. I (15) of the Act of 1906, certified :

The workman is not suffering from nystagmus. He is hyperopic and suffering from incipient cataract. His condition is such that he is fit for surface work : his incapacity is not due to the accident.

The employers thereupon ceased to pay compensation. But on July 22,

1925, the workman obtained a fresh certificate that he was suffering from miner's nystagmus, and was thereby disabled from earning full wages. This certificate did not fix the date of disablement, and under the Act therefore this disablement dated from the date of the certificate. The learned county court judge had found that the disease from which the applicant was suffering in 1925 was the same disease as in 1923, i.e., was a continuation of it, and he granted compensation. This House held that the terms of the certificate of Jan., 1925, did not preclude him from finding as he did, and upheld the award of compensation, notwithstanding that the man had not been in the employment of the employers for more than 12 months before July, 1925. I think it is plain that the House recognised that the only material question was whether the applicant had recovered from the original disease: that though in Feb., 1925, there were no symptoms of incapacity due to the disease, yet, as visible symptoms come and go, if the disease in July was the original disease, the workman was entitled to recover. I see no trace of any suggestion that the vital question was whether the "disability" had ceased: indeed, the decision suggests that it is irrelevant.

In *M'Dougall's* case (3), a workman had been certified as disabled by miner's nystagmus in 1923, and received compensation; but in Apr., 1924, he accepted £50 under a registered agreement in discharge of all claims in respect of present disabilities and future risks from that attack of nystagmus. In May, 1924, he resumed full work underground, and was again certified on Sept. 12, 1925, as disabled by miner's nystagmus. The date of disablement was given as Sept. 11, 1925. On a claim for compensation, the sheriff-substitute found that it was practically certain that some traces of miner's nystagmus remained when the applicant started work in May, 1924, but they did not then disable him from earning full wages, but, holding that the disablement of Sept. 11, 1925, was a fresh accident, he awarded him compensation. It was apparently not in dispute that if the incapacity were due to the old accident the workman would be barred by the release, which, however, did not affect a claim in respect of a new accident. The Court of Session reversed the decision. They took the view that the arbitrator had in substance found that the applicant had not recovered from the old disease, and that his present incapacity was due to it. Holding that the mere ceasing of the disability in the sense of the ceasing for a time of the incapacity to earn full wages was no bar to recovery in respect of the old accident, they held the applicant bound by the release. In the House of Lords this decision was reversed. VISCOUNT HALDANE, after stating, as would appear erroneously, that by subsect. (2) of the then sect. 8, where the workman was employed in a scheduled process the relevant scheduled disease is deemed to have been the cause of the

disablement, and, calling attention to the report of the Medical Research Committee on nystagmus, says at p. 426 :

It is not unnatural that the disablement and the disease should be treated as indistinguishable, and I think for the present purpose they were really indistinguishable in fact as well as indistinguishable under the statute. Under the statute, it is plain to my mind that what we have to deal with here is the disablement.

My Lords, if, in the statute, disablement means the same thing as disease, I can understand the proposition. But, with the greatest respect for the noble Lord, if they are different I cannot understand how an industrial disease, whether it be miner's nystagmus or lead poisoning, can be indistinguishable from the inability to earn wages, the result of the disease. The suffering workman, I imagine, could distinguish. VISCOUNT DUNEDIN agrees with the exposition of the section by VISCOUNT HALDANE, but also, and this is what causes trouble, "with what the sheriff-substitute said in a single sentence." I am not sure what the sentence was, but I think it is "I was of opinion that what entitled a workman to compensation in such a case is not the presence of the disease, but the disablement arising therefrom." LORDS PHILLIMORE and BLANESBURGH do not give reasons of their own on this point. LORD WARRINGTON, however, says, at p. 429 :

The arbitrator has found that the disablement resulting from the original attack of the disease had ceased. The result of that seems to me to be that the workman can no longer be treated as suffering injury by accident arising from the first attack of the disease. There then comes a fresh attack, causing fresh disablement, and a fresh certificate, and those elements together constitute a fresh injury by accident, in respect of which he is entitled to compensation.

He further says that he concurs in thinking that it is quite irrelevant in the present case to consider whether or not there remained traces of the disease during any part of the time in question. The material circumstance was that the disablement which is essential to the accident had ceased.

My Lords, there can be no doubt that the language used by the noble Lords, or by some of them, creates difficulty, especially as they dissent from the opinions delivered in the Court of Session, which had put on the Act what I have ventured to suggest is the obvious meaning of it. But the decision can be supported by the view that the finding as to the disease continuing was only an inference of the sheriff-substitute. He had before him a fresh certificate in Sept., 1925, fixing the date of disablement to be Sept. 11, 1925, *i.e.*, the date on which the disablement by the disease commenced (sect. 43 (2)). It would appear to follow that the previous disablement must be referred to an outbreak of the disease from which the workman had recovered. And it will appear that this explanation of the decision is given by LORD WARRINGTON himself in a subsequent case in the House of Lords, which appears to

me quite inconsistent with *M'Dougall's* case (3) if disability really means accident. I must first refer to *Wilsons & Clyde Coal Co. v. Flynn* (6). There a miner had twice suffered from nystagmus, and, being disabled thereby, had been in receipt of compensation, but had after each occasion commuted his compensation for a lump sum. He was out of employment from Nov., 1927, to Feb., 1929, when he resumed work with new employers, but after working two hours had to leave, and on Feb. 18, was certified as suffering from nystagmus, and the date of disablement was certified to be Feb. 15, 1929. It appeared from the evidence that he was still suffering from the original nystagmus which disabled him in Nov., 1927. The arbitrator, accepting this evidence, held it proved that the present disablement was not due to the nature of his employment within 12 months before the date of disablement (sect. 43 (1)), and refused compensation. The House of Lords, affirming the Court of Session, held that this was wrong, and that the certificate was conclusive of the right to compensation, for it conclusively fixed the date of disablement and the arbitrator could not vary it. VISCOUNT DUNEDIN referred to *M'Dougall's* case (3) with the object of showing that that case treated the certificate as conclusive. He does, however, say, at p. 169 :

The First Division in *M'Dougall's* case (3) had held—and it is put most concisely in a single sentence by LORD BLACKBURN—that the existence of the disease and not the disablement was the accident. Of course, that has been held to be wrong.

My Lords, LORD BLACKBURN did say that, and was clearly wrong, for the disease is not the accident, but is an injury by accident. I do not, however, regard *Wilsons'* case (6) as deciding anything but the finality of the certificate where the certifying surgeon has fixed the date of disablement.

Now, however, we come to *Connor v. Cadzow* (7), where *M'Dougall's* case (3) was again discussed. In that case, the miner, who had been disabled by nystagmus and been in receipt of compensation, was certified by the medical referee on Sept. 25, 1929, to have recovered from his attack of miner's nystagmus and "to be fit for his ordinary work." It must be noticed that the certificate states two things : the disease is at an end ; the disability is at an end. The workman claimed that he had not recovered and could bring his case under sect. 9 (4). The sheriff-substitute allowed a proof, but was reversed on appeal by the Court of Session. On the first hearing before this House, the matter was remitted to obtain from the medical referee an answer to the question whether he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not, after and in consequence of the attack, more susceptible to the disease than he had been before it. Now, if the decision in *M'Dougall's* case (3) meant what is alleged, such an inquiry must have been irrelevant. The ceasing of the disability had been conclusively certified, and, whether the

disease continued or not, would have been immaterial. Their Lordships therefore cannot have construed *M'Dougall's* case (3) in the sense contended for; and this is shown by the sequel. The medical referee answered the question in the negative, and thereupon this House reversed the decision of the Court of Session. All their Lordships took the view that the material question was whether the disease still subsisted. LORD BUCKMASTER said that, if a man had been once attacked and had completely recovered, recurrence of the disease would be due to his original susceptibility, but, if the recovery be not complete, there is the added probability of a recurrence owing to the fact that the original conditions caused by the first attack have not completely passed away. He says at p. 402:

In the case of a complete recovery, the second attack must be regarded as an independent accident, and this is made plain in the judgment of LORD WARRINGTON in the case of *M'Dougall* (3).

This opinion was concurred in by VISCOUNT DUNEDIN. LORD WARRINGTON, in agreeing, said at p. 405:

The respondent relied upon *M'Dougall's* case (3), but in my opinion this causes no difficulty. The workman had there been disabled by nystagmus, he had been fully compensated by payment of a lump sum, and had been certified as having completely recovered. He was again attacked by the disease and obtained a fresh certificate of disablement. All that this House decided was that this disablement was a fresh injury by accident, and I cannot see that this has any bearing on the present case.

LORD WARRINGTON seems to have been mistaken if he meant that there had been a certificate of having completely recovered before the last certificate. But it seems plain that he considered that there had been conclusive proof of recovery from the disease, and that fact was the ground of the decision. LORD THANKERTON, stating that the parties were agreed that the certificate must be taken as meaning that the workman was left more susceptible to the disease than he was before the first attack, says at p. 409:

It follows that the workman has not completely recovered from that disablement.

This must be read by reference to a former passage (pp. 408, 409), in which he says appellant's averments mean that he

has not completely recovered from the disablement of Feb. 14, 1928, in respect that that attack of the disease has left him less immune from a further attack, and that the risk of recurrence so engendered is wholly or mainly responsible for his failure to obtain work.

Recovery from disablement in this sense must mean recovery from the disease which produced disablement. One does not recover from incapacity, but from the cause of the incapacity. This is made clear later in the opinion, where he says that counsel for the respondents

argued that a recurrent attack of industrial disease, which disables a workman,

must constitute a fresh disablement and he founded on the cases of *M'Dougall* (3), and *Brown v. Dixon* (8). But in both these cases the original disablement had ceased before the second attack occurred. In the present case the certificate does not establish that the disablement has not yet ceased.

It is perhaps sufficient for the present purpose that LORD BUCKMASTER, with VISCOUNT DUNEDIN's concurrence, and LORD WARRINGTON, all treat *M'Dougall's* case (3) as proceeding on the footing that there had been complete recovery from the original disease, and that the final certificate was of a fresh disability from a fresh attack.

M'Dougall's case (3) was again discussed in *Penrikyber Navigation Colliery Co. v. Edwards* (9). In that case a miner had been certified to have been disabled by miner's nystagmus from Feb. 17, 1920. From 1920-24 he had been paid compensation for total incapacity. From 1924-26 he worked on the surface. In 1926 he was certified to be still suffering from miner's nystagmus; from that date he was out of employment and was paid for partial incapacity. In Jan., 1930, he was served with a notice under sect. 12, and served a counter-notice, and the dispute was referred to a medical referee, who certified in February that the workman was not then suffering from miner's nystagmus, and the incapacity was not due to nystagmus but to other defects. In March the workman obtained a certificate from the certifying surgeon that he was then suffering from miner's nystagmus, and that the date of disablement was Oct., 1920. The county court judge refused compensation, relying on the medical referee's certificate. The Court of Appeal ordered a new trial, holding that the county court judge had not considered the possibility of a fresh outbreak of the disease since Feb., 1930. This House directed that the medical referee should state whether he intended by his certificate to certify that the workman had completely recovered from the attack, in the sense that he was not, after and in consequence of the attack, more susceptible to the disease than he had been before it, the same question as was put in *Connor v. Cadzow* (7). The medical referee answered in the affirmative, in substance saying that the susceptibility to attack was natural, and not induced by the first attack of the disease. On this the House held that the certifying surgeon's certificate in March was inconsistent with the medical referee's certificate in February, and that the latter must prevail. It will be found from the opinions in this House that everyone assumed that the question was recovery or not from the disease, and that no one attached importance to the finding that the incapacity was due to another cause. But I only cite the case for passages from the opinions of VISCOUNT DUNEDIN and LORD WARRINGTON. VISCOUNT DUNEDIN, referring to the Act of 1906, says, at p. 310 :

What was declared to be an accident was not the industrial disease . . . but the disablement entailed by the disease. In that Act the provisions as to what might happen if the disablement owing to the accident was no longer present or had

become less in character, were to be found not in the body of the Act but in the schedule.

My Lords, it is inconceivable to me that, if VISCOUNT DUNEDIN ever meant that disablement was the accident in the narrow sense contended for by the respondents, he would, in the very next sentence, have spoken of "the disablement owing to the accident," which would then mean the disablement owing to the disablement. LORD WARRINGTON, at p. 325, repeats his explanation of *M'Dougall's* case (3), which he gave in *Connor v. Cadzow* (7) :

In *M'Dougall v. Summerlee* (3), the man had been certified to have completely recovered from a fresh attack. He was again attacked and obtained a fresh certificate of disablement, and it was decided by this House that this fresh disablement was a fresh injury by accident.

In *French v. Archibald Russell, Ltd.* (10), this house had to consider the effect of the amendment of sect. 9 (4) of the Act of 1925 by sect. 1 of the Act of 1931, where a workman had been certified to have recovered from an attack of nystagmus and to be fit for his ordinary work. He claimed that he was suffering from "the continuing effects of the injury" because he could not get work unless he was able to sign a declaration that he had not previously suffered from nystagmus. At p. 346 in the opinion of LORD TOMLIN, in which the other noble and learned Lords concurred, is to be found this statement :

It follows that in cases of industrial disease the injury by accident is not the contraction of the disease *simpliciter*, but the contraction of the disease plus the consequent disablement or suspension as the case may be.

If one adds to this "death," which is independent of a certificate of disablement or of suspension, but with which LORD TOMLIN had not to deal, this proposition is unassailable. But it seems to me quite inconsistent with the proposition that disablement alone is the accident. He adds that "continuing effects of the injury" refer to the physical condition of the workman resulting from the injury.

The construction of the Act for which the appellant contends is that adopted by the Court of Appeal in *McNicholas v. West Leigh Colliery Co., Ltd.* (11). In that case the miner had been certified in 1928 to have been disabled by nystagmus. But in 1931 the medical referee had given a certificate which showed, as stated by LORD HANWORTH, M.R., that at that date he was not suffering from nystagmus : *his incapacity was non-existent*, there was on his part no idiopathic condition, which made him susceptible to miner's nystagmus, and, if he had a fresh onset of nystagmus, that would be due to the susceptibility which arose out of the attack in Apr., 1928, but at that time there was no incapacity. Nevertheless, the court made a declaration of liability. ROMER, L.J., in the course of his judgment said at p. 44 :

It is, on the plain words of the section, the disease that he is entitled to treat as

the injury, and not the disablement, from which it follows that he does not cease to be entitled to treat himself as having sustained injury by accident merely because his disablement ceases temporarily. He continues to be entitled to treat himself as suffering from an injury arising out of an accident so long as he suffers from the disease.

This appears to me to be plainly right ; and to lead necessarily to the relief given by a declaration of liability. The decision under appeal on the other hand necessarily cuts out the possibility of a declaration of liability in cases of industrial disease, a very serious diminution of the rights of the workman existing in relation to ordinary accidents. In the case under appeal SWIFT, J., criticised this statement of ROMER, L.J., as being inconsistent with some of the language used by ROMER, L.J., in *Timmings v. Brodsworth* (1). I agree that there is some difficulty in reconciling the two cases ; but of the two I prefer the former, the principle of which, I think, bound the Court of Appeal in the latter case, and appears to me, for the reasons I have given, to be in accordance both with principle and with the current of the cases in this House later than *M'Dougall's* case (3).

My Lords, the simple question is whether a workman who has been certified to have been disabled by an industrial disease, and is found to be still suffering from that disease and to be disabled by that disease, is debarred from recovering compensation because, for some time after the original disablement, he was able to earn full wages at the employment in respect of which he was originally certified. Such a proposition, as it appears to me, is quite inconsistent with the rights given in the case of ordinary accidents ; it is inconsistent with the terms of the Act, including sects. 12 and 18, which apply both to ordinary accidents and to causes of industrial disease. It is supported by what I venture to think is too narrow a construction of the decision in *M'Dougall's* case (3), a construction which in the narrow form seems to me not only inconsistent with every other section of the Act, but also to have been rejected in subsequent decisions of this House to which two out of three of the noble Lords who gave opinion in *M'Dougall's* case (3) were parties. It appears to me that the workman in this case was entitled to have his claim for compensation assessed by the county court judge, and that the appeal should be allowed, and the case remitted to him for that purpose. The orders in the Court of Appeal and in the county court must be set aside, and the appellant should have his costs here and in the courts below.

LORD RUSSELL OF KILLOWEN : My Lords, when the arguments on this appeal had concluded, my conviction was that this appeal should be allowed, if it were possible to adopt that course in the face of what this House had said and decided in the case of *M'Dougall v. Summerlee* (3).

I confess that I had thought it impossible so to do. I have, however, had the opportunity of reading and considering the opinion of the noble Lord on the woolsack. It has opened up a way through what I feared was an *impasse*, and I accordingly, am prepared to concur in the motion proposed.

LORD MACMILLAN : My Lords, I am convinced that the decision which we are about to pronounce is consonant both with the spirit and with the letter of the statute. Like my noble and learned friend, LORD RUSSELL OF KILLOWEN, I experienced some difficulty in reconciling our conclusion with the views expressed in this House in the *M'Dougall* case (3), and I am glad that it has proved possible to surmount this difficulty in a manner so satisfactory.

Appeal allowed with costs.

Solicitors : *John T. Lewis & Woods*, agents for *Randell, Saunders & Randell*, Swansea (for the appellant) ; *Bramall & Bramall*, agents for *F. E. Metcalfe*, Bristol (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* POOLE CORPORATION.

[CHANCERY DIVISION (Farwell, J.), November 24, 25, 26, 1936.]

Open Spaces—Conveyance—Restrictive covenant—Private Act—Building on open space—Caretaker's lodge—Calculation of area withdrawn from public purposes—Public Health Act, 1875 (c. 55), s. 164—Poole Corporation Act, 1919 (c. xlv), ss. 39, 40, 88.

A local authority acquired land in fee simple to be used as an open space and covenanted to preserve the land as an open space and take all necessary steps to maintain the land as such. By a private Act the corporation was permitted to erect on the land so conveyed bathing and other huts and similar structures, tents, booths, and stalls and construct and maintain bathing pools, baths, shelters, pavilions and conveniences; but by a later section it was not to exercise these powers except within an area not exceeding 4 acres, and no erection was to be more than 14 ft. in height. The corporation executed extensive works upon the land including a promenade, lavatories, pavilion, café, car park, putting green, and enclosed a portion of the land and laid it out as a garden. The extent of all these works was in fact more than 4 acres. The corporation then desired to build a bungalow for the occupation of a resident caretaker. The building did not infringe any of the restrictions other than the extent of the land upon which it would exercise its powers under the Act. It was contended on the one hand that the corporation had by these acts withdrawn more than 4 acres from public use and on the other hand that, as the land actually covered with buildings was approximately $\frac{1}{2}$ acre, the corporation was acting well within its powers. The covenantee, party to the conveyance of the land, raised no objection to the proposed use and it was found as a fact that the corporation was acting honestly in the best interests of the public in requiring a bungalow for a resident caretaker:—

HELD: (i) there was nothing in the covenant in the conveyance that prevented the corporation exercising any power given it by the public Acts in reference to open spaces.

(ii) the corporation had power under the Public Health Act, 1875, to erect a caretaker's house if it thought it necessary for the proper maintenance of the open space.

(iii) as the powers given by the private Act were in addition to and not in derogation of those given by the public Acts, and there was no express prohibition in the private Act of what was intended to be done, the proposed erection was in order.

(iv) in calculating the amount of land withdrawn from public purposes, only land actually covered by buildings should be included.

[EDITORIAL NOTE.] The facts of this case quite commonly occur in the development of open spaces and recreation grounds and the matter is therefore of general interest as to the right of an authority to erect buildings and other erections upon the land and in some measure to withdraw the land from use for public purposes. The case also carefully considers the position arising when an open space or recreation ground is subject to a restrictive covenant in a conveyance, the public Acts relating to open spaces and a private Act relating to the open spaces of a particular local authority.

AS TO BUILDINGS ON OPEN SPACES, see HALSBURY, 1st Edn., Vol 21, Open Spaces, pp. 589, 590, para. 1021; and FOR CASES, see DIGEST, Vol. 36, pp. 251, 252, Nos. 33-42.]

Cases referred to:

- (1) *Stourcliffe Estates Co., Ltd. v. Bournemouth Corpn.*, [1910] 2 Ch. 12; 33 Digest 51, 307.

(2) *A.-G. v. Sunderland Corpn.* (1876), 2 Ch. D. 634; 36 Digest 251, 33.

(3) *A.-G. v. Pontypridd Urban Council*, [1906] 2 Ch. 257; 33 Digest 9, 5.

ACTION by the Attorney-General at the relation of certain owners of land situate on the Sandbanks Estate, Poole, to restrain the defendant corporation from erecting on the Sandbanks Recreation Ground, Poole, a bungalow or lodge for the occupation of a resident caretaker of the recreation ground.

The facts of the case are fully set out in the judgment.

Alexander Grant, K.C., and *Harold Lightman* for the plaintiff.

H. B. Vaisey, K.C., and *C. R. R. Romer* for the defendant corporation.

Grant, K.C.: The erection of the proposed dwelling-house for the caretaker would be contrary to the provisions of the Poole Corporation Act, 1919. Obviously it does not come within sect. 39, nor can it be justified under sect. 40. Sect. 41 restricts the corporation to an area of 4 acres upon which it may exercise the powers given by sects. 39 and 40. The land was originally given for public purposes and the corporation has withdrawn more than 4 acres from the use to which the ground was intended. [Counsel referred to *Stourcliffe Estates Co., Ltd. v. Bournemouth Corpn.* (1).]

Vaisey, K.C.: On the proper construction of the Act of 1919, what the defendant corporation proposes to do is well within its powers. Reliance is placed upon sect. 88 of the 1919 Act, which preserved the general powers of control and maintenance. The erection of this house is necessary properly to carry out the statutory duties of the corporation with regard to the land in question. The total area of the land occupied by buildings, including the site of the proposed lodge, is 0.542 acres or $\frac{1}{22^{\frac{1}{2}} \cdot 6828}$ of the whole ground, and if the Open Spaces Act, 1906, applied, the corporation was within the restriction contained in that Act which permitted $\frac{1}{20}$.

Romer, following on the same side: The only person who can enforce the covenant is the covenantee, and the covenantee had expressly authorised the building which it is proposed to erect. That being the position, the provisions of the Public Health Act, 1875, s. 164, apply to this land, as the erection of this lodge is within the implied powers of the corporation and there is nothing in the private Act to take away such powers. [Counsel referred to *A.-G. v. Pontypridd Urban Council* (3), *A.-G. v. Sunderland Corpn.* (2).]

Grant, K.C., in reply: The *Bournemouth Corpn.* case (1) covers the points raised in this case. What the legislature did by the private Act was to impose restrictions on the powers of the local authority as they might have been imposed by the Local Government Board under the Public Health Acts Amendment Act, 1907, s. 76.

FARWELL, J.: The facts in this case are in quite a small compass.

There is no serious dispute on any question of fact ; the question which has really to be determined is the true construction of a private Act of Parliament and certain public Acts of Parliament. In the year 1905, the defendants, who are the corporation of Poole, acquired, as owners in fee simple, a portion of land which formed part of the Sandbanks estate which then belonged to the commissioners of Poole Harbour. It is situate at Sandbanks in the borough of Poole. It is a narrow strip of land running from Poole Harbour, and in 1905 it was an open space. The conveyance was made by the commissioners of Poole Harbour and it was a conveyance without consideration except the consideration of certain covenants entered into by the Poole corporation. The conveyance is dated Apr. 28, 1905, and made between the Poole Harbour Commissioners of the first part and the Poole Corporation of the second part. It recites that the commissioners are entitled in fee simple to the land in question, and that they have agreed to convey it in consideration of the council entering into the covenants thereafter contained. It witnesseth that the commissioners convey unto the council all that land as set out and forming part of the Sandbanks estate and that such land consists of 12 acres 2 roods 17 perches or thereabouts :

to be held by the corporation in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use.

Then there is a provision with regard to any land not required for the purposes aforesaid. The covenant is in these terms :

Also, the council will at all times thereafter, subject as aforesaid, preserve the land conveyed as an open space or as a pleasure ground or a recreation ground and take all necessary steps to maintain the land as such.

There are other covenants to which I need not refer. At that time the rights of the corporation in respect of this piece of land were regulated by the Public Health Act, 1875, s. 164, subject, of course, to the restrictions which were placed upon the corporation by the covenants into which it entered. Sect. 164 provides :

Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.

Any urban authority may make bye-laws for the regulation of any such public walk or pleasure ground, and may by such bye-laws provide for the removal from such public walk or pleasure ground of any person infringing any such bye-law by any officer of the urban authority or constable.

I have no evidence as to what use was made of the land by the council immediately after it had acquired it, but in 1919 a private Act of Parliament was passed, known as the Poole Corporation Act, 1919, and

that Act contains certain provisions with regard to this particular land. I must refer to that Act in some detail. The Act begins by recitals, including one which reads :

And whereas it is expedient to authorise the corporation to purchase by agreement certain parts of the foreshore and lands adjacent thereto within the borough and to confer on the corporation further powers with regard to the regulation improvement and development of such parts of the foreshore and lands as by this Act provided—

and then there are the not unusual recitals :

And whereas it is expedient that the other provisions contained in this Act be enacted : And whereas the purposes of this Act cannot be effected without the authority of Parliament.

By sect. 3, it is provided :

The Lands Clauses Acts (except the provisions of the Lands Clauses Consolidation Act, 1845, with respect to the purchase and taking of lands otherwise than by agreement and except sect. 127 of the said Act) shall be incorporated with and form part of this Act.

Then there is the interpretation clause to which I need not refer. The second part of the Act refers to a bridge undertaking, and this is not relevant to anything which I have to consider. Sect. 36 is a section to which I must refer. It provides that :

For the protection of the Poole Harbour Commissioners (in this section referred to as “ the commissioners ”) the following provisions shall notwithstanding anything contained in this Act or in the Acts incorporated herewith have effect unless otherwise agreed in writing.

I must refer to subsect. (5) :

The corporation shall not exercise upon the lands at Sandbanks now vested in them and known as the Sandbanks Recreation Ground the powers conferred by the following sections of this Act, of which the marginal notes are “ Power to establish pleasure grounds and erect and let bathing huts, etc., ” and “ Power to construct bathing pools, etc., ” except within such area or areas not exceeding in the whole 4 acres as shall from time to time be approved in writing by the commissioners and no erections whatsoever shall be made under the provisions of the said sections by the corporation upon the said recreation ground within 150 feet of the western boundary and 180 feet of the eastern boundary thereof.

Then there is a provision for arbitration in the event of any dispute between the commissioners and the corporation. There is no evidence before me that there is any dispute or ever has been and no question arises under the arbitration provision in the Act.

Part III is headed “ Improvement Provisions, ” and by sect. 38 power to purchase land by agreement is given to the corporation, and I need not refer more especially to that. Sect. 39 is a section of considerable importance. It gives power to establish pleasure grounds, and reads :

(1) The corporation may set apart any lands purchased or taken on lease under

the provisions of the last preceding section for the purpose of pleasure grounds may erect and maintain thereon—

that is the land purchased or taken upon lease—

and upon lands at Sandbanks now vested in them and known as the Sandbanks Recreation Ground—

that is the land in question—

bathing and other huts and similar structures tents booths and stalls and may let the same or any of them together with such an amount of land adjacent to such a structure as the corporation think fit in any case to any persons on such terms and conditions and for such periods as the corporation may think fit.

Then there is a provision that the provisions of the Public Health Acts Amendment Act, 1907, shall apply, but I need not refer further to that. Sect. 40 is important. It provides :

The corporation upon any part of the lands referred to in the section of this Act the marginal note whereof is "Power to purchase lands adjacent to foreshore by agreement" purchased or taken on lease by them and upon the Sandbanks Recreation Ground and (with the consent of the owner of the foreshore) upon the foreshore may construct and maintain bathing pools baths shelters pavilions and conveniences and may take rents or charges for the use thereof or admission thereto.

Sect. 41 was inserted for the protection of the Sandbanks owners, that is to say, the persons who are owners and occupiers of land situate upon the promontory in question. This is an action by the Attorney-General at the relation of certain persons who are owners or occupiers for the time being of the said premises. Sect. 41 reads :

For the protection and benefit of the owners lessees and occupiers for the time being of lands situate upon the promontory known as the Sandbanks the following provisions shall notwithstanding anything in this Act or incorporated therewith have effect (that is to say) :

(1)—(a) The corporation shall not exercise upon the lands at Sandbanks now vested in them and known as the Sandbanks Recreation Ground except within an area or areas not exceeding in the whole 4 acres in extent the powers conferred by subsect. (1) of the section of this Act the marginal note whereof is "Power to establish pleasure grounds and erect and let bathing huts, etc.," and by the section of this Act the marginal note whereof is "Power to construct bathing pools, etc.;"

(b) No erection whatever shall be placed upon the Sandbanks Recreation Ground by the corporation within 150 feet of the western boundary or within 180 feet of the eastern boundary of the said recreation ground ;

(c) No erection placed under the powers of this Act upon the Sandbanks Recreation Ground shall exceed in height 14 feet.

Subsect. 2 provides that the corporation shall not exercise the powers conferred by the said subsection and section of the Act upon any part of the lands and foreshore purchased or taken on lease under the powers of the section of the Act the marginal note whereof is "Power to purchase

land adjacent to foreshore by agreement " situate within certain points which are set out, and :

Provided that nothing in this section shall prevent the erection by the corporation of tents between any of the said points respectively subject to the following conditions (viz.):

- (a) No tent shall be allowed to remain erected between sunset and sunrise ;
- (b) Not more than two tents shall be erected on any section of the said lands and foreshore measuring 80 feet in length along the line of high water ;
- (c) No tent shall occupy a greater space than 80 square feet.

Sect. 42 provides that :

The corporation may place or authorise any person or persons to place seats or chairs on any of the lands referred to in the section of the Act the marginal note whereof is " Power to purchase lands adjacent to the foreshore by agreement " purchased or taken on lease by the corporation and in any recreation ground of the corporation for the use of the public and may if they think fit charge or allow such person or persons to charge reasonable sums for the use of such chairs and may make bye-laws for regulating the use of the chairs and for preventing injury or damage thereto.

Sect. 44 provides :

The corporation may appoint officers for securing the observance of this Part of this Act and of the bye-laws and regulations made thereunder and may procure such officers to be sworn in as constables for that purpose but any such officer shall not act as a constable unless in uniform or provided with a warrant.

I need not refer to the last section of that part of the Act. Part IV and the following parts deal with other matters to which I need not refer, and the only other section which is relevant for any purpose I have to consider is sect. 88, which provides :

All powers rights and remedies given to the corporation by this Act shall (except where otherwise expressly provided) be deemed to be in addition to and not in derogation of any other powers rights or remedies conferred on them or on any committee appointed by them by Act of Parliament charter law or custom and the corporation or such committee as the case may be may exercise such other powers and be entitled to such other rights and remedies as if this Act had not been passed.

Then there is a proviso I need not read. After the passing of this Act the corporation resolved to do some extensive works upon the land in question. It made a promenade. It made a pavilion of some considerable size with a balcony. It erected certain lavatories. Then it laid out a portion of the land as a garden. There were plots surrounded by wire netting or a low wall. Otherwise it is laid out more or less as a garden with paths. It also erected a café. There is in front of the café a space which is fenced off and which is used for supplying refreshments to persons. There are certain plants and trees round that. A considerable portion of the ground is used as a car park, that is to say, members of the public who take their cars are

permitted to park them—no doubt having to pay a small fee for the pleasure of doing so. There is a putting-green which is enclosed and in which at any rate the persons who desire to use the putting-green, unless provided with their own clubs and balls, may be required to make certain payments to the corporation. The evidence as to the extent of these erections and alterations to the ground is this. The whole area of this piece of land which was acquired by the corporation from the Poole Harbour Commissioners is a little over 12 acres. If the whole of the land which has been occupied by the council by having plots, buildings, baths, etc., is taken into account, then it is admitted that the area exceeds 4 acres. On the other hand, if the only portions of the land to be considered are those portions which are actually covered by buildings and other erections, then admittedly the area so occupied is something about half an acre. Certainly not much more. There is no doubt about the evidence. If one takes the whole of the area which has been used in the way in which it has been used by the council and in the way which I have described, then the area is more than 4 acres. On the other hand, the actual buildings do not cover anything like 4 acres but only half an acre. The evidence on this part of the case is that the public are in no way restricted from using the paths or the promenade or the grass plots or any other part of this land. No doubt they have to pay for the refreshments if they go into the café. But there is no exclusion of the public, as I understand it, from any portion of the land in question. A member of the public may walk about in the grounds, and I suppose he may go into the café, but whether he may stop there if he does not buy something is another matter. There is nothing to prevent anybody using any part of the ground. The corporation, having made these various erections and laid out the ground in the way I have described, came to the conclusion, in the year 1934, that for the proper maintenance and protection of the property it was necessary that there should be a resident caretaker. Not finding any very convenient place in which to provide accommodation for such a person, the corporation determined to build a small house or bungalow on this piece of land for the occupation of such servant. Accordingly it commenced to build a one-storey bungalow of brick. After it had erected a considerable portion of that house, objection was taken to the building and it was said that it was *ultra vires* the corporation, and that it had no right to erect a dwelling-house at all on this piece of land. Accordingly the corporation ceased work on the building and it has remained since 1934 in the condition in which it then was—in an unfinished state. The evidence is that when it is completed, or if it is completed, it will not exceed 14 feet in height, except possibly for the chimney. It is a building which is in course of being erected. The only objection which can be made to it is

that the corporation has no power to erect such a building at all, and accordingly it should be restrained from proceeding with the erection and be ordered to remove the erection so far as it has gone up. There is no suggestion of want of good faith. I saw Mr. Short in the witness-box. He is a member of the bar, though not now in practice. He is a member of the defendant corporation and he is the chairman of the committee dealing with this matter, and he gave evidence before me. He is quite obviously a perfectly honest witness who gave his evidence fairly, and he said that the corporation found from their experience in other cases and from general consideration of this particular site that it deemed it necessary or, at any rate, desirable to have a resident caretaker and that it desired to have this house for his accommodation. Mr. Short did not go so far as to say that it was impossible in any other way or by some other means to render what protection might be thought necessary for this ground, but his view was, and it has been accepted by the council, that the most satisfactory way on the whole was to have somebody living on the spot who could go out at any time and whose movements would not be known by any person who should not be on the land in question. I think there is no doubt that the corporation, in deciding to erect this cottage for the use of the caretaker, acted in the honest belief that it was the best thing to do in the circumstances and that they did not realise at the time that there was any objection or reason why they should not erect it. However, whether they acted *bona fide* or not, if the corporation has no power to do it, it may be prevented. The question I have to determine is whether it has power to erect such a cottage as this. Now, great reliance has been placed by the plaintiffs upon a case which has considerable similarity to the present case. The case in question is a decision of PARKER, J., confirmed by the Court of Appeal, and the name of it is *Stourcliffe Estates Co., Ltd. v. Bournemouth Corpn.* (1). In that case, by an indenture dated Jan. 15, 1904, the Bournemouth Corporation had acquired certain lands, and the indenture was in these terms :

To hold the same unto the corporation in fee simple as regards so much thereof as lies to the north of the slope of the cliff to be devoted to the purpose of a public garden or pleasure ground. And the corporation hereby covenant with the company their successors and assigns to preserve and keep the land to be devoted to pleasure ground purposes as an open space for the enjoyment of the public in such manner and form as the corporation shall think best in the interest of the public subject to no building or erections of any kind being put thereupon except such structures as summer houses a band stand or shelters not more than 12 feet in height for the accommodation and convenience of the public.

The corporation desired for the convenience of the public to erect certain conveniences and lavatories on the land in question. Objection was taken to its so doing and an action was commenced to restrain it from erecting such buildings. As a result of that action it was held by

PARKER, J., and subsequently by the Court of Appeal, that the erection of such buildings was in contravention of the covenant in the conveyance, and that being so, the corporation was not entitled to erect the buildings in question. The whole case really turned on this. The court said there was nothing to prevent the corporation acquiring a piece of land subject to restrictive covenants, and if it did so, it was bound by those restrictive covenants, notwithstanding that the corporation was the person into whose hands the land had passed, and in that case, there being restrictive covenants to keep the land as an open space and to erect no buildings or erections of any kind except certain things which did not include the erections in question, the corporation was bound by that covenant just as much as a private person would be, and the erection of those particular buildings would be a breach of this covenant because the corporation would not be preserving the land as an open space and erecting upon it only the particular buildings specified in the conveyance. Although under general Acts the corporation might have power, and no doubt it would have power, to erect such buildings as they desired, yet by virtue of this covenant it could be prevented from erecting such buildings in breach of the covenant. As I understand it, that is the effect of that case. Accordingly, it is binding upon me and I must follow it, and I desire to follow it so far as it has application to the case I have to consider. I hope I have stated accurately what is really the effect of that case. COZENS-HARDY, M.R., says at p. 17, "Is the covenant binding upon the corporation?" and he says, "I ask myself, why not?" The court found that the answer to the question put by COZENS-HARDY, M.R., was that there was no reason why the corporation should not be bound by the covenant, and it was prevented from breaking it. So far as this case is concerned, if that which the corporation is proposing to do by erecting this house for the caretaker is a breach of the covenant in the conveyance, then the corporation may be prevented from proceeding with that erection, and that question turns upon the construction to be put upon the covenant in the conveyance. I have looked at the covenant in the conveyance, and it is obvious to me at once that the covenant in the conveyance I have referred to is quite different. In the *Bournemouth Corpn.* case (1) the council covenanted that the land should be kept as an open space and that there should be no buildings placed upon it except those specified in the conveyance. That is not the language of the conveyance I have to determine. It is:

The corporation will preserve the land hereby conveyed as an open space or pleasure ground or recreation ground for the use of the public.

There is nothing there which restricts the right of the corporation to use the land in accordance with the powers given to it by general Acts, except that it must be used as an open space or as a pleasure

ground or as a recreation ground. But if for the purpose of making it a pleasure ground or a recreation ground, acting within the powers given it by any enabling Act, it thinks it right to erect such buildings as it thinks necessary to make it a pleasure or a recreation ground, I can find nothing in this conveyance—as there was in the conveyance in the *Bournemouth Corpn.* case (1)—which prevents the erection of any buildings except certain specified buildings. That being so, I am unable to see that the covenant is extended in the case of a corporation merely because it has general powers under other Acts, notwithstanding that a corporation is bound by a covenant of this sort as much as anyone else. That principle I must remember to apply. If what this council was going to do was in my judgment a breach of this covenant, I should not hesitate to stop their doing it. But I cannot read it as a covenant not to erect any buildings at all. It is a covenant that the land shall not be used as anything but an open space or as a pleasure or recreation ground.

But that is not by any means the end of this case, because although there is nothing in the covenant to prevent the corporation doing what it desires to do, it is said that the private Act of Parliament does impose such terms and conditions upon the corporation as to deprive it of the power to do that which it desires to do. Before I come to that, I should say this. The power which is given by the Public Health Act, 1875, s. 164, in connection with pleasure grounds, is to lay out, plant, improve and maintain lands for the purpose of being used as public walks or pleasure grounds. That must mean that the corporation is entitled to do anything which is properly and reasonably necessary for the laying out and the maintaining of the grounds as pleasure grounds, and it has been held in *A.-G. v. Sunderland Corpn.* (2) that the erection of a small library and museum is within the powers given to a public body. In my judgment, apart from anything in the private Act, if the corporation has come to the conclusion that, in order to maintain and keep in proper order the pleasure grounds under its control, it is necessary to have a resident caretaker, that is something which is incidental to and ancillary to its powers. Moreover, if it is found that there is no reasonably convenient means of providing accommodation for such a person otherwise, in my judgment the erection of such a building as may be necessary is also something which comes within the power which is given and which is part of that which it is entitled to do for the purpose of maintaining the pleasure ground. So I have come to the conclusion that apart from the Act of 1919, there is nothing in the conveyance which would prevent the corporation from doing that which it proposed to do. Nor do I find that it is outside the power given by the Public Health Act, 1875. Therefore if the corporation is to be prevented from doing what it seeks to do, it must be by the provisions of this private Act.

But before I turn to that Act, I should say this. I am unable to accept the view that has been pressed upon me on behalf of the plaintiffs that in calculating the 4 acres I ought to take into account all that part of the land which has been occupied. When I examine the Act in regard to the land, I see it is provided that the corporation shall not exercise upon the land vested in it certain things except in an area not exceeding 4 acres. The power to erect bathing and other huts and to maintain bathing pools and baths is given to the corporation under sects. 39 and 40. It is true that the space used for a car park is in no sense a structure within the meaning of sects. 39 and 40. When one has to consider what the area is that is referred to, one must look back to see what this Act enables the corporation to do. When one finds what it enables the corporation to erect, the acreage in question is so much of the whole area as is occupied by the structures and erections in question. I am unable to say that a part in which the public can walk or parade, or a plot of grass with a fence round it, is a structure within sects. 39 and 40, and if that is so, it is to be determined whether the erection of the proposed building would cause the land occupied to exceed 4 acres. The answer must be in the negative. The space already occupied is something about half an acre. Therefore, so far as it turns upon that it cannot be said to be an infringement. The evidence is that the cottage is not to exceed 14 feet in height. There is no evidence that the building will exceed 14 feet in height. Again, in that regard, this erection would not be a breach of the Act in question. I turn to the Act again. In my judgment, if the corporation is to be prevented from doing what it seeks to do, it must be by virtue of this Act and nothing else. I have already read the portions of the Act which seem to be relevant. Sect. 36 is a section which has been inserted for the protection of the Poole Harbour Commissioners, but there is nothing to suggest that the Poole Harbour Commissioners are anything but consenting parties to anything which the corporation has done or is doing. So it is necessary to turn to sects. 39, 40, 41 and 88. It is perfectly true that this Act does give to the corporation powers it had under the Public Health Acts Amendment Act, 1907. By sect. 76 of that Act it is provided that the Ministry may make rules, and that subject to restrictions which may be prescribed a local authority shall have certain powers in respect of any pleasure ground under its control, in addition to any powers it has under any general Act. These powers are powers which are given by this private Act.

The way in which this case is put by the plaintiffs is this. It is said that on its true construction so far as this land is concerned, this private Act is self-contained, by which I mean that it provides what the corporation may do and may not do. It is said that since the power to erect this kind of building is not given in terms to the corporation by this

private Act, it must follow that Parliament has thought fit to restrict the powers the corporation would otherwise have by the general law and to confine the corporation to the express powers given by the Act itself. If that be the true construction of the Act, it would follow that the plaintiffs are entitled to succeed. The whole question depends upon the true construction of the Act. I appreciate the importance of bearing in mind that the Act does give powers which otherwise the council would have under the general Act of Parliament. It is a consideration to be borne in mind. The power given by sect. 39 is a power to erect certain structures, and it cannot be suggested, and it has not been suggested, that this particular building comes within any erection permitted by sect. 39. Whether the corporation would have power to erect all the buildings mentioned in sects. 39 and 40 under the general law, without the express power given by these sections, I have not to determine. Nor do I know whether they touch all those particular things which come within the general powers given by general Acts of Parliament. There is no doubt that this Act does confer upon the corporation express powers with regard to these erections. By sect. 40 there is express power to erect other buildings. But it would be difficult to say that the building proposed is within the terms of sect. 40. It certainly is not a bathing pool or shelter or a pavilion or a convenience in the sense in which that word is used. It is not a building within the powers of that section. When I turn to sect. 41 I find this. The owners are to have certain protection. There is the provision "notwithstanding anything in this Act or incorporated therewith." By sect. 3 the Lands Clauses Acts are incorporated in terms and there are no other Acts expressly incorporated. The words "Notwithstanding anything in this Act or in the Lands Clauses Acts" must be taken to mean that the corporation shall not exercise upon the lands in question the powers given it. Then there is a provision that no building shall be placed upon the land within certain limits. It is not suggested that the building is within those limits. Sect. 88 is really, in my judgment, the section upon which this question turns. It states that all the powers given by the Act shall, except where otherwise expressly provided, be deemed to be in addition to and not in derogation of any other powers given by Act of Parliament, charter, law or custom. As I read this section, it means this. Nothing in this Act is to deprive the corporation of powers given to it by other Acts of Parliament to this extent, that if there is an express prohibition contained in this private Act, then that express prohibition overrides the powers which otherwise the corporation would be entitled to exercise by virtue of any other Act and it restricts its powers within the limits imposed by the private Act. It is impossible, in my judgment, to read this section as saying that all the powers given by the public Acts are excluded, and that this Act and this Act alone must be looked

at to see what are the powers of the corporation. In my judgment it is quite plain that all the powers given to the corporation by any other Act are powers which it is entitled to exercise except and unless there is an express provision which prevents it from so doing. When I look back at sects. 39 and 40 I do find that there are powers given to the corporation to make certain erections. But the whole of the powers given by this Act and the whole of the powers given to the corporation by any general Act can only be exercised within the limits imposed by the covenants in the deed. As the covenants in the deed provide or give the corporation power to use the land as a recreation or pleasure ground, and as the structures permitted by the private Act are incidental to what may be called a pleasure ground, the powers are consistent with the covenants. I can find nothing which expressly forbids the erection of any building other than those which are specified in sects. 39 and 40. If the words "except where otherwise expressly provided" had not been in sect. 88, I can well understand that, having provided in terms for the erections which could be built, no others could be built. I can find nothing which expressly prevents the erection of the building in question, but subject, of course, to what I have said, namely, that no buildings could be erected which were not properly for the purpose and use of this land as a public recreation ground or as a pleasure ground. If the building is one which is reasonably necessary for the proper maintenance of the land as a pleasure ground or a recreation ground, there is power to erect it and there is nothing in the Act of 1919 which expressly prohibits it. If that is the true view, it follows that this action must be dismissed with costs.

Solicitors: *Arthur S. Joseph & Co.* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *Wilson Kenyon*, Town Clerk, Poole (for the defendant corporation).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

CHANDARASEKERA (*alias* ALISANDIRI) v. R.

[PRIVY COUNCIL (Lord Roche, Sir John Wallis, Sir George Rankin),
November 10, 12, 25, 1936.]

Privy Council—Ceylon—Criminal Law—Evidence—Murder—Throat wound—Victim conscious but unable to speak—Signs—Verbal evidence—Admissibility—Ceylon Evidence Ordinance, No. 14 of 1895, s. 32.

The deceased was found with her throat cut, the wound rendering her unable to speak, but she was fully conscious and able to understand what was said to her, and to make signs and nod her head slightly. When she was questioned she made certain signs which, it was alleged, indicated the accused, and in reply to a direct question whether it was the accused she nodded her head in reply. She died shortly afterwards:—

HELD: (i) the evidence as to signs made in answer to questions put to the deceased was admissible, but statements of witnesses as to what interpretation they put upon the signs were not admissible.

(ii) the question whether it was the accused and the nod of assent given in reply by the deceased constituted a “verbal” statement within the meaning of the Ceylon Evidence Ordinance, No. 14 of 1895, s. 32, and, as such, was admissible in evidence.

[EDITORIAL NOTE.] This case considers the admissibility of a dying declaration which is only assented to by nods of assent by the dying person. The question in this case is whether such evidence was “verbal evidence” within the Ceylon Evidence Ordinance, and it was held to be so. The wording of the Ceylon Ordinance is in fact taken from the accepted definition of a dying declaration in English law.

AS TO DYING DECLARATIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 450-452, para. 771; and FOR CASES, see DIGEST, Vol. 15, pp. 804, 805, Nos. 8709-8722.]

Cases referred to:

- (1) *Queen-Empress v. Abdullah* (1885), I.L.R. 7 All. 385; 15 Digest 805, case s.
- (2) *Emperor v. Sadhu Charan Das* (1921), I.L.R. 49 Cal. 600.
- (3) *Chandrika Ram Kahar v. King-Emperor* (1922), I.L.R. 1 Pat. 401.
- (4) *Mam Chand v. R.* (1924), I.L.R. 5 Lah. 324.
- (5) *R. v. Mitchell* (1892), 17 Cox, C.C. 503; 15 Digest 805, 8717.
- (6) *Ranga v. R.* (1924), I.L.R. 5 Lah. 305; Digest Supp.
- (7) *Vaithinatha Pillai v. King-Emperor* (1913), L.R. 40 Ind. App. 193; 11 Digest 531, 347.
- (8) *Fitzgerald's Case* (1841), Ir. Cir. Rep., 168; 15 Digest 804, case q.

APPEAL by special leave from a verdict and sentence given and passed in the Supreme Court of the island of Ceylon (MR. COMMISSIONER F. J. SOERTSZ, K.C.), on May 1, 1935, whereby the appellant was convicted of murder and sentenced to death. The facts of the case are fully set out in the judgment of their Lordships, delivered by LORD ROCHE.

L. M. de Silva, for the appellant, referred to: *Queen-Empress v. Abdullah* (1), *R. v. Mitchell* (5), *Ranga v. R.* (6), *Chandrika Ram Kahar v. King-Emperor* (3), *Vaithinatha Pillai v. King-Emperor* (7), *Fitzgerald's Case* (8).

The Attorney-General (Sir Donald Somervell, K.C.) and *Kenelm Preedy*, for the respondent.

LORD ROCHE : This is an appeal by special leave against a judgment and sentence of the Supreme Court of the island of Ceylon dated May 1, 1935, whereby, after a trial before a commissioner and a jury, the appellant was sentenced to death for the murder of a woman named Salami Nadatchi on May 15, 1934. The jury had returned a verdict of guilty by a majority of six to one. The main point raised in the appeal was whether information given by the deceased woman before her death was a statement within the meaning of the Ceylon Evidence Ordinance, No. 14 of 1895, s. 32, and as such was admissible in evidence by virtue of that section. This information was admitted in evidence, and directly implicated the appellant. The material part of the section is as follows :

Statements by persons who cannot be called as witnesses.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases :—

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

The facts of the case, as proved by evidence not the subject of objection, were as follows : The deceased was a widow, living alone in a two-roomed one-storied house on a plot of land lying between the estates of one Stanley Jayawardene and of one Collin Silva. The deceased's house was about 150 yds. from the estate bungalow of Collin Silva, where a witness named Rengam Arumugam, watcher of the estate, lived with his wife. The accused man had worked as a carter for Stanley Jayawardene's estate, and lived in the neighbourhood, but recently, and until shortly before May 15, 1934, he had been in the employment of two brothers Mohamadu, a few miles away. He had been discharged from this employment some days before May 15 and was then unemployed. On the day in question he had been to the place of business of the brothers Mohamadu, had borrowed a bicycle from one of them, and gone home on it to dinner at his house, which he left after dinner about 2 p.m. Between 2 p.m. and 3 p.m. he was seen near the house of the deceased woman, in conversation with her. Between 3 p.m. and 4 p.m. he was seen riding the bicycle away from that locality, and was described by a witness (Charles) as dismounting and as going into a thicket and lurking there and behaving in a suspicious and excited manner. He then, after bathing in a stream, went back on the bicycle to the place of business of the brothers Mohamadu, where he was later arrested. Meanwhile, at about 4 p.m., the deceased had come in a terribly wounded condition to the bungalow of Collin Silva, occupied

by Arumugam. The principal wound was one about 4 in. in length extending from the right side of her neck across the throat to about $\frac{1}{2}$ in. on the left side of the middle line. There were minor wounds on the face and head, and her ears were severed and torn. She had evidently made her way unaided from her own house, and was found on the verandah of Collin Silva's bungalow. There the interrogation took place from which the evidence in dispute was derived, and in consequence the accused was arrested the same afternoon at the Mohamadus' place of business. The statement of the accused, made on May 16, was of the nature of an alibi, and in particular was to the effect that from 12.30 p.m. onwards he was at the boutique. This was proved at the trial to be untrue, as appears from the evidence summarised above. At the trial the accused did not elect to give evidence, nor was evidence called on his behalf. At the house of the deceased woman, the main features of the attack upon her were plainly to be seen. There was blood on a camp cot in the outer room upon which the deceased must have been sitting or lying when attacked. The room was disturbed, and jewellery which she possessed was missing. The door from this room to the outside was locked, and the wounded woman, as was indicated by blood marks, made her way into the inner room and then out of a window and thence by a path to Collin Silva's bungalow. There she was bandaged and propped up against a wall with cushions. The throat wound rendered her unable to speak; but she was fully conscious and able to understand what was said to her and to make signs and to nod her head, though slightly. She was asked questions both by the police and by neighbours, and in particular by one Martin Perera, a carter who had worked with the accused for Mr. Stanley Jayawardene and who also knew the deceased woman. Mr. Stanley Jayawardene was present at the material time, and there was no ground for suggesting that the evidence to which objection was taken was derived solely or mainly from police sources, or that Perera or Mr. Jayawardene, who gave evidence of what took place, were witnesses with ill-will to the appellant. The greater part of the interrogation was conducted by Martin Perera, who spoke to the wounded woman in Sinhalese. The course and result of it was as follows: Asked who cut her neck, the deceased indicated by signs the height of the person and later pointed to Mr. Jayawardene and also made signs as of goading a bull. The accused had worked for Mr. Jayawardene as a carter. She also pointed to a constable and then patted or slapped her cheek two or three times. The accused had some time previously assaulted a constable by slapping his face, and this was a matter of common knowledge. Probably at this stage—though the witnesses were not entirely in agreement as to the order of events—Martin Perera put the direct question: "Was it Alisandiri?"—the name by which the accused was ordinarily known. The wounded woman nodded her

head in answer to this question. As to this fact, and that it was a nod of assent, no witness seemed in any doubt. The wounded woman was removed to hospital and died there, and, as has been already stated, the appellant was arrested and charged.

At the trial, the admissibility of the evidence in question seems to have been raised by counsel for the defence as soon as the jury was empanelled and sworn. The jury were quite properly ordered to retire, and the question of admissibility was argued and decided in their absence. An authority, *Queen-Empress v. Abdullah* (1), which will be referred to later in this judgment, was cited to the learned commissioner, and in accordance with that authority he ruled that evidence as to signs made in answer to questions put to the deceased was admissible, but that statements of witnesses as to what interpretation they put upon the signs were not admissible. It was said, upon the argument of this appeal, that the latter part of the ruling was not observed, and that evidence ruled inadmissible was in fact given. It is difficult to adhere to a clear line of division between the description of signs and the interpretation of signs, and it may be that in some respects witnesses trespassed beyond the line and so usurped what obviously is the function of the jury; but their Lordships observe that in some instances the matter complained of was elicited by cross-examination on behalf of the accused. Their Lordships are of opinion that no substantial grievance can be made out in this regard, still less any real or serious miscarriage of justice. The main question is whether any part of the evidence as to what passed between the deceased and Perera should have been admitted. In their Lordships' opinion, the ruling of the learned commissioner was correct. It is to be observed that, in the section, the word used is "verbal," and not "oral," which is used elsewhere in the Ordinance, as, for example, in sect. 3 and sect. 119 in reference to evidence given in court. It is unnecessary to decide whether the question put: "Was it Alisandiri?" and the nod of assent, would have constituted an oral statement made by the deceased, but their Lordships are clearly of opinion that it constituted a verbal statement made by her. The case under consideration closely resembles the case of a person who is dumb and is able to converse by means of a finger alphabet. Upon proper evidence proving the words used in a conversation so held, their Lordships think that a statement so made would be a verbal statement within the meaning of the section. So here their Lordships think that there was proper and sufficient evidence of a verbal statement by the deceased to the effect that it was the accused who cut her neck. As to the remainder of the evidence as to signs made by the deceased, it was necessarily given in order that it might be understood in what circumstances and context the vital question came to be asked and to be answered. Mention has already been made of the decision in Allahabad

upon which the learned commissioner relied to support his ruling. This was a decision of the Full Court and was pronounced in the year 1885. Since that time it has been followed in Bengal in the case of *Emperor v. Sadhu Charan Das* (2); in Patna in *Chandrika Ram Kahar v. King-Emperor* (3); and in Lahore in *Mam Chand v. R.* (4). The material provisions of the Evidence Act in India are identical with the provisions of the Ceylon Ordinance. For the reasons already given, their Lordships think that those decisions were correct, and that the learned commissioner was right in following them.

Observations were properly and forcibly made by counsel for the appellant as to the caution required in the reception of evidence of this character, and in the use to be made of it. It is, of course, true that evidence of signs of an ambiguous or uncertain character ought not to be admitted at all, and that in many cases the evidence, though admissible, might be of little weight. It is no doubt also true that answers to questions of a leading character may be of little weight, but, in the circumstances of this case, Martin Perera's question was in its context other than a mere leading question. At any rate, all such matters are matters for the jury, going to the weight and not to the admissibility of the evidence, and there is nothing here to show that anything took place in this connection calling for or justifying the interference of this Board. Unfortunately neither the advisers of the appellant nor the Crown were able to trace or produce any note of the summing up. In the absence of any suggestion, based on any other materials, that the summing up was open to objection, their Lordships can only assume that the learned commissioner who heard the argument on the admissibility of the evidence with regularity, and ruled upon it, as their Lordships have decided, correctly, also directed the jury adequately and properly as to the weight of the evidence. The result seems to their Lordships to be this: Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction. It was a case in which, if the deceased's statement was received, and was believed, as it evidently was by the jury, to be clear and unmistakable in its effect, then a conviction was abundantly justified, and indeed inevitable. For these reasons, their Lordships have felt themselves impelled to advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Douglas Grant & Dold* (for the appellant); *Burchells* (for the respondent).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

GARDINER *v.* WALSH.[CHANCERY DIVISION (Clauson, J.), **December 1, 1936.**]*Sale of Land—Restrictive covenant—Covenant against erecting a building—Moving shed erected on free land to land subject to covenant—Breach.*

Certain property was sold subject to a restrictive covenant which provided that the owner for the time being would not at any time erect any building on a certain part of the property. There was a coal-shed, a wooden structure on a concrete foundation, on part of the premises not subject to the covenant. The owner of the land had this shed carried to the part of the premises subject to the covenant, where it stood directly on the ground without any foundations:—

HELD: the owner had not erected a building within the covenant.

[EDITORIAL NOTE.] The problem of what is a building within a covenant against building is one of some difficulty, and the authorities upon the matter are few. The position is complicated by the varied nature of buildings, particularly as to their permanence or movability, and further by the fact that an advertisement hoarding has been held to be building within such a covenant. The present case is purely illustrative of the view the court takes upon all the circumstances of such a case and does not in any sense lay down any proposition of law. It is clear that the decision in all such cases must depend both upon the particular covenant and upon the circumstances of the particular case. It will, however, be of assistance when it is necessary to advise upon the construction of such a covenant and in considering the question whether there has been a breach.

AS TO COVENANTS AGAINST BUILDING, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 454, para. 827, and FOR CASES, see DIGEST, Vol. 31, pp. 154, 155, Nos. 2887-2891, and Vol. 40, pp. 315, 316, Nos. 2681-2683.]

ACTION for a mandatory injunction requiring the defendant to remove a shed erected by him on land adjacent to land owned by the defendant, the erection of such shed in the position in which it was placed being said by the plaintiff to be a breach of a covenant not to build on the land in question. The covenant was entered into by the defendant's predecessor in title, who purchased the land from the plaintiff, and who covenanted for himself, his heirs and his assigns, owners for the time being of the land conveyed.

H. A. H. Christie, K.C., and *Hon. Denys Buckley* for the plaintiffs.

F. K. Archer, K.C., and *J. Anthony Plowman* for the defendants.

CLAUSON, J.: The plaintiff in this case had a piece of land, abutting on the highway, at the back of which he had erected a house, and he was minded to sell the portion of land abutting on the highway for the building of a house. He conveyed this portion of land to the defendant's predecessor in title, taking from the purchaser a covenant that he, his heirs, and his assigns, owners for the time being of the land then conveyed, would not at any time erect any building on any part of the land south-east of a line marked on the plan. Nobody doubts what the position is. Building is intended to be restricted on the southern half of the land.

The present defendant is the assign of the gentleman who entered into the covenant, and, although on the pleadings it was suggested that he was not bound by the covenant, it is perfectly clear that he is. The question that I have to decide is whether there has been a breach of the covenant. The defendant had a shed, which was used as a coal-shed, on part of his land. The dimensions of it were 6 ft. 8 ins. by 7 ft. 5 ins. It had a pitched roof. The apex of the roof is 9 ft. 3 ins. high. The sides of the building are 6 ft. 10 ins. from the ground. It is a wooden structure, but it was on a concrete foundation. The defendant was minded to erect a more substantial coal-shed. He had this wooden structure carried into his garden, into the part to which the restriction extends, and he put it there, simply standing it upon the ground, and used it as a tool-shed. In doing that, had he erected a building within the terms of the covenant upon the portion of the land to which the restriction applies? A learned judge once said that a building is something which is built. For myself, I do not think that that carries the matter much further. Some things would hardly be regarded as buildings even if let into a concrete foundation. One must have regard to a number of factors. Is it permanent? Is it so big as to be really worth consideration, or is it put into its present position as a non-permanent or unsubstantial building? One can give all sorts of examples. One can imagine a flimsy structure, such as a hangar to hold an aeroplane. I have to look at the matter from a practical point of view. I must consider the document and the circumstances, and one purpose for which the restriction was imposed was the benefit of the adjoining property. Even a flagstaff obstructs a view. I have had evidence, and I do not see my way to hold that, in moving this structure, the defendant can be said to have erected a building. I am not attempting to lay down any general proposition if some other structure in some other circumstances were placed there. All that I can say is that I am not prepared to grant an injunction restraining the defendant from having this particular structure in this particular place. There will be a declaration that the structure is not a breach of the covenant.

Solicitors: *Wiley & Powles* (for the plaintiff); *Kingsley Wood, Williams & Murphy* (for the defendant).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

MITCHELL AND ANOTHER *v.* HIRST, KIDD & RENNIE, LTD., AND ANOTHER.

[MANCHESTER AUTUMN ASSIZES (Lawrence, J.), November 30, 1936.]

Libel—Newspaper report—Criminal proceedings—Fair and accurate report—Charges of theft and of taking car without owner's consent—Charge of theft withdrawn—Report of "theft"—Consolidated actions—Apportionment of damages—Law of Libel (Amendment) Act, 1888 (c. 64), s. 5—Road Traffic Act, 1930 (c. 43), s. 28.

The plaintiffs took a motor car from the yard of a hotel and went for a ride, while the owner was inside the hotel. The plaintiffs were charged (i) with theft and (ii) with having taken a car away without the owner's consent contrary to the Road Traffic Act, 1930, s. 28. At the police court the charge of theft was withdrawn, and both plaintiffs were convicted on the charge under the Road Traffic Act, 1930. Reports appeared in certain newspapers headed, "Stole motor car" and "Motor car theft." The reporters present at the police court did not hear the withdrawal of the charge of theft, and this was found to have been due to inattention:—

HELD: (i) the reports were not fair and accurate, and the plaintiffs were entitled to damages for libel.

(ii) the Law of Libel (Amendment) Act, 1888, s. 5, under which a jury may apportion damages between the defendants in consolidated libel actions, applies to a judge sitting alone. In the present case the damages and costs should be apportioned equally.

[EDITORIAL NOTE.] This case turns upon what is a fair and accurate report of police court proceedings in a newspaper. The law does not require from newspaper reporters strict accuracy in the use of legal terms, but where the nature of a charge is defined in ordinary terms a greater degree of accuracy is necessary. The judgment in this case apparently leaves open the question as to the position where the failure of a reporter to hear a material part of the case is not due to inattention.

AS TO NEWSPAPER REPORTS OF LEGAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 480, 481, para. 580; and FOR CASES, see DIGEST, Vol. 32, pp. 137-139, Nos. 1678-1700.

AS TO APPORTIONMENT OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 519, 520, para. 645; and FOR CASE, see DIGEST, Vol. 32, p. 188, No. 2300.]

CONSOLIDATED ACTIONS for damages for libel against Hirst, Kidd and Rennie, Ltd., the printers and publishers of the Oldham Evening Chronicle, and Northern Daily and Weekly Newspapers (1920), Ltd., the printers and publishers of the Oldham Standard, in respect of publications in their newspapers.

On May 15, 1936, the plaintiffs, Arthur Mitchell and George Bamford Richards, who had spent the evening at the Grapes Hotel, Oldham, took a motor car from the yard of the hotel and went for a ride. The owner of the car was inside the hotel at the time. When the car was missed the police were informed and an hour later the plaintiffs were found with the car in a *cul-de-sac* at Shaw, near Oldham. At the police court on the following day the deputy chief constable withdrew in open court one of the charges then preferred against the plaintiffs in connection with the car escapade, namely, the charge of theft. Both the

plaintiffs were then convicted under the Road Traffic Act, 1930, s. 28 of taking a car away without the owner's consent. On May 18 a report of the case appeared in the Oldham Evening Chronicle headed, "Stole motor car in Oldham." "Arrested at Shaw"; and in the Oldham Standard headed, "Motor car theft." Richards was dismissed from his employment on the Wednesday following. Two reporters present at the police court hearing did not hear any announcement about the withdrawal of the theft charge.

The Law of Libel (Amendment) Act, 1888, s. 5, so far as material, provides :

It shall be competent for a judge or the court, upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together. . . .

In a consolidated action under this section the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately ; and if the jury shall have found a verdict against the defendant or defendants in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages they shall have so found between and against the said last-mentioned defendants ; and the judge at the trial, if he awards to the plaintiff the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants.

A. Denis Gerrard for the plaintiffs.

J. Lustgarten for the defendants.

Lustgarten : There is no question of malice on the part of the newspapers. The liability, if any, can only be for negligence. The question is, what is the responsibility of a reporter if something material is said in a public court and not heard by the reporter.

LAWRENCE, J. : The report must be fair and accurate. If it could not be heard, that would be another matter.

Lustgarten : As between theft and the offence under the Road Traffic Act of taking a car without the consent of the owner there is only a question of degrees of dishonesty : both are dishonest.

LAWRENCE, J. : You will have to make out that there is no difference in the public estimation between the two offences.

Lustgarten : Yes. Then either report would be as serious as the other. [This with reference to an accurate report.]

Gerrard : The defendant's case is that the plaintiffs are as dishonest as the reports make out. There is a confusion between dishonesty and culpability. Many crimes are not dishonest. The public never realised, from the reports, that the charge of theft had been withdrawn. Those members of the public among whom the plaintiffs move, for they are clerks, are of sufficient education to appreciate the difference that would make.

LAWRENCE, J. : This is a libel action brought by Mitchell and Richards

against the owners and publishers of certain newspapers which published reports of police court proceedings last May. I must decide whether the two reports, in the Oldham Chronicle and Oldham Standard, were fair and accurate. The reports stated in substance that both plaintiffs had been found guilty of stealing a motor car, whereas they had only been found guilty of taking a motor car away without the owner's consent. I must first consider the fairness and accuracy of the report, because it is suggested that the reporters did not hear the withdrawal of the theft charge. I accept Mitchell's, Richards' and the deputy chief constable's evidence. Whatever Mitchell and Richards said on arrest or in the police court I accept what they say as truthful evidence to-day. I accept also the evidence of the two reporters, that they did not hear the withdrawal; and I find that it was due to their inattention. It follows that the report is not fair and not accurate. It is not suggested that the papers or reporters had malice at the time when the publications were made.

The police court hearing was on Saturday, May 16, and I accept the evidence of Richards when he says that he telephoned to his employer that he could not come to work that day; and that later he explained all to the manager. On the following Monday the inaccurate reports appeared. Richards was dismissed on Wednesday. He had been with that employer for a year and for another year at least with his predecessors. I have not heard the manager. I have heard the evidence of Mr. Hardman, the director who was responsible for Richards' dismissal, and I do not accept it. He said he acted on the report and if he had known the true facts it would not have made any difference. The damage is little affected, as Richards got fresh work six weeks later. On the following Friday communications were made to the newspapers and they published a correction. The correction was not in what I consider the proper place; and even had this been so, that would not have completely put an end to damage occasioned by the inaccurate report.

The newspapers saw fit to instruct counsel to put questions as if the offence were in fact one of theft. I do not agree with that although I say the escapade was a foolish one. I award £100 damages to Mitchell and £109 damages to Richards.

Gerrard: By the Law of Libel (Amendment) Act, 1888, s. 5, damages may be apportioned between the defendants where a judge is sitting with a jury and the actions are consolidated.

LAWRENCE, J.: I think this must clearly apply to a judge alone in these circumstances. I apportion the damages and costs equally.

Solicitors: *Megson & Nicholson*, Oldham (for the plaintiffs); *Wrigley, Claydon & Fripp*, Oldham (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

BULLINGDON RURAL DISTRICT COUNCIL v. OXFORD CORPORATION.

[KING'S BENCH DIVISION (Singleton, J.), **November 23, 24, December 4, 1936.**]

Local Government—Alteration of areas—Financial adjustments—Settlement—Capital sum plus interest less tax—Transaction treated by income tax authorities as capital payment—Tax deducted not accounted for—Claim to recover tax deducted.
Mistake—Payment subject to deduction of tax—Receipt in full settlement—Inland Revenue decision that no tax payable—Re-opening accounts.

Certain claims arose to be settled in connection with the increased burden falling upon the plaintiff council consequent upon the alteration of the boundaries of the city of Oxford under the Oxford Extension Act, 1928. Terms of settlement were recommended to the parties by accountants appointed to negotiate a settlement, and by letter the plaintiffs stated that they accepted the following settlement: capital sum, £4,100; one year's burden in respect of highways, £1,925; plus interest at the rate of 5 per cent. per annum from Oct. 1, 1929 [the amount being left blank]. The defendants in reply sent a cheque for £6,759 5s. and a receipt for execution under the plaintiff council's seal. This receipt stated that the sum of £6,759 5s. was received "in full satisfaction and discharge of all claims of the plaintiffs upon the defendants in connection with or arising out of the alteration of the boundaries of the city of Oxford under the Oxford Extension Act, 1928, as follows: capital sum, £6,025 [the total of the two capital sums above-mentioned]; interest at 5 per cent. per annum from Oct. 1, 1929, to Dec. 31, 1932, £979, less income tax at 5s. in the £, £244 15s." The income tax authorities regarded the payments, including the so-called interest portion, as capital sums, and intimated that they would not look to the defendants to account for tax in respect of the deductions made. The plaintiffs claimed from the defendants £244 15s., the sum stated in the receipt to have been deducted in respect of income tax:—

HELD: as the settlement was expressed to be in full satisfaction and discharge of all claims upon the defendants, and the contract was not entered into under a mistake as to the present existence of an essential fact recognised by law as the foundation of the contract, the settlement could not be re-opened and the plaintiffs could not recover the sum claimed.

[EDITORIAL NOTE.] Though the matter here is concerned with the alteration of areas of local authorities, the real point at issue is the re-opening of settled accounts. Accounts were settled upon the understanding between the parties that part of the payment was in the nature of interest, and in respect of this part income tax was deducted at the standard rate. A receipt was given under seal and stated to be in full satisfaction and discharge of all claims. [The revenue authorities later took the view that the payment treated as interest was in fact a capital sum and no tax should have been deducted. In these circumstances it is held that the transaction cannot be re-opened, and no claim can be made for the recovery of the sum deducted.]

AS TO RE-OPENING ACCOUNTS UPON THE GROUND OF MISTAKE, see HALSBURY, 1st Edn., Vol. 21, Mistake, p. 34, para. 70; and see also pp. 7-9, paras. 14, 15; and FOR CASES, see DIGEST, Vol. 35, pp. 162, 163, Nos. 578-586.]

Cases referred to:

(1) *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629; 28 Digest 71, 373.

- (2) *Inland Revenue Comrs. v. Ballantine* (1924), 8 Tax Cas. 595 ; 28 Digest 63, case t.
- (3) *Simpson v. Maurice's Exors.* (1929), 45 T.L.R. 581 ; Digest Supp.
- (4) *Inland Revenue Comrs. v. Barnato*, [1936] 2 All E.R. 1176 ; Digest Supp.

ACTION for £244 15s. as money received by the defendants to the use of the plaintiffs, or alternatively as balance of moneys agreed to be paid to the plaintiffs by the defendants as compensation under the Oxford Extension Act, 1928. The facts are fully set out in the judgment.

H. J. Wallington, K.C., and *E. J. Rimmer* for the plaintiffs.

Cyril Radcliffe, K.C., and *Maurice FitzGerald* for the defendants.

SINGLETON, J. : This is a somewhat unusual case. The rural district council of Bullingdon claim against the mayor, aldermen, and burgesses of the city of Oxford the sum of £244 15s. as money received by the defendants to the use of the plaintiffs, or alternatively as balance of moneys agreed to be paid to the plaintiffs by the defendants as compensation under the Oxford Extension Act, 1928. It is necessary to refer to the Oxford Extension Act, 1928, which, by the interpretation section, sect. 2, says that the appointed day under that Act means Apr. 1, 1929. Sect. 3 provides :

This Act shall, except so far as is otherwise herein expressly provided, and so far as there may be anything in the subject matter or context inconsistent therewith, come into operation on the appointed day.

By sect. 4 (1) of the Act certain boundaries are altered, and the subsection is as follows :

The boundary of the existing city, the area whereof is coloured pink on the city map, shall be altered so as to include in addition to that area the added part of Headington, so much of the Headington rural district as includes the existing parish of Cowley, the added part of Iffley, and the added part of Marston, and so much of the Woodstock district as includes the added part of Cutteslowe, the added part of Water Eaton, and the added part of Wolvercot.

Sect. 43 of the Act deals with the powers, property, etc., of the Headington rural council and the Woodstock council, and sect. 43 (3), and sect. 61, provide that the Local Government Act, 1888, s. 62, shall apply to any adjustment which may become necessary, subject to the provisions of the local Act.

It is necessary, too, that I should refer to the Oxfordshire Review Order, 1932, an order made by the Minister of Health in pursuance of his powers under the Local Government Act, 1929, s. 46. By that order certain rural districts were abolished and dissolved, and the boundaries of others were altered. Cl. 24 of the order is one to which I was referred, and cl. 47 of that order provides what shall be done with the property of the dissolved rural councils, and applies the thirteenth schedule. The plaintiffs, the Bullingdon rural district council, stepped

into the shoes of the Headington rural district council, which had ceased to exist, and for the purposes of this action they are to be considered as having such rights as the Headington rural district council had before the Oxfordshire Review Order.

Before the Headington rural district council disappeared, they had consulted a firm of accountants, Messrs. W. B. Keen & Co., and had instructed them to act for them in the financial adjustment. After the date of the order, Messrs. Keen continued to act in the matter on behalf of the plaintiffs. Mr. Harris, a member of the firm, gave evidence before me. His instructions were to prepare a claim against the city of Oxford and to negotiate a settlement, if possible. Mr. Harris met Mr. Arthur Collins, who was advising the city of Oxford, and ultimately negotiated a settlement, or (more accurately) agreed with him the terms which each was to recommend to his principals. The position thereafter is shown by the correspondence, which was agreed between the parties. On Dec. 14, 1932, the clerk to the plaintiff council wrote to the town clerk of the city of Oxford :

Oxford Extension Act, 1928. Financial Adjustment—late Headington Rural District Council.

The council at their meeting held yesterday considered the recommendation of the advisers to the late Headington R.D.C. (Messrs. Keen & Co.) that the council (as successors of the Headington R.D.C.) accept the following settlement of the claim for increase of burden in consequence of the above Act : Capital sum payment in settlement of claim, but excluding highways, £4,100 ; one year's annual burden in respect of highways, £1,925 ; plus interest at the rate of 5 per cent. per annum from Oct. 1, 1929 [the amount of which is left blank], when I was directed to inform you that this council accept the above settlement as fair and equitable.

On the following day the town clerk of Oxford replied, acknowledging the receipt of the letter, and saying that it should receive attention. Then on Jan. 5, 1933, the city treasurer of the defendants wrote to the clerk to the plaintiff council :

Financial adjustment claim of the late Headington R.D.C.

I beg to enclose herewith cheque value £6,759 5s. arising out of the above financial adjustment, and also a form of receipt which I shall be glad if you will have executed under seal of your council. This amount, as you will see from the receipt, includes interest less tax to 31st ult. and agrees with your letter of Dec. 14 last addressed to the town clerk.

The cheque was enclosed, and on Jan. 10 a receipt or a release under seal was given by the plaintiffs in respect of that payment. That document bears date Jan. 10, 1933, and it is in these terms :

Received from the corporation of the city of Oxford the sum of £6,759 5s., being in full satisfaction and discharge of all claims of the late Headington rural district council and of the Bullingdon rural district council (appointed as the successors of the Headington rural district council by the Oxford Review Order, 1932) upon the corporation of the city of Oxford in connection with or arising out of the altera-

tion of the boundaries of the city under the Oxford Extension Act, 1928, as follows : Capital sum, £6,025 [that is the total of the two capital sums shown in the letter of Dec. 14] ; interest at 5 per cent. per annum from Oct. 1, 1929, to Dec. 31, 1932, £979 ; less income tax at 5s. in the £, £244 15s.,

leaving that item as £734 5s., which, added to the capital sum, made a total of £6,759 5s.

It is on this document that the defendants base one of their contentions. It is to be observed, first, that the sum paid is arrived at by a calculation of interest from Oct. 1, 1929 ; secondly, that income tax is deducted ; and, thirdly, that this basis of settlement is accepted. I do not find that there is any agreement enforceable against the defendants before the date of their cheque which was sent with the letter of Jan. 5, 1933. There had been a mention of interest in the plaintiffs' letter of Dec. 14, 1932, but no mention of tax. Both sides seem to have been satisfied that the deduction of tax was right, and it was thought that the matter was closed as between the two councils. Mr. Harris told me that it was the general practice to include a deduction for income tax payable on interest, and that both he and Mr. Collins would have advised their respective clients that tax should be deducted. If income tax was due and payable on the interest item, it was properly deducted under the Income Tax Act, 1918, All Schedules Rules, r. 19 (1). It was assumed that the city of Oxford would account for it. If they had done so, the plaintiffs would have got the benefit of that. If the city of Oxford had paid the amount to the revenue authorities, the plaintiffs could have got it back if it turned out that tax was not payable—in other words, if the revenue authorities did not claim some of that interest. The state of the accounts of the Bullingdon rural district council with the revenue was such that if the deduction was a proper deduction for tax they would have got the benefit of that payment or deduction. But views on tax matters—indeed, on most matters—change from time to time, and again the position is shown by the agreed correspondence in this case.

The correspondence to which I propose to refer now begins on Jan. 4, 1934, when the local inspector of taxes wrote to the city treasurer of Oxford :

I have to inform you that the county accountant has raised the question of the legality of the deduction of tax made by your council from the so-called interest portions of the financial adjustment payments made to the Bullingdon rural district and the Chipping Norton rural district councils on Jan. 11 and 20, 1933, respectively. I have referred the matter to my board, and I am now informed that the payments as a whole, including the so-called interest portions, are to be regarded as capital sums. The matter is one primarily for adjustment between the councils concerned, and as I understand that the income tax liabilities of the four councils concerned have not been finally settled, I suggest that the position could be arranged by further payments by your council. If this course is adopted, the revenue will

not look to you to account for tax in respect of these deductions. I shall be obliged if you will advise me in due course whether you have been able to make satisfactory arrangements.

The city treasurer replied to that letter on Jan. 16, 1934 :

In reply to your letter of the 4th inst., with reference to payments made by this corporation in respect of the financial adjustments arising out of the extension of the city boundaries, the payments made to the Bullingdon rural district council and the Woodstock rural district council were in full satisfaction and discharge of all claims and so acknowledged under seal.

That is the answer which was made from time to time, as the correspondence shows.

On Nov. 12, 1934, the county accountant addressed to the city treasurer of the defendants a letter in these terms :

Oxford Extension Act, 1928.

With reference to our recent conversation regarding the deduction of income tax from the so-called interest portions of the compensation moneys paid to the Bullingdon and Chipping Norton rural district councils as successors to the Headington and Woodstock rural district councils in connection with the financial adjustments under the above Act, I shall be greatly obliged if you will look into this question. You will perhaps remember that I took up with the inspector of taxes of Oxford, first district, the question of recovery of this tax, as it appeared that such interest was not interest within the meaning of Sched. D, Case 3, and was not, therefore, liable to assessment. I was informed by the inspector of taxes that the board of inland revenue had, after consideration, decided that no part of the payments made to the Bullingdon and Chipping Norton rural district councils as successors represented annual interest from which tax was deductible. The inspector's letter was dated Jan. 4, 1934, and he suggested that as the liabilities to income tax of the councils concerned had not been finally agreed, the position could be arranged by further payments representing the tax deducted being made by the Oxford city council. He said that if this course were adopted, the inland revenue authorities would not then require the city council to account for the tax so deducted, and he added that he had written to your council in similar terms. I am about to clear up a few outstanding matters in connection with the apportionments of the abolished rural district councils, and, as these income tax payments are involved, perhaps you will kindly inform me if you are able to pay over the amounts of tax as suggested by the inspector of taxes.

The city treasurer replied on Nov. 21. I need not read the whole of the letter. He said in the latter part of it :

The claims of these councils were settled on Jan. 10 and Feb. 1, 1933, and the receipts from the councils set forth the capital sum and the interest, and were acknowledged under seal. I wrote the inspector of taxes on Feb. 16, 1934, and notified him of these facts, and, under the circumstances, I cannot agree to re-open the matter.

Then the county accountant wrote to the inspector of taxes on Nov. 22, and said :

In view of the city treasurer's statement that he cannot agree to re-open the

matter, I shall be greatly obliged if you will make other arrangements for the recoupment of the tax.

The inspector of taxes replied :

So far as I am concerned, I have to say that the amounts in question are regarded as capital payments, and the revenue is not concerned with any question as to how the amounts were calculated.

Then on Feb. 14, 1935, the clerk to the plaintiffs wrote to the defendants' town clerk, enclosing certain letters, and saying :

It will be quite clear from this correspondence that the sum of £244 15s. was deducted from the payment to this council as income tax on so-called interest which in fact is not interest liable to income tax and the deduction should not have been made. This sum will not be accounted for by the city council to the inland revenue commissioners and is therefore due to this council. The sealed receipt mentioned by the city treasurer was for the sum of £6,759 5s., whereas the amount due to this council under the financial adjustment was £7,004. Will you please arrange for this amount of £244 15s. to be paid over to this council forthwith, or, if the city treasurer still adheres to his decision not to re-open the matter, I will report the present position of this matter to the council at the next meeting.

That was replied to by the town clerk on Mar. 8, 1935. The reply was :

I am directed to inform you that the committee is not prepared to re-open the matter.

The clerk to the plaintiffs wrote again on Mar. 25, 1935, setting out some facts and saying :

It is assumed that the settlement was also accepted by the city, and, as the money which the city council have retained as tax deduction is not to be handed over by you to the inland revenue authorities, the city council are obviously in honour bound to hand it over to this council, to whom it is due under the agreed settlement. I am asked by the council to point out that, had the city paid this tax over to the inland revenue authorities, we could have recovered it by reason of available set off.

On May 13, 1935, the town clerk wrote, saying :

I beg to refer to your letter of Mar. 25 last, which has been laid before the finance committee, who have decided that the previous decision not to re-open this matter be adhered to.

There is a certificate of the city treasurer in these terms :

I certify that on paying to Bullingdon rural district council of 13, Beaumont Street, Oxford, the sum mentioned in the second column of the subjoined statement, I deducted the amount of income tax set forth in the third column of the statement, and I further certify that this tax has been or will be paid by me either personally to the proper officer for the receipt of taxes or by way of deduction from rent or other income when received by me.

The figures are set out below, including the "amount of income tax deducted by me, £244 15s." That certificate appears to be dated

Apr. 5, 1935, but, so far as I know, at that time it had been said by the revenue authorities that they were not claiming tax or asking for tax on the interest amount, because, as they said, the so-called interest was not interest in their view at all.

In those circumstances, the plaintiffs commenced this action on Apr. 6, 1936. The defence, in para. 1, pleads the Oxford Extension Act, 1928, which led to certain claims by the Headington rural district council, and that the amount of those claims was not admitted. In para. 2, it says :

On Jan. 10, 1933, the sum of £6,759 5s. was paid by the defendants to the plaintiffs and was accepted by the plaintiffs from the defendants in full discharge of the said claims and the plaintiffs gave to the defendants a receipt under their seal for the said sum in full satisfaction and discharge of all claims of the said Headington rural district council or themselves upon the defendants in connection with or arising out of the said alteration of boundaries.

Para. 3 is a general denial. The plaintiffs, by their reply, in para. 2, plead :

It was an express or implied term or condition of the said receipt that the defendants should pay the sum of £244 15s. to the proper officer for the receipt of taxes. The defendants have not paid the said sum to the said officer.

In para. 3 they say :

Further, or alternatively, it was an express or implied term or condition of the said receipt that, if the said sum of £244 15s. was not properly deductible as income tax, the defendants would pay the same to the plaintiffs.

Para. 4 says :

Alternatively, if, contrary to the plaintiffs' contention, the said receipt was not subject to either or both of the terms and conditions set out in paras. 2 and 3 hereof, the said receipt was *ultra vires* the plaintiffs, and null and void in that it represented a voluntary payment of £244 15s. by the plaintiffs to the defendants.

I think I am right in saying no argument on the last paragraph was directed to me.

The case came before me for hearing on Nov. 23, and was continued on Nov. 24. The only witness, apart from those I have mentioned, Mr. Harris and Mr. Oswin, the plaintiffs' clerk, was the city treasurer of Oxford, and he put in an exhibit, D.1, a statement showing the position between the inland revenue and the city for the material year ; that is, the year 1932/33. This statement speaks for itself. It is sufficient to say that it shows that the defendants had a credit with the revenue for that period, and, even if income tax was chargeable on the £979 interest item, the inland revenue could not recover the actual sum, having regard to the credit which the defendants had.

The defendants say they made the deduction under r. 19 of the general

rules, and that, in the circumstances, they are not responsible to the revenue under r. 21. The city treasurer told me that at a later date the settlement between the city and the county council had been on a different basis, in that income tax was not deducted when the adjustment with the county council was arrived at. He added that the city had always relied, as against the plaintiffs, on the receipt which had been given, and that they were advised by their financial adviser that it would be dangerous to re-open a matter under seal. I cannot help thinking that, in a case such as the present, it would have tended to promote good relations between neighbouring local authorities if the defendants had paid over the comparatively small sum claimed in this action and thus put the plaintiffs in the same position as the county council were put after the inland revenue had expressed a view, and it perhaps may be expected in the future that the relations between the plaintiffs and the defendants will not be as cordial as the relations between neighbouring local authorities should be. But with this I am not concerned. All I have to decide is whether the plaintiffs are entitled to succeed in this action. It is clear, I think, that in order to succeed they must show that income tax was not payable on the interest item. It is not enough to say that the inspector of taxes is not asking for income tax. Mr. Wallington cited certain cases to me on this matter. He referred to *Re National Bank of Wales, Ltd.* (1), and *Inland Revenue Comrs. v. Ballantine* (2), at p. 610, and also to *Simpson v. Maurice's Exors.* (3). Mr. Radcliffe referred to *Inland Revenue Comrs. v. Barnato* (4).

I am not sure that this case is covered by any of the authorities cited to me. At one time during the argument I was inclined to the view that this was a case in which income tax was payable, and that it was covered by r. 1 of the rules applicable to Case III, but there are two matters which point to a different conclusion. First, the Local Government Act, 1888, s. 62, does not, on the face of it, make any provision for the payment of interest or the allowance of interest; it deals with any capital sum, and not with interest. It is under that section that the financial adjustment between the two bodies was made. Secondly, though a practice was in existence between accountants of taking a date six months after the appointed day and allowing interest as from that date, I do not see that there was any contract to that effect as between the plaintiffs and the defendants. The letter from the plaintiffs to the defendants of Dec. 14, shows that they were adopting their accountants' method of arriving at a total figure and including interest, but there is no contract by the defendants to pay interest, at least until they sent their cheque. In the circumstances I incline to the view that the interest is rather an incident in the total sum paid by way of compensation than interest within the meaning of r. 1 of the rules applicable to Case III. I do not think, for reasons which will appear, that it is

necessary for me to express a definite view on this question. If it were, I should have required further argument on a matter of much complexity. Indeed, at one time I considered whether the inland revenue authorities ought not to be represented, but it seemed that, in this particular case, at least, it was of no interest to them, having regard to the state of the accounts between them and the defendants. But, whether income tax was chargeable on the interest or not, I do not see that the plaintiffs can now be heard to say that it was not. At the time the cheque was sent by the defendants to the plaintiffs, both parties concurred in the view that the position was correctly shown by that which is set out in the receipt; in other words, both agreed that tax was chargeable on the interest which was calculated as shown on the document. Both parties agreed to deduction of income tax under r. 19. Since then the plaintiffs' view has changed because of the attitude of the revenue. As the revenue will not give the plaintiffs credit for the payment of this tax, the plaintiffs claim to recover the amount from the defendants.

If the parties were wrong in their view as to income tax being chargeable, this was a mistake of law. They agreed as to a total sum payable, and the defendants paid a sum which was agreed to be due on the financial adjustment between the parties. I do not see that the plaintiffs can re-open the matter, even if it be the fact, as to which I express no opinion, that both were mistaken in their view of the law. There was no fraud or concealment. The settlement was on the usual basis at that time between accountants of experience, and it was expressed to be in full satisfaction and discharge of all claims upon the corporation in connection with or arising out of the alteration of the boundaries of the city under the Oxford Extension Act, 1928. It is not a case in which the contract was entered into under a mistake as to the present existence of an essential fact recognised by law as the foundation of the contract. I think Mr. Radcliffe's argument is right, in that the £244 15s. was not money received to the use of the plaintiffs, nor was it received as their agents. It was a deduction made under r. 19, and it was a deduction which the defendants believed they were entitled to make, and which the plaintiffs believed the defendants were entitled to make.

As to the alternative claim, I accept Mr. Radcliffe's argument that there never was any enforceable contract under which the defendants were to pay any sum in excess of that which they have paid. Even if there had been an antecedent contract to pay more, I think the release or receipt would have prevented this claim from succeeding.

Mr. Wallington, in his reply, put the matter tersely in this way: "We are short of £244 in our compensation money." In one sense they are. They received £244 less than they would have done if income tax had not been deducted on the interest item. Whether that was a proper deduction or not, they agreed to it, and, on receiving the cheque, they

gave a receipt or release in the terms I have already mentioned. They cannot now re-open that settlement.

It follows that there must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors : *John J. McIntyre* (for the plaintiffs) ; *Sharpe, Pritchard & Co.*, agents for *A. Holt*, Town Clerk, Oxford (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

VINCENT v. TAURANGA ELECTRIC-POWER BOARD.

[PRIVY COUNCIL (Lord Russell of Killowen, Lord Macmillan, Lord Alness, Sir Lyman Poore Duff, Sir George Rich), **July 27, October 15, 1936.**]

Privy Council—New Zealand—Limitation of actions—Action against electric-power board—Breach of implied term in employee's contract—Breach of duty—Electric-power Boards Act, 1925, s. 127.

The appellant alleged that on June 6, 1930, while working in the employment of the respondents, he met with an accident and sustained severe injuries. A writ was issued on Apr. 1, 1932, and an amended statement of claim delivered on July 5, 1932, based alternatively (a) on a breach of an implied term in the appellant's contract with the respondents, or (b) on a breach of duty owed by the respondents to the appellant as a workman in their employ. By the Electric-power Boards Act, 1925, s. 127, "(1) No action shall be commenced against the Board . . . acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any alleged irregularity or trespass or nuisance or negligence, or for any act or omission whatever until the expiry of one month after notice in writing specifying the cause of action. . . . (2) Every such action shall be commenced within 6 months next after the cause of action first arose, whether the cause of action is continuing or not" :—

HELD : (i) the appellant's right of action was barred by lapse of time under the Electric-power Boards Act, 1925, s. 127.

(ii) in any event, an action based on a breach of an implied term in the appellant's contract could not have been maintained.

[EDITORIAL NOTE. The New Zealand statute, the Electric-power Boards Act, 1925, contains a section—sect. 127—in somewhat similar terms to the English Public Authorities Protection Act, 1893, s. 1, though by no means in precisely the same terms. The question at issue was whether an action in respect of an injury to a workman due to negligence or breach of duty of the Board is within the section, and it is held that the Board must in such a case have been acting in the execution or the intended execution of the Act. The limitation therefore applies to such a case.

AS TO LIMITATION OF ACTIONS IN SUCH CASES, see HALSBURY, 1st Edn., Vol. 23, Public Authorities, pp. 339-347, paras. 689-704; and FOR CASES, see DIGEST, Vol. 38, pp. 102-112, Nos. 732-795.]

Cases referred to :

(1) *Edwards v. St. Mary, Islington, Vestry* (1889), 22 Q.B.D. 338; 38 Digest 107, 765.

- (2) *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 38 Digest 102, 733.
- (3) *Sharpington v. Fulham Guardians*, [1904] 2 Ch. 449; 38 Digest 109, 783.
- (4) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784.
- (5) *Hayes v. King's County County Council*, [1917] 2 I.R. 496; 38 Digest 108, case f.
- (6) *Appelbe v. West Cork Board of Health*, [1929] I.R. 107; Digest Supp.

APPEAL from a judgment of the Court of Appeal of New Zealand (SIR MICHAEL MYERS, C.J., HERDMAN, MACGREGOR, BLAIR, KENNEDY, J.J.) dated June 22, 1933, affirming in part and reversing in part a judgment of SMITH, J., dated Sept. 27, 1932.

The facts of the case appear in the judgment of their Lordships delivered by LORD ALNESS.

W. N. Stable, K.C., John Buckley and John Platts Mills, for the appellant, referred to : *Edwards v. St. Mary, Islington, Vestry* (1), *Lyles v. Southend-on-Sea Corpn.* (2), *Sharpington v. Fulham Guardians* (3), *Bradford Corpn. v. Myers* (4), *Hayes v. King's County County Council* (5), *Appelbe v. West Cork Board of Health* (6).

Hon. S. O. Henn Collins, K.C., and Alexander Ross, for the respondents, were not called upon.

LORD ALNESS : This is an appeal by special leave *in forma pauperis* from an order of the Court of Appeal of New Zealand, dated July 21, 1933, dismissing an appeal by the present appellant from an order of the Supreme Court of New Zealand, and allowing a cross-appeal by the present respondents from the aforesaid order of the Supreme Court of New Zealand.

The sole question at issue before the Board is whether the appellant's right of action against the respondents is barred, as being out of time, by the terms of the Electric-power Boards Act, 1925, s. 127. The relevant facts in the case are few in number, and are not in dispute. The appellant was a linesman in the employment of the respondents, who are a body corporate constituted under the provisions of the Electric-power Boards Act, 1925, for the Tauranga District. The respondents, *inter alia*, generated and supplied electric power to consumers of electricity within their area. The appellant alleges that, on June 6, 1930, while working, in the employment of the respondents at Te Puke, on a transformer connected with highly powered lines, he met with an accident, and sustained severe burning and other injuries. On Apr. 1, 1932—i.e., admittedly more than 6 months after the cause of action first arose—the appellant issued a writ against the respondents in the Supreme Court of New Zealand, claiming general and special damages resulting from his injuries. On July 5, 1932, the appellant delivered an amended statement of claim. His claim was based alternatively (a) on a breach of an implied term of his contract of employment with the respondents,

or (b) on a breach of duty owed by the respondents to the appellant as a workman in their employ. The respondents, on Aug. 30, 1932, delivered their statement of defence, pleading, *inter alia*, that the action, having regard to the terms of the Electric-power Boards Act, 1925, s. 127, was time barred.

It may be convenient at this point to set out the precise terms of sect. 127. They are as follow :

(1) No action shall be commenced against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any irregularity or trespass or nuisance or negligence, or for any act or omission whatever, until the expiry of one month after notice in writing specifying the cause of action, the court in which the action is intended to be commenced, and the name and residence of the plaintiff and of his solicitor or agent in the matter has been given by the plaintiff to the defendant.

(2) Every such action shall be commenced within 6 months next after the cause of action first arose, whether the cause of action is continuing or not.

On July 8, 1932, it was ordered by the court, by consent, that the question of law—"Whether the Electric-power Boards Act, 1925, s. 127, is applicable to the plaintiff's cause of action, and an effective bar to the proceedings instituted by him"—should be argued, before the trial of the action, the action being meanwhile adjourned. In short, the defence tendered by the respondents was treated by the court as a demurrer point. On Sept. 27, 1932, the question of law referred to was argued before SMITH, J., and on Oct. 21, 1932, the learned judge found : (i) that, if the appellant could, at the trial of the action, show circumstances from which the contract alleged in the amended statement of claim was to be implied, the Electric-power Boards Act, 1925, s. 127, would not bar the action ; and (ii) that, if and in so far as the appellant's claim rested solely upon the respondents' omission to perform a statutory duty, sect. 127 was a bar to the action. The appellant appealed against finding (ii), and the respondents cross-appealed against finding (i).

On July 21, 1933, the appeal and the cross-appeal were heard by the Court of Appeal of New Zealand, when it was ordered by the court that the appeal be dismissed, and that the cross-appeal be allowed. From that order, special leave to appeal *in forma pauperis* having been granted by an Order in Council, the present appeal has been taken.

The decision of the appeal must, in their Lordships' opinion, turn upon the proper construction to be attached to sect. 127 of the Act of 1925, and its application to the facts of the case. Mr. Stable, in the course of a forceful and ingenious argument, invoked the assistance which he conceived that he obtained from certain decisions pronounced in England under an analogous statute, the Public Authorities' Protection Act, 1893. In their Lordships' judgment, these decisions, to say the least of it, fall to be handled with care, inasmuch as the wording

of the two statutes differs in material particulars. Their Lordships think that they must steadily bear in mind the terms of sect. 127 of the New Zealand statute. The form of that section is somewhat peculiar, and it will repay analysis. The section falls into two parts. The first subsection is negative, and forbids an action of the character there described, unless the plaintiff has complied with certain conditions precedent. These are that written notice be given by the plaintiff to the defendants, a month before the raising of the action, of (a) the cause of action, (b) the court in which it is to be commenced, and (c) the name and residence of the plaintiff and of his solicitor or agent. The second subsection is positive, and provides that every action described in subsect. (1) shall be commenced within 6 months after the cause of action first arose. Now, their Lordships cannot doubt that this is an action against the Board for something done or omitted to be done in the execution or intended execution of the Act. The statutory words are characterised by the utmost amplitude, and they seem to their Lordships to leave the appellant no loophole of escape.

It matters not whether one regards the appellant's claim as based on implied contract or on tort. The nomenclature employed appears to their Lordships, in the circumstances, to be immaterial. The appellant, in his amended statement of claim, has chosen to christen his first cause of action as implied contract, and his second as tort; but both sound in breach of the Electrical Supply Regulations, 1927, reg. 178. In any event, the first alternative appears to their Lordships to be difficult to maintain. Mr. Stable was constrained to admit that he was unaware of any precedent for so basing such a claim as this, and he also admitted, that, if his argument was sound, the doctrine of implied contract might, with equal force, have been invoked, and successfully invoked, in any action of damages by a workman against his employer, for breach of the Factory Acts. If Mr. Stable is right, then the supineness of learned counsel in failing sooner to discover and apply this sovereign remedy against time limitation is, to say the least of it, remarkable. On analysis, the implied contract on which the appellant founds is revealed as being one of peculiar character. It is a contract on the part of the employer, as was pointed out in the course of the argument, to observe the requirements of reg. 178—in other words, to obey the law. But the employer has no option to do otherwise. Moreover, if Mr. Stable is right, then, as he admitted, not only is any employee of the Electric-power Board unaffected by the statutory time limit, but, wherever the relation of master and servant exists, that limit does not apply. This, it seems to their Lordships, is a *reductio ad absurdum* of the argument under consideration.

Mr. Stable demurred to the importance attached by the Court of Appeal to an alleged admission made by counsel in the course of the

hearing before them. Their Lordships do not propose to proceed either upon that admission, or upon the English decisions cited by Mr. Stable. While not desiring to cast the slightest doubt upon the soundness of these decisions, their Lordships, placing the terms of sect. 127 of the New Zealand Act *vis-à-vis* of the proceedings in this case, cannot resist the conclusion that the appellant's claim is out of time. They will therefore humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the Court of Appeal of New Zealand should be affirmed.

Appeal dismissed.

Solicitors: *T. E. Crocker & Son* (for the appellant); *Wray, Smith & Halford* (for the respondents).

[*Reported by T. A. DILLON, ESQ., Barrister-at-Law.*]

THE ATTORNEY-GENERAL OF NEW ZEALAND *v.* THE NEW ZEALAND INSURANCE COMPANY, LTD., AND OTHERS.

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Alness, Sir Lyman Poore Duff), **July 24, October 15, 1936.**]

Privy Council—New Zealand—Charity—Charitable, benevolent, educational or religious purposes—Validity.

A testatrix domiciled in New Zealand, bequeathed to the trustee and executor of her will (the respondent company) her residuary estate, "to apply the same in making other bequests towards institutions, societies or objects established in or about Auckland aforesaid for charitable, benevolent, educational or religious purposes" within the absolute discretion of the trustee:—

HELD: the gift failed for uncertainty, as a gift for "benevolent purposes" is not a good charitable gift.

[**EDITORIAL NOTE.** It was sought in this case to distinguish a gift to benevolent institutions from a gift for benevolent purposes, but their Lordships refused to recognise any such distinction.

AS TO ALTERNATIVE CHARITABLE OR OTHER PURPOSES, see **HALSBURY**, *Hailsham Edn.*, Vol. 4, pp. 167-169, para. 221; and **FOR CASES**, see **DIGEST**, Vol. 8, pp. 294-297, Nos. 719-740.]

Cases referred to:

- (1) *A.-G. for New Zealand v. Brown*, [1917] A.C. 393; 8 Digest 298, 748.
- (2) *Edgar, etc. v. Cassells*, [1922] S.C. 395; Digest Supp.
- (3) *Shaw's Trustees v. Esson's Trustees* (1905), 8 F. (Ct. of Sess.) 52; 8 Digest 296, case (b).
- (4) *Houston v. Burns*, [1918] A.C. 337; 8 Digest 297, 739.

APPEAL by the Attorney-General of New Zealand (as representing the institutions, societies and objects established in and about Auckland for charitable, benevolent, educational or religious purposes) from a majority judgment of the Court of Appeal of New Zealand (MYERS, C.J.,

SMITH and JOHNSTON, JJ., REED, J., dissenting), dated May 18, 1935, reversing a judgment of HERDMAN, J., of the Supreme Court of New Zealand dated Sept. 12, 1934. The facts of the case relevant to the appeal appear in the judgment of their Lordships delivered by LORD MACMILLAN.

W. P. Spens, K.C., and J. H. Stamp for the appellant.

Spens, K.C.: There is a fundamental distinction between a bequest for benevolent or religious purposes, and a bequest to benevolent or religious organisations in so much as the former expression does not indicate the persons or class of persons who are to enjoy the legacy, whereas the latter expression effectively does so. The word "benevolent" has been treated by the New Zealand legislature as sufficiently definite to distinguish one association from another. The distinguishing characteristic of benevolence is that it seeks to promote the welfare of others without any object of personal gain and the presence or absence of this characteristic in the purpose of an association is easily recognised. [He referred to *A.-G. for New Zealand v. Brown* (1), *Edgar, etc. v. Cassells* (2).]

Stamp: In this instance a benevolent institution is just as much recognisable as a charitable institution. It should be the proper object of selection for distribution on the part of a trustee. [He referred to *Shaw's Trustees v. Esson's Trustees* (3), and *Houston v. Burns* (4).]

R. F. Roxburgh, K.C., and G. P. Slade for the respondent, the trustee and executor of the will, and *Gavin T. Simonds, K.C., and A. Andrewes Uthwatt* for the other respondents, were not called upon.

LORD MACMILLAN: The late Mrs. Catherine Smith of Auckland in her will dated Dec. 23, 1930, dealt with her residuary estate as follows:

As to the rest, residue and remainder of my real and personal property of whatsoever kind and wheresoever situate (including all money or property bequeathed or devised as aforesaid where such bequest or devise shall have lapsed) I direct my trustee to apply the same in making other bequests towards institutions, societies or objects established in or about Auckland aforesaid for charitable, benevolent, educational or religious purposes and my trustee may benefit such institutions, societies or objects and in such amounts or amount as it in its absolute discretion shall deem advisable.

The testatrix died on Aug. 12, 1933, and the net value of the residue of her estate was between £80,000 and £90,000. The sole question for determination is whether the residuary bequest above quoted is valid and effectual. HERDMAN, J., in the Supreme Court of New Zealand held that it was, but his decision was reversed by the Court of Appeal (REED, J., dissenting).

Their Lordships find themselves so fully in agreement with the views

expressed by the learned Chief Justice and his colleagues in the majority in the Court of Appeal, and in particular by JOHNSTON, J., in his brief but very lucid judgment, that it would be superfluous to repeat what has already been so well said.

The privilege of controlling by will the disposition of property after death is subject to the condition that such disposition must be made in favour of ascertained or ascertainable persons or objects. A testator is not permitted to delegate to others the disposition of his property, subject to this, that he may confer upon his trustees a power of selection and apportionment among a definitely prescribed class of beneficiaries. In the case of charitable objects the law, by reason of the favour in which charity is held, has accepted such objects as constituting a sufficiently ascertained class notwithstanding its wide extent, and permits a testator to direct a fund to be distributed among such charities and in such proportions as his trustees may in their discretion decide. But in all other cases the requirement of definite precision is enforced in the definition of the individuals or classes to be benefited.

Now it is settled beyond dispute that a bequest by a testator in favour of benevolent objects to be selected by his trustees does not answer this requirement and is ineffectual because of its indefiniteness. In the present bequest the fatal word "benevolent" occurs on which so many testamentary dispositions have been shipwrecked, but it is urged that the bequest is saved by the fact that it is not in favour of benevolent purposes at large to be selected by the trustee but is in favour of institutions, societies or objects in or about Auckland for benevolent purposes. It is suggested that sufficient definiteness is imparted to the benevolent objects of the bequest by specifying that they are to be institutions, societies or objects, presumably in existence and ascertainable, and that these institutions, societies or objects are to be in or about Auckland, so that the trustee should have no difficulty in determining the class of objects from which to select beneficiaries.

It is probably the case that the addition of a local qualification may in certain circumstances render sufficiently definite what would otherwise be too wide a class, but in the present instance the want of precision is inherent in the word "benevolent" itself. Consequently, however circumscribed the local area and assuming that only existing organisations are intended, it still remains that to predicate of an institution, society or object in or about Auckland that it must be "benevolent" is not to identify it with the requisite precision. That being so, it is unnecessary to discuss whether a further ambiguity lurks in the word "objects," or to comment on the peculiar form of the direction to the trustee to make bequests.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed and the judgment of the Court of Appeal of New

Zealand of May 18, 1935, be affirmed. By arrangement between the parties no order with regard to costs is necessary.

Appeal dismissed.

Solicitors: *Mackrell, Maton, Godlee & Quincey* (for the appellant); *Baker & Nairne* (for the respondent, the executor and trustee of the will); *Bartlett & Gluckstein* (for the other respondents).

[*Reported by T. A. DILLON, ESQ., Barrister-at-Law.*]

HARDING v. H. & E. WATERS, LTD.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Eve, J.), **October 23, 1936.**]

Workmen's Compensation—Voluntary payment of compensation—Notice to reduce—No counter-notice—Reduced payments accepted for 6 months without complaint—Implied agreement—Application for review—Treated as original application for arbitration—Workmen's Compensation Act, 1925 (c. 84), ss. 11, 12, 21.

A workman was voluntarily paid compensation at the rate of 25s. a week in respect of an injury by accident. The employers served a notice on the workman under the Workmen's Compensation Act, 1925, s. 12 (3), and in due course reduced the weekly payments to 17s. 6d. No counter-notice was served and for 6 months the workman accepted the weekly payments of 17s. 6d. During those 6 months correspondence passed between the solicitors acting for the parties and there were negotiations for a lump sum settlement, but no complaint was made as to the reduction in the weekly payments. The workman then applied for a review and for a restoration of the weekly payments of 25s. The county court judge declined to infer an agreement between the parties that the workman should receive compensation at the reduced rate, and he held that the workman's condition was the same as at the date of service of the employers' notice under sect. 12 (3). He found the measure of the workman's incapacity at that date to be £1 a week, and, treating the proceedings as an original application for arbitration, he awarded compensation at the rate of £1 a week. No formal amendment of the proceedings was, however, made. The employers appealed:—

HELD: (i) the county court judge was entitled to allow the application for review to be treated as an application for arbitration.

(ii) the fact that the workman did not serve a counter-notice on the employers did not preclude him from bringing arbitration proceedings in opposition to the diminution of the compensation paid.

(iii) the county court judge was entitled to decline to infer an agreement that the workman should receive compensation at the reduced rate.

Per SLESSOR, L.J.: where a county court judge thinks fit to give leave to amend the proceedings particularised, either in whole or in part, the amendment ought to be made then and there, so that if any question subsequently arises, the Court of Appeal can see exactly what case was made before the county court judge.

[EDITORIAL NOTE.] Where a workman has applied for a review in a case where he should have brought an application for arbitration under the Act, the county court judge can proceed with the hearing treating it as an application for

arbitration. This decision was come to in *Robinson v. Vickers-Armstrong, Ltd.* (1). That case, however, was discussed at length in *Francis v. London Public Omnibus Co.* (1933) 26 B.W.C.C. 539; Digest Supp., and the effect of the decision may be open to some doubt, though it does not appear to have been dissented from on the point for which it is cited in the judgment here. The present decision not only places the position beyond doubt, but adds the practical direction that if the case is proceeded with as an arbitration they should be properly formulated upon the new basis.

AS TO AMENDMENTS, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., p. 563; and FOR CASES, see DIGEST, Vol. 34, pp. 385, 386, Nos. 3111-3126.]

Cases referred to:

- (1) *Robinson v. Vickers-Armstrong, Ltd.* (1929), 22 B.W.C.C. 171; Digest Supp.
- (2) *Pudney v. France (William), Fenwick & Co., Smith v. Leach & Co.*, [1925] 1 K.B. 346; 17 B.W.C.C. 241; 34 Digest 380, 3081.

APPEAL from an award of His Honour JUDGE KONSTAM, K.C., made at East Grinstead County Court on July 21, 1936.

The workman, Harding, sustained an injury by accident in Sept., 1932. He was voluntarily paid compensation as for total incapacity at the rate of 25s. a week. In 1934 the workman was given light work at a wage of 7s. 6d. a week. On Oct. 19, 1935, the employers served a notice on the workman under the Workmen's Compensation Act, 1925, s. 12 (3), together with a copy of a medical certificate to the effect that the workman's earning capacity had increased, and in due course they reduced the weekly payments to 17s. 6d. The workman served no counter-notice on the employers in opposition to this certificate, and for 6 months he accepted the weekly payments of 17s. 6d. During those 6 months correspondence passed between the solicitors acting for the parties and there were negotiations for settlement by payment of a lump sum, but no complaint was made as to the reduction in the weekly payments. In Apr., 1936, the workman applied under the Workmen's Compensation Act, 1925, s. 11, for a review and for a restoration of the weekly payments of 25s., on the ground that his condition was not improving, but was likely to deteriorate, and that he was suffering considerable pain. The county court judge declined to infer an agreement between the parties that the workman should receive compensation at the reduced rate, and he held, after hearing medical evidence, that the workman was in the same condition as he had been in Oct., 1935, when the employers' notice was served. He found the measure of the workman's incapacity at that date to be £1 a week, and, treating the proceedings as an original application for arbitration under the Workmen's Compensation Act, 1925, s. 21, he made an award of compensation at the rate of £1 a week from Oct. 21, 1935. No formal amendment of the proceeding was, however, made. The employers appealed.

Gerald A. Thesiger for the appellants.

C. A. Collingwood for the respondent.

SLESSER, L.J.: This case was brought before the county court judge in the form of an application for a review under the Workmen's Compensation Act, 1925, s. 11, and it appears clear that that form of application was misconceived. The application, whatever its merits, ought to have been made in the form of a request for arbitration under sect. 21 of the Act.

One of the questions which arise in this case, and will have to be determined, is whether the county court judge was justified when he had before him only an application for review, in allowing that application to be treated as an application for arbitration and in dealing with it on that basis. In the circumstances—for all these cases have to be considered on their own particular facts—the court is of opinion that this is a case (in that respect resembling *Robinson v. Vickers-Armstrong, Ltd.* (1)) where the case ought to have been considered on its merits. In so far as the county court judge acceded to the suggestion that the application for a review should be treated as an arbitration, the matter was, in the opinion of the court, considered on its merits. I would like to make this observation, which is of general application: where a county court judge thinks fit to give leave to amend the proceedings as particularised, either in whole or in part, the amendment ought to be made then and there, so that if any question subsequently arises, this court can see exactly what case was made before the county court judge. It is to put the other side and this court in some difficulty if, when leave to amend has been given, advantage of that leave is, strictly speaking, not taken, and the case proceeds upon the footing of a form different from that in which it is framed. A good deal of the argument might have been avoided had counsel for the workman, when he obtained leave to have this matter treated as one of arbitration, properly formulated his case on that basis.

The facts of the case are these: Harding was injured in Sept., 1932, and for some time was unable to do any work at all. In 1934, the employers gave him some light work. They paid him compensation, without any arbitration proceedings, at the rate of 25s. a week. Subsequently, however, they thought fit to serve on him a notice under sect. 12 (3) of the Act, accompanied by a medical certificate that his earning capacity had been increased, and in due course they reduced his compensation from 25s. to 17s. 6d., in pursuance of the notice. For all purposes this case has been treated throughout as if no counter-notice was served by the workman, and, therefore, no question arose of reference to a medical referee. The employers, having served their notice under sect. 12 (3) in proper form, undoubtedly became entitled to terminate or diminish the weekly payment, and no complaint can be or is made on that point. According, however, to a line of authorities beginning with *Pudney v. William France, Fenwick & Co.*,

Ltd. (2), the mere fact that a workman has not served a counter-notice under sect. 12, disputing the employers' medical certificate, does not preclude him from bringing arbitration proceedings in opposition to the termination or diminution of the compensation paid and in support of his contention that he is in fact entitled to some other sum. That is what the workman did here. After some 6 months, he took proceedings which were in the form of a request for a review in the county court and in which he asked for the restoration of the weekly payment of 25s. He asked that the employers' notice under sect. 12 (3) should be ignored and that he should continue to get compensation at 25s. a week on the ground that his condition was not improving, but was likely to deteriorate, and that he was suffering considerable pain, not only in his work but also in walking to work. The county court judge, having thought fit to treat this case as an application to go to arbitration, heard medical evidence which was adduced both on behalf of the workman and on behalf of the employer. He accepted that given for the workman to the extent that he came to the conclusion that there was no change of circumstances since the notice had been served under sect. 12(3). He found that the workman was in the same condition as that in which he had been when that notice was served. Thereupon he asked himself, as he was fully entitled to do, what the degree of incapacity was from which the workman was suffering on Oct. 21, 1935, that incapacity being the same as that existing on the date of the application. He came to the conclusion that the measure of the incapacity was £1 a week. Under the Act it is entirely for him to assess the degree of partial incapacity, and there is no appeal with regard to that.

It is, however, argued for the employers, that, by reason of the workman's abstention from any criticism or challenge of the reduction to 17s. 6d., and the fact that there had been some suggestion in a letter written by the workman's solicitors that the matter might be settled by a lump sum, in which letter no complaint was made of the reduction, there was an agreement between the parties that the workman should receive 17s. 6d. and no more. If such an agreement could have been shown to exist, that would have been a complete answer to the workman's case, but the county court judge has declined to infer any agreement of the kind. He expresses the opinion in his judgment that the lapse of a few months on what may have been negotiations for a lump sum settlement, is not enough to justify him in inferring an agreement. That would appear to be a matter entirely for the county court judge. It was open to the employers to prove, if they could, that the workman had, either expressly or impliedly, agreed to take 17s. 6d. a week. In that, however, they failed. It follows that the judge was entitled to find that the workman's incapacity at the time when the reduction was made was such as to merit compensation at £1 a week. The employers,

although they were entitled to reduce the compensation from 25s. a week, were accordingly only entitled to reduce it to £1. For these reasons this appeal must, in my opinion, be dismissed.

SCOTT, L.J. : I agree and have nothing to add.

EVE, J. : I agree.

Appeal dismissed.

Solicitors : *J. Lord Thompson & Weeks* (for the appellants) ; *Gamlen, Bowerman & Forward*, agents for *White & Mason*, East Grinstead (for the respondent).

[*Reported by FRANK ROWE, Esq., Barrister-at-Law.*]

HOLLIS BROS. & CO., LTD. v. WHITE SEA TIMBER TRUST, LTD.

[KING'S BENCH DIVISION (Porter, J.), **November 9, 11, 1936.**]

Sale of Goods—Contract—Printed words—Compensation for under-shipment—Typewritten words—"Sold subject to shipment"—Short delivery—Liability of sellers.

By a printed form of contract for the sale of timber it was provided that "In the event of under-shipment of any item buyers are to accept . . . the quantity shipped, but have the right to claim compensation for such short shipment." This form of contract was used for a contract for sale of timber for shipment from a port in the Arctic Circle which is open for shipping only for about 21 days in the year. The details of the particular contract were added to the printed form in typewriting and a clause was also added which provided that the goods were "sold subject to shipment : any goods not shipped to be cancelled." In a claim for damages for short delivery :—

HELD : the contract gave to the sellers an option whether or not they would ship any timber, but once shipped the sellers were obliged to supply the timber in fulfilment of the contract. If, however, the full quantity of timber was not shipped, the buyers could not recover damages for short delivery.

[EDITORIAL NOTE.] In this case is considered the standard form of charterparty adopted in the case of ports in the Arctic Circle, which are only open to vessels for a very short period in the year. To such ports vessels generally go in an "expedition," accompanied by an ice-breaker, and a special clause is used to ensure that there is no sale unless the goods are shipped. In the present case the clause was extended to provide that "any goods not shipped to be cancelled," i.e., to be treated as unsold.

AS TO DELIVERY OF WRONG QUANTITY, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 212, 213, para. 365, and FOR CASES, see DIGEST, Vol. 39, pp. 559-561, Nos. 1664-1678.]

Cases referred to :

- (1) *Hadjipateras v. Weigall (S.) & Co.* (1918), 34 T.L.R. 360 ; 41 Digest 307, 1688.

- (2) *Glynn v. Margetson & Co.*, [1893] A.C. 351 ; 41 Digest 311, 1715
 (3) *Barnett v. Javeri & Co.*, [1916] 2 K.B. 390 ; 39 Digest 404, 396.
 (4) *Johnson v. Macdonald* (1842), 9 M. & W. 600 ; 39 Digest 403, 388.

SPECIAL CASE STATED by an arbitrator. The parties entered into a contract for the sale of 50 standards of parquet blocks c.i.f. for shipment from Igarka, North Russia, to Hull, during the summer of 1935. Igarka, which is in the Arctic Circle, is open to shipping only for about one month in the year. The contract, which was in the standard form adopted by the Timber Trade Federation of the United Kingdom and by the White Sea Timber Trust, Ltd., of London by authority of "Exportles" of Moscow, was for the shipment of two parcels of wood blocks, one of 30 standards of blocks $9\frac{1}{4}/9\frac{1}{2}$ ins. in length and the other of 20 standards measuring $18\frac{1}{2}/19$ ins. long. The contract provided, *inter alia* :

In the event of undershipment of any item buyers are to accept or pay for the quantity shipped, but have the right to claim compensation for such short shipment.

The details of the particular transaction were added in typewriting, and the following clauses were also added :

This contract is subject to sellers making necessary chartering arrangements for the expedition and sold subject to shipment any goods not shipped to be cancelled.

All goods under this contract are subject to a variation of 25 per cent. more or less.

The goods were shipped by different vessels. The consignment of 30 standards of the shorter blocks was in one cargo and was in order. In the other consignment there was a non-shipment of 6.268 standards of the longer blocks, but there was included a further quantity of short blocks instead. There was thus an over-shipment as to the short blocks which the buyers accepted under an option given to them by the contract. The buyers claimed damages for short delivery and the matter was submitted to arbitration. The arbitrator found in favour of the buyers subject to the opinion of the court on the question whether the buyers' right to claim compensation for short shipment was negated by the typed words "sold subject to shipment: any goods not shipped to be cancelled."

Gordon Alchin, for the White Sea Timber Trust, Ltd., the sellers, referred to *Glynn v. Margetson & Co.* (2), *Barnett v. Javeri & Co.* (3), and *Johnson v. Macdonald* (4).

W. L. McNair, for Hollis Bros. & Co., Ltd., the buyers, referred to *Hadjipateras v. Weigall (S.) & Co.* (1).

PORTER, J. : This award deals with a contract for the sale of certain wood goods from a port in the north of Russia, called Igarka, to be

shipped during the summer of 1935. Loading in this latitude is limited to 21 days. Igarka is a port developed under the present Russian Government in the extreme north, from which it is difficult to get goods, and from which goods are obtainable only provided an expedition is sent. Though it is not necessary to my determination, as I understand the facts, an expedition to this port is one in which a large number of vessels go, escorted by an ice-breaker, in order to make it as certain as possible that the expedition can be carried through. The result, of course, is that the shipping season is short, and accordingly there is the provision of latitude for the ships' loading.

The sale was a sale of two parcels of goods, one of which was just half the length of the other. All the goods were small in size and short in length, the largest length specified being 19 ins. Though there were two parcels, the parcels, I think, must be considered as separate interests. That was provided for by the provision in the printed part of the contract: "Each part of this contract to be considered as separate interests." As originally framed, the contract provided that there should first of all be a 10 or 5 per cent. margin for the quantity to be delivered or taken. Actually that particular provision has been altered by the typewritten words and a variation is made of 25 per cent. instead of the lesser variation provided in the printed words of the contract. That provision is not in dispute, the result being that when one is considering what goods have to be taken or delivered one regards the amount specified not as a static quantity, but as a quantity with a margin on either side of 25 per cent.

The real dispute arises with regard to certain terms in the printed contract; and their modification or alteration by certain terms in the typewritten portion of the contract. In the original provision regarding the quantities which have to be, or may be, taken, so far as the maximum is concerned, there is a provision by which the buyers can, if they desire, take a maximum over the amount specified in the contract, or they can take the contract quantity. In each case the sellers have to pay the extra expenses for providing more than the contract quantities. So far as this is concerned the smaller length was supplied in quantities in excess of the amount which the buyers needed, and the buyers in fact took more. The arbitrator has found that, having taken more than the contract quantity, they were not entitled to compensation in respect of that greater amount, and that part of the decision stands.

So far as the larger size of goods is concerned—the 1 in. by 3 ins. by 18½/19 ins.—there was a considerable shortage in the delivered quantity, even if one takes into consideration the fact that there is a provision for a variation of 25 per cent. The actual amount delivered was about one half—it is not necessary for me to put it with accuracy. Of course, if the original provisions of the printed contract had remained

in existence, the buyers would have been entitled to compensation under the words :

In the event of under-shipment of any item the buyers are to accept or pay for the quantity shipped, but have the right to claim compensation for such short shipment.

That provision, however, did not remain in those terms, because it is at least modified, and possibly altered, by the third clause, in the type-written words :

This contract is subject to sellers making necessary chartering arrangements for the expedition and sold subject to shipment : any goods not shipped to be cancelled.

It is said on behalf of the sellers that these words mean that the obligation of the seller is subject to a double condition ; the first condition being that the necessary chartering arrangements are made, and the second condition being that the goods must be shipped, and any goods not shipped are to be cancelled. In other words, unless the goods are shipped the sellers are not obliged to tender the documents or goods, this being a c.i.f. contract. On the other hand, they could tender what was shipped, and any goods not shipped would be cancelled. I do not, for this purpose, intend to decide that which may well arise in another case, namely, whether, supposing there to be a short shipment, beneath the minimum quantity, the buyers are obliged to take the smaller quantity. In fact they have taken the smaller quantity, and that particular question does not arise in this case. I have merely to determine whether, the buyers having taken that portion, the sellers are excused from paying compensation for the short shipment. Now, it is said here by Mr. McNair on behalf of the buyers, that I must read the contract as a whole, and that it is possible to give effect both to the printed words and to the written words of the contract. He says in effect, first of all, that in this case the buyers made provision for two types of goods, and that you must not ship one type of goods so as to prevent the shipment of the other ; you must not fill up your space with the smaller goods so as to shut out the larger goods. And he says they are entitled, looking at the contract, to infer that the smaller goods are less valuable than the larger goods. All I can say about that is that there is no such finding in the case as stated, and I do not think I am entitled to speculate as to which of the goods was the more valuable.

He says, secondly, and it is true, that when one is considering the construction of a contract containing both written and printed words one must as far as possible give effect to both the written and the printed words. The authorities state with accuracy the proposition which one has to bear in mind when construing documents in these cases. Nevertheless, though that is so, there are cases in which it is not possible to give effect to both the printed and the written words, and in such a

case the written words must prevail. The case that was quoted to me, *Hadjipateras v. S. Weigall & Co.* (1), I do not use for any purpose except to show that there may be cases where you can and must disregard the printed words altogether and take the written words only. In the present case, Mr. McNair points out, it might have been possible to leave out the words: "This contract is subject to the sellers making the necessary chartering arrangements for the expedition," if it is true to say that the meaning of the phrase, the sellers sold "subject to shipment: any goods not shipped to be cancelled," is that it is left to the shippers to ship or not to ship, and if the goods are not in fact shipped, the bargain is that they are under no obligation to deliver the goods at all. That is true, but I do not think that is the conclusion of the case, because one knows that in mercantile contracts one does from time to time get repetition of provisions, some of which may not be necessary, but which are thought to be desirable in order to point out the exact position in which the parties stand, one to the other.

Then is it possible to take the second part of the words "sold subject to shipment: any goods not shipped to be cancelled," and give them a meaning which is consistent with the words "in the event of under-shipment buyers are to accept and pay for the quantities shipped, but have the right to claim compensation for short shipment?" I do not think it is. At one time I thought it might be possible to say that "sold subject to shipment" means "subject to some shipment taking place," and it might be possible to say "any goods not shipped to be cancelled" merely provided that there was no obligation upon the sellers to ship, at a future date, any goods left on their hands. I do not think that is consistent. It seems to me to be inconsistent with the whole scheme of the arrangement by which the expedition is to start, and which merely gives a latitude of 21 days for shipping. I thought also that it might be possible to say that "subject to shipment: any goods not shipped to be cancelled" might be construed as meaning "sold subject to the possibility and the ability of the sellers to ship, and sold subject to any goods not able to be shipped to be cancelled." I do not think that is the natural meaning of the words, and I do not think I ought to speculate as to what was in the minds of the parties when they made the contract.

In my view "subject to shipment" means "provided the sellers in fact ship," and that meaning must be read with the phrase "any goods not shipped to be cancelled." Reading the two phrases together, the meaning is not "subject to some shipment taking place," but is "sold subject to these goods being shipped," and the clause provides that if a portion of the goods is shipped that does not prevent the sellers from saying that that portion may be delivered in accordance with the contract, though the rest is not. I agree that the actual provision itself is not very happily drawn, because one finds that it says that this contract

is subject to the chartering arrangements for the expedition, and it goes on "and sold subject to shipment." The proper meaning of that, and its accurate meaning, would be that the contract was sold subject to shipment. I do not think that this looseness of language makes any difference. I think one must say, particularly in regard to the fact that "any goods not shipped to be cancelled" follows "sold subject to shipment", that it means the goods and not the contract are sold subject to the shipment.

I think I can get some assistance—in spite of the differences rightly pointed out by Mr. McNair—from the "to arrive" cases. Just as in the "to arrive" cases there is no sale of the goods until the goods arrive in the ship, and that leaves it at the option of the sellers to ship or not to ship as they please, so here the words "subject to shipment" seem to me to leave it in the option of the sellers whether they intend to ship or not. I think it is too late in the world's history now to make any criticism of the construction put upon the words "to arrive." I think it is an old established principle how those words are to be construed. It is true those were not c.i.f. contracts and these are, but I think that the two cases are to some extent analogous. The words "to arrive" mean that if the goods do not arrive there is no sale, and here the words "sold subject to shipment" mean that they are sold if they are shipped, but if they are not shipped then there is no sale. It is quite true that that puts it in the option of the sellers to ship or not to ship, but the words in my opinion bear that plain meaning, and I do not think that the objection ought to prevail.

One more argument was put forward by Mr. McNair, and that is that in the first typewritten clause, "all goods under this contract are subject to a variation of 25 per cent. more or less," the words "or less" are unnecessary if the facts are that there is no obligation on the sellers to ship at all unless they are so minded. I think one can give some meaning to those words in spite of the provision in cl. 3 that they were sold subject to shipment. The fact that the goods are sold subject to shipment does not, in my view, mean that if the goods in fact are shipped, the sellers can then say "We have shipped the goods but we do not intend to attribute them to this contract." If the goods are shipped they must be attributed to the contract, and the sellers cannot afterwards say if the market rises "It is true we shipped these goods. They were free goods at that moment unattributed to any contract, and we do not intend to fulfil your contract with these goods. We intend to treat them as free goods and sell them in the market." My view is that if they have shipped the goods the sellers are obliged, at any rate if they have not been shipped in fulfilment of other contracts, to supply them under this contract. But, when one is determining how much they must supply under this contract, the quantum is decided by the first provision,

and they need not, in respect of the larger goods, supply more than 15 standards instead of 20 standards.

For these reasons, I think the alternative is the correct award, and I find in accordance with the alternative award, which is, I understand, that the sellers pay the buyers £13 2s. 6d.

Solicitors: *Wynne-Baxter & Keeble* (for the White Sea Timber Trust, Ltd.); *Pritchard, Sons, Partington & Holland*, agents for *Andrew M. Jackson & Co.*, Hull (for *Hollis Bros. & Co., Ltd.*).

[Reported by C. ST. J. NICHOLSON, Esq., *Barrister-at-Law.*]

PRATT'S TRUSTEE IN BANKRUPTCY v. PRATT.

[CHANCERY DIVISION (Farwell, J.), **November 30, December 1, 1936.**]

Guarantee—Co-sureties—Agreement between co-sureties that one to be primarily liable—Whether equitable charge created in favour of co-surety secondarily liable on property of co-surety primarily liable.

The defendant and her husband guaranteed an overdraft upon a company's account at a bank, the defendant depositing as security certain stock, and her husband the title deeds of certain property. As between themselves it was agreed that the husband should be primarily liable, but the bank did not recognise any such primary liability. The husband was adjudicated bankrupt and his property was sold by the trustee in bankruptcy, with the bank's consent, the purchase price of the property charged to the bank being duly paid over to the bank. The bank also realised the stocks deposited by the defendant. The defendant claimed that the agreement between herself and her husband that the husband was to be primarily liable on the guarantee had the effect of creating an equitable charge in her favour on the husband's property and she alleged that the trustee in bankruptcy wrongfully sold the property charged to the bank by her husband for less than he could have obtained for it, and she claimed from the trustee in bankruptcy the difference between the purchase price obtained and the price which she alleged ought to have been obtained :—

HELD: the agreement between the defendant and her husband did not have the effect of creating an equitable charge upon the husband's property, and the defendant had no cause of action against the trustee in bankruptcy.

[EDITORIAL NOTE.] There is considered here the effect of an agreement between two co-sureties that one shall as between themselves be primarily liable to the creditor. Both sureties gave a charge on property to the creditor and it was attempted to show that in such circumstances the property charged by the surety to be primarily liable was equitably charged to the co-surety to cover any money he or she might be required to pay under the guarantee. The court found no justification for such a contention and held that the right of the co-surety was only one of personal indemnity.

AS TO SECURITIES GIVEN BY CO-SURETIES, see HALSBURY, Hailsham Edn.,

Vol. 16, pp. 121, 122, paras. 143, 144; and FOR CASES, see DIGEST, Vol. 26, pp. 149, 150, Nos. 1124-1131.]

Cases referred to :

- (1) *Gee v. Liddell*, [1913] 2 Ch. 62; 26 Digest 119, 843.
- (2) *Craythorne v. Swinburne* (1807), 14 Ves. 160; 26 Digest 141, 1048.
- (3) *Re Denton's Estate, Licenses Insurance Corpn. & Guarantee Fund, Ltd. v. Denton*, [1904] 2 Ch. 178; 26 Digest 10, 9.

ACTION, which was not contested, for £110 for goods sold, and counter-claim for £268 16s. 6d.

Guarantees were given to the Westminster Bank by the defendant, Mrs. Pratt, and her husband in respect of a company called Harelda, Ltd., of which company the defendant and her husband were the sole directors. Mr. Pratt owned certain land at Wivenhoe, in Essex, and he deposited the title deeds of this land as security. Mrs. Pratt deposited, as security, certain stock.

In June, 1934, a receiving order was made against Mr. Pratt, and the property in respect of which the bank had an equitable mortgage was sold by the trustee in bankruptcy, with the bank's concurrence, together with other land of the bankrupt's estate. Mrs. Pratt's security was realised by the bank, and she claimed against the trustee in the bankruptcy of her husband on the ground that, although they had both given a guarantee to the bank in respect of the company's overdraft, they had agreed as between themselves that the husband was to be primarily liable, and it was contended that such agreement gave her an equitable charge upon the property comprised in her husband's security. Mrs. Pratt also claimed that the property charged had realised less than it otherwise would have done, by reason of its being sold with other property and not as a separate lot.

J. G. Strangman, for the plaintiff: The defendant has not proved a breach of duty. The bank had only an equitable charge on the bankrupt's property, and could not have sold it without an order of the court, which would have increased the cost of selling the property. Also, there is no evidence that the property charged to the bank would have realised so much, had it been sold alone. There is no evidence that the property charged to the bank was adversely affected by its being offered with other property.

J. Leonard Stone, for the defendant: Where there are two co-sureties, there is an equitable doctrine which makes them equally liable to contribute, and if one surety pays the debt he can claim against the other. That does not depend upon contract. But the equitable doctrine can be varied by express contract as between the co-sureties. Admittedly, such contract will not bind the principal creditor, but the sureties may agree between themselves, although the rights of the creditor are not affected. In this case, the agreement between the sureties was that one

of them was to be primarily liable. In such a case, the only way in which that priority can be maintained and enforced is by giving the second guarantor a charge upon the security of the first. In the present case, the trustee is in no better position than the mortgagor, because he can only succeed to his rights. Mrs. Pratt's interests should have been protected. The trustee did not sell as agent for the bank. [Counsel referred to *Gee v. Liddell* (1), *Craythorne v. Swinburne* (2), *Re Denton's Estate* (3).]

FARWELL, J. : This action is brought by the trustee in bankruptcy of a Mr. Pratt against the wife of the bankrupt. So far as the action itself is concerned, it is a claim for the sum of £110, being made up of a sum of £160 for goods sold, less an amount paid on account. The amount of £110 was claimed by a specially endorsed writ. The defendant admits that she owes the sum of £110, and, therefore, so far as that is concerned, the plaintiff is entitled to judgment for £110, and costs. The defendant has counterclaimed against the trustee in bankruptcy for the payment of a sum of £268 16s. 6d., being an amount which it is said ought to be paid to her. That claim arises in this way. The bankrupt and his wife were the sole directors of a limited company known as Harelda, Ltd. The company was in need of financial assistance in the year 1932, and in Aug., 1932, the defendant guaranteed an overdraft made to the company by the Westminster Bank at the branch where the company's account was, and she charged to the bank as security certain stock. The amount of that guarantee was limited to £500. The charge was in the usual form. On Aug. 11, 1933, the company was in need of further money. There was a meeting of the directors of the company, namely, of the bankrupt and his wife, and, amongst other things done at that meeting, the directors were empowered to obtain an increase of the overdraft at the company's bankers up to a limit of £800, Mr. Pratt to be the first guarantor and Mrs. Pratt to continue as second guarantor. On that wording, the bankrupt arranged for a further overdraft at the bank. He signed a guarantee up to £700, and he deposited with the bank as security for the amount the title deeds of certain property at Wivenhoe, in Essex. That property was pledged to the bank. It was property which consisted of a piece of land with a building on it, which had been a factory, and there was also a portion of foreshore abutting on to the River Colne. The bankrupt owned other property immediately adjoining that land, and he claimed to be the owner of a further extent of the foreshore. He was also the owner of 42 acres of land which land has been described as saltings or marshland. It is probably of no very great value, because from time to time it is inundated with sea-water, the river in that part being tidal, and the sea-water renders the land unsuitable for agricultural purposes. That marshland and the foreshore

were held by the bankrupt under a different title and were not included in the property pledged to the bank. At the same time as the bankrupt gave that security to the bank, the lady (the defendant) agreed to extend the limit of her guarantee to £600, and subsequently, in Sept., 1933, she further agreed to extend the limit to £675.

Unfortunately, matters did not proceed successfully from the point of view of the bankrupt, and on June 28, 1934, a receiving order was made against him, and on Sept. 20, of the same year, he was adjudicated bankrupt. The plaintiff in this action was appointed his trustee in bankruptcy. On Jan. 30, 1935, Mrs. Pratt was called upon by the bank to pay under her guarantee. By that time the trustee in bankruptcy desired to sell that portion of the bankrupt's property at Wivenhoe, and the trustee suggested to the bank that it might be a good plan if there was a sale of both the property pledged to the bank and the other adjoining property, and that there could be one sale by public auction. The bank was willing to agree to that course being adopted. They wanted to recover their money, as £700 was owing to them at the date of the receiving order. They wanted to recover from the bankrupt, in priority to making a claim against the wife. At the time when the guarantees were given by the bankrupt and his wife, they both saw Mr. Garvin, who was the manager of the bank at the time, and there is no doubt whatever that as a result of a discussion, Mr. Garvin made it perfectly plain, both to the bankrupt and to his wife, that, so far as the bank was concerned, there was no question of a primary or secondary liability at all. The bank would claim the right to proceed against the property of either of them as it thought fit, and in the order it thought fit, and the bank could recognise no arrangement of primary or secondary liability at all. But there is no doubt that Mr. Garvin, who gave evidence, and Mrs. Pratt, who gave evidence, have made it quite plain that there was an arrangement between the bankrupt and his wife that, as between themselves, the bankrupt should be the person primarily liable. In the words of the minute, he was to be the first guarantor. That was to be the arrangement between husband and wife. The bank, having £700 owed to it and being desirous of recovering it, was willing that the property in which it had an interest should be sold, and it was willing that it should be sold by the trustee in bankruptcy with the other property immediately adjoining it which belonged to the bankrupt. The bank would not, of course, have been able to sell the property without applying to the court unless the mortgagor, or, as he was a bankrupt, the trustee in bankruptcy, consented. But as the trustee in bankruptcy was willing to agree to the property being sold, it was possible to avoid any such application. Accordingly the trustee in bankruptcy proceeded to have the property put up for sale by auction. The trustee started by consulting well known auctioneers and surveyors, who thought that the matter

would be better dealt with by local auctioneers, who were acquainted with the vicinity of the property in question. Accordingly, acting on that advice, the trustee in bankruptcy consulted some local auctioneers, and he had the assistance and services of one of the partners in that firm, a Mr. Wright, who has had 17 years experience. He knew the vicinity of the property well, and he knew the local conditions, and the trustee no doubt to a very great extent relied upon him. In my judgment, the trustee was entitled to consult a gentleman such as Mr. Wright, and to rely upon his advice, in considering how the property should be sold. In 1924 there had been an attempted sale of the whole of this property by the bankrupt himself, and at that time the property had been lotted for the purpose of sale in two lots. The same method of lotting was advised by Mr. Wright. Lot 1 consisted of saltings with the whole of the foreshore, and lot 2 consisted of the portion of the land with the factory. Lots 1 and 2 were put up together, and bought by the same purchaser. The price obtained for the two lots was £600. The putting up for sale of lots 1 and 2 together was not a matter to which the bank was asked to give its express consent. At any rate, it never objected to that method of sale. It was agreed that Mr. Wright, as the auctioneer, should state the proper proportions of the purchase price, and he has apportioned £300 to the property which was charged to the bank and £300 to the other property. From that, the expenses of the sale had to be deducted, with the result that the bank received £268 16s. 6d., being the proceeds of the sale, less expenses. The bank, when it received that sum of £268 16s. 6d., did not apparently treat it as a payment *pro tanto* of the amount of the debt, but placed it in a suspense account, waiting to see the result of the final adjustment between the various parties. The bank also took steps to realise the security of Mrs. Pratt, which it held, and the stock sold realised £651. The balance of that sum it also put to a separate account, which is waiting the result of these proceedings and other matters. The bank has also lodged a proof in the bankruptcy for the balance of the amount due, and that is how the position stands. The bank has not in fact treated itself as being satisfied either by one guarantor or the other, but for the moment is holding the money in the suspense account.

In these circumstances, the position seems to me to be this. The bank has in its possession the whole of the money, so far as it is concerned, which can be realised by the sale of the property pledged to it to secure the overdraft of the company. So far as the bank is concerned, it is content with the position. It has made no sort of claim or any sort of complaint against the trustee or against the auctioneer, nor anything of that sort at all. It has not raised any objection to the method by which the property was sold. So far as there is any evidence before me, the bank is satisfied with what has been done. But the defendant is not satisfied.

The defendant takes the view that the sale was wrongful in this sense, that it was wholly wrong to include in the sale of lot 2, the portion of the land with the factory upon it, land which comprised the marshland or saltings and a portion of the foreshore. Her view is that the saltings or marshland was completely worthless, or even worse than worthless, as it has produced no revenue at all, and there was some payment to be made in respect of it. Therefore it was a burden, and not a benefit, and the fact that it was included with the other property had no effect on the purchase price. The whole of the purchase price, therefore, must be attributable to the property which was charged to the bank, and no part of it can be attributed to the other part of the property sold. That being so, she argues, the whole of the £600 should have been paid over to the bank, and, if the bank had received the whole of it, her liability would have been less, and, as the bank has not taken any steps to recover any balance of the purchase price, she is entitled to bring this action on her own behalf, and require the balance to be paid over to her by the trustee as being the proceeds of the sale. She also claims damages.

There are two points I have to consider. The first point is whether in the circumstances the defendant has any cause of action whatever against the trustee. If she has no cause of action at all, it matters not whether the sale was a proper one or not, and the other question does not arise. If, on the other hand, she has a cause of action, then it may be material to consider on the evidence whether there was any ground for saying that the sale was improper in any way, or that the price obtained could be attributed only to the land charged. It is not necessary for me to answer the second question, because I take the view that the defendant has no cause of action. In my judgment, the evidence given on behalf of the defendant does not justify the claim she makes, even if she has a cause of action. I have seen Mr. Wright in the witness-box, and I am satisfied that he used his best abilities in advising how the land should be lotted and dealt with. The only evidence to support the suggestion of the defendant was the evidence of the person who bought the land, and he thought the marshlands had been thrown in. I cannot overlook the fact that, not so very long ago, the person who bought them made an offer of £400 for the marshland, which offer was not accepted. The onus is on the defendant, and, in my judgment, she has failed completely to discharge it, and, if it was necessary to find for the plaintiff on that point, there would be an end of the matter. But in my view the lady has no cause of action at all. This is not, in my view, a case of subrogation. It is not a case where the creditor has discharged the debt by realising the property of one of the guarantors, leaving the other guarantor's property wholly or partly intact, in which case the one whose property has been taken is entitled to stand in the shoes of the

creditor, so far as necessary, and to be treated as having a charge on the property which the bank has caused to be freed from the charge by the payment of the other guarantor. That is not the position here. The bank has undoubtedly sold the property of both the guarantors. The bank has received the proceeds of the sale. It is quite true that the proceeds of the sale have been paid into a suspense account. It is not possible to suggest in this case that the question of subrogation arises. It is said that, because the bankrupt and his wife agreed as between themselves that the husband should be primarily liable, that agreement has the effect of creating a charge in favour of the wife, that from the date the arrangement was made the wife had a charge upon the property of the husband to secure the fulfilment of the contract between herself and her husband, and, in these circumstances, she is entitled to sue the trustee in bankruptcy as a person having a charge on the property, and that the trustee has sold the property wrongfully. That is a proposition which is not justifiable. I know of no equity which would entitle a person in the position of the defendant here to an equitable charge. It was an agreement between husband and wife that the husband should pay, and keep the wife and her property indemnified from the debt due to the bank. That in itself does not, in my judgment, give the wife any charge on the property of the husband. I cannot see that an equitable charge was created on the property of the husband pledged to the bank. There is no authority of which I know which would support that proposition. It is said that a decision of WARRINGTON, J. (as he then was), in *Gee v. Liddell* (1) was an authority in support of that proposition ; but in my judgment it has nothing to do with the case I have to determine. Mr. Stone found sentences in the judgment in that case which, he says, support his proposition, but I cannot take a sentence divorced from the whole judgment in which it was made, and in my judgment the case is not an authority for the proposition stated by Mr. Stone. I know of no principle which entitles a party to say that an agreement of this kind, made between themselves, gives rise to an equitable charge upon the property of one of the parties. It may give rise to a cause of action, and it may be that the defendant in this case has a cause of action, and may prove in the bankruptcy. But the claim in this action can be only on the ground that she has some independent charge on the property. In my judgment, she has failed wholly to show that she has any cause of action at all, and all I can do is to dismiss the counterclaim.

Solicitors : *Laurance Collins & Fearnley-Whittingstall* (for the plaintiff) ; *Hugh-Jones & Flinn* (for the defendant).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

SYMES AND JAYWICK ASSOCIATED PROPERTIES, LTD. v.
ESSEX RIVERS CATCHMENT BOARD.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.), **December 7, 1936.**]

Sewers and Drains—Land drainage—Sea-wall—Right to drain from seaward to landward side of wall—Implied Crown grant—Rights of drainage of upper landowner.

There cannot exist at law a right on the part of an owner of land on the seaward side of a sea-wall to let sea-water on to the land on the landward side of the wall, or to make any breach in the sea-wall which will expose the land on the landward side to the risk of such an event. Such a right cannot be claimed under an implied grant from the Crown; nor where the land on the seaward side is the higher, can it be claimed as the right of the owner of higher ground to drain his land on to lower ground.

[EDITORIAL NOTE.] In the court of first instance, ATKINSON, J., was clear in his view that there could be a right to drain through a sea-wall from the seaward side. The Court of Appeal have unanimously taken the opposite view on this fundamental aspect of the case and the present judgments are almost entirely devoted to the discussion of this fundamental principle. It is held that there can from the very nature of the thing be no such right.

AS TO SEA-WALLS AND DEFENCES, see HALSBURY, 1st Edn., Vol. 28, Waters and Watercourses, pp. 382-384, paras. 717-720; and FOR CASES, see DIGEST, Vol. 44, pp. 79-83, Nos. 606-664. FOR THE LAND DRAINAGE ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 529.]

Cases referred to :

- (1) *A.-G. v. Tomline* (1880), 14 Ch. D. 58; 44 Digest 79, 606.
- (2) *A.-G. of Southern Nigeria v. Holt (John) & Co. (Liverpool), Ltd.*, [1915] A.C. 599; 44 Digest 68, 491.
- (3) *A.-G. v. Chambers* (1854), 4 De G.M. & G. 206; 44 Digest 65, 457.
- (4) *Mellor v. Walmesley*, [1905] 2 Ch. 164; 44 Digest 66, 471.
- (5) *Hudson v. Tabor* (1877), 2 Q.B.D. 290; 44 Digest 82, 640.
- (6) *A.-G. v. De Keyser's Royal Hotel*, [1920] A.C. 508; 44 Digest 546, 499.
- (7) *Patent Agents Institute v. Lockwood*, [1894] A.C. 347; 42 Digest 613, 139.
- (8) *Baird (Robert), Ltd. v. Glasgow City Corporation*, [1936] A.C. 32; Digest Supp.

APPEAL by the defendants from a decision of ATKINSON, J., delivered on May 14, 1936, and reported in [1936] 2 All E.R. 551. The facts are fully set out in the judgments.

G. H. Beyfus, K.C., and *Geoffrey Hutchinson* for the appellants.

R. M. Montgomery, K.C., and *G. O. Slade* for the respondents.

GREER, L.J. : This is an appeal from the judgment of ATKINSON, J., in an action brought by Mr. Francis Albert Victor Symes and Jaywick Associated Properties, Ltd., against the Essex Rivers Catchment Board, whereby it was declared that the defendant board was not entitled to stop up a sluice or culvert in the sea-wall abutting upon the foreshore at St. Osyth in the county of Essex, and that the defendants, by closing

up the sluice or culvert in exercise or purported exercise of their statutory powers under the Land Drainage Act, 1930, had deprived the plaintiffs of legal rights which otherwise they would have enjoyed, and that the plaintiffs had suffered damage from the said closing up of the said sluice or culvert, and whereby the defendants were restrained by injunction from stopping up or obstructing the said sluice or culvert, and the defendants were ordered to replace the sluice or culvert and reopen the same within 14 days from the date of the judgment, and it was directed that judgment should be entered for such amount of damages as should be found due upon an inquiry by one of the official referees. The learned judge stayed execution, pending this appeal, on the defendants' undertaking in the meantime to pump away the water on the seaward side of the sea-wall in question.

The facts relevant to the only point which it seems to me necessary to decide in this case are as follows. There is on the coast of Essex in the neighbourhood of St. Osyth an ancient sea-wall, the age of which was not proved by either party, but it must be taken that the sea-wall was erected either by the Crown direct or by the commissioners of sewers, in whom for a long time were vested the powers of the Crown to create and keep in order sea-walls, in order to prevent the incursion of the sea into the land behind the sea-wall. The plaintiffs alleged that in some way or other they had acquired a right to drain under the sea-wall, at a place called Tendring in the said county, the sea-water that from time to time accumulated on the seaward side of the sea-wall. The *locus in quo* was a horseshoe-shaped piece of land formed by an inward curve in the sea-wall in the neighbourhood of St. Osyth, which is more particularly described on the plan used at the trial. The claim of the two plaintiffs to the rights to which they alleged they were entitled arose in the manner following. They claimed as owners of plots of land, on the seaward side of the sea-wall, which they had bought from a daughter of a Mr. Stedman, who had acquired her title to the land as follows. Two speculators named Stedman and Bond had bought the land on the seaward side of the sea-wall, together with the land behind the sea-wall, between that and a counter-wall further inland, hereinafter referred to as the caterpillar-shaped land. They formed a company, and conveyed the land to the company. All the shares in the company belonged to Stedman and Bond. Bond became insane, and Stedman bought his shares at the bargain price of £500, and became the sole shareholder. He then got the company to convey the land on the seaward side of the sea-wall to one of his daughters, who held the land as trustee for Stedman or his company, and the land on the landward side to another daughter, who also held it as trustee for him or his company.

The above facts are stated with more detail later in this judgment.

It was alleged that the effect of the conveyance of the seaward land was to vest in the purchaser of that land the right to a *quasi*-easement to drain the sea-water under the sea-wall through a wooden sluice which had taken the place of an old brick drain. All that was known about the brick drain was that in the year 1900 a witness called at the trial, who was in 1900 a mere boy, had been playing with pieces of wood in the neighbourhood of the culvert, and he found that his pieces of wood were carried towards the caterpillar-shaped land on the landward side of the sea-wall against a grid, but what was the height of the water at that time or what was the level or condition of the bottom of the culvert was not proved. In my judgment, it was established with sufficient probability by a witness named Latham, called for the defendants, who knew this district very well and had inspected the sea-wall in 1922, that the land between the sea and the sea-wall and beyond it was at one time level, and that culverts such as the one in question existed in many places for the purpose of what is called a relief-sewer, that is to say, for the purpose of enabling flood-water which accumulated in the caterpillar-shaped land to flow back again on to the seaward land and so to the sea. The learned judge did not accept Mr. Latham's evidence. I think he ought to have done so, as it was the only evidence on the subject, and there was no reason to doubt his veracity or competence to give the evidence he did give.

Before the year 1931, the sea frequently flowed as far as the sea-wall, and the bulk of the sea-water drained back into the sea through the sand and shingle, but part of it remained in a ditch which had been made at some time or other on the seaward side of the sea-wall, and this only disappeared by evaporation in the summer. There was no evidence up to the year 1931, except that of the boy above referred to, that any sea-water had been escaping through the culvert to the landward side of the sea-wall. A farm behind the sea-wall and the counter-wall was known as the Cockett Wick Farm. On June 24, 1931, a company called the Clacton Sporting Lake Company, Ltd., was formed to purchase the seaward land and the land between the sea-wall and the counter-wall. As stated above, the only persons interested in the company at this time were Stedman and Bond, who each held half the shares in the company. For the sum of £500, Stedman bought out Bond, who had then become of unsound mind. Stedman then owned all the shares in the company, and the company conveyed the seaward land to a Mrs. Suffling, a daughter of Stedman, and the caterpillar-shaped land behind the sea-wall to a Mrs. Robinson, another of Stedman's daughters.

In Oct., 1931, the defendant board came into existence, and at a later date became the drainage board for the whole area. Some time in Oct., 1931, while the old board was still in control, it was suggested by Stedman that the company should be permitted to substitute a

wooden sluice for the original culvert. It had been found that for two and a half feet on each side of the culvert in the wall the brickwork of the culvert had been removed, and the space on the seaward side had been filled in with clay and other material and the subsequent growth of herbage, which prevented any efflux of water either way to any amount that mattered. The sluice was inspected on behalf of the catchment board when they succeeded the old board, and Stedman agreed that the maintenance of the sluice should only be allowed upon the terms that a penstock must be put in to control the sea-water. The effect of the penstock, if it had been kept in order, would have been that the board could at any time that they chose have insisted on its being kept closed, and so have prevented any flow of sea-water into the sluice. The penstock was duly put in by Stedman. Thereafter, on Oct. 30, Mrs. Suffling, to whom the part known as Tendring on the seaward side of the wall had been conveyed, conveyed to the plaintiff Symes a site which was one of a number of plots which had been planned by Stedman for the building of bungalows on the Tendring area. Between Mr. Symes' property and the sea-wall there were other plots, which were subsequently conveyed to other purchasers.

In Mar., 1934, the plaintiff company acquired a clubhouse building in the centre of the Tendring area, further removed than Mr. Symes' property from the sea-wall, and having between it and the sea-wall several other plots subsequently sold to other purchasers. Later, a company was formed, called the Jaywick Freeholders Association, to represent the various purchasers. Between 1931 and 1935 a very large number of bungalows was put upon the Tendring area by purchasers from Mrs. Suffling. The land comprised in the Tendring area was entirely unsuited for a building estate, inasmuch as on many occasions sea-water used to come over on to the property and flood it for a considerable time. Stedman, or his company, constructed a roadway on the top of the shingle on the seaward side of the Tendring area. This had the effect of reducing the number of occasions on which the sea would get into the Tendring area, but it did not prevent it on all occasions, and on Sept. 15, 1935, a very high tide poured sea-water over into the area where the plaintiffs' and other purchasers' houses were. For a considerable time the defendants' predecessors did not find it necessary to use a penstock, because the sea-water used to come in on the far side of the sea-wall, through a sluice known as Bond's Sluice, which was out of repair, and the sea-water, if any, which flowed from the horseshoe area did not make any material difference in the amount of sea-water behind the sea-wall. But in 1935 Bond's Sluice, through which the water from the caterpillar area used to flow to the main river, which had been broken down for a long time, was repaired, and thereafter the sea-water was kept out of the caterpillar area except to the extent that it could get into that

area through the wooden sluice. The defendants, with the consent of Stedman, closed the penstock in order to control the flow of the sea-water through the wooden sluice, but it was found a day or two afterwards that the penstock had been destroyed and rendered useless. Thereupon, in order to prevent the sea-water flowing beyond the sea-wall, the defendants filled up the end of the sluice so as to make it watertight. Somebody or other, probably the servants or agents of Stedman, removed the clay and other material with which the hole had been filled up, and the servants of the board replaced it. It was taken down again by the agents of Stedman and, in addition to that, an actual breach was made in the sea-wall by cutting it down so that the water could flow through the gap. This was afterwards repaired by the defendants, and the plaintiffs then brought this action. I should like to add that I have summarised to the best of my ability the effect of the evidence, but I have had an opportunity of reading the written judgment of SCOTT, L.J., who has gone into every detail with regard to these matters. I agree entirely with what he says in his written judgment.

In order to succeed, the plaintiffs had to prove in some way or other that they had acquired a right to drain sea-water through the culvert under the sea-wall. In my judgment, they failed to establish any such right, and on that ground their action should have been dismissed.

It is clear from *A.-G. v. Tomline* (1), and some observations in the House of Lords in *A.-G. of Southern Nigeria v. Holt (John) & Co. (Liverpool), Ltd.* (2), that sea-walls owe their origin to the prerogative of the Crown to protect the realm against the incursion of sea-water, just as a wall of a fort is erected to prevent the attack of an enemy. In the *Nigeria* case (2), at p. 620, LORD SHAW says this :

In truth and substance what was done was to protect the land, to guard against the invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject, but with this duty of the Crown. This principle is in accord with the law laid down in *A.-G. v. Tomline* (1), and principally with the opinions of FRY, J., at the trial, and COTTON, L.J., in the Court of Appeal.

The decision of the Court of Appeal in *A.-G. v. Tomline* (1) appears to me to show conclusively that nobody can acquire any right to interfere with the operation of a sea-wall so as to prevent it operating as intended by the Crown when it was built. Whether a gap is made in the sea-wall or a hole is made under the sea-wall with the object of letting sea-water into the lands which lie behind the sea-wall, those who make

such a gap or hole are committing an illegal act ; they can acquire no right to let sea-water into the lands behind the sea-wall, such a right being absolutely inconsistent with the object of the Crown in causing the sea-wall to be built. No grant from the Crown can be inferred from the existence of a drain such as the one in the present case of a right to let the sea-water through such a drain on to the land behind the sea-wall. The object of the existence of sea-walls is to be compared with the object of defences against an enemy of the Crown. It would be absurd to suppose that the owner of a fortress, having built his defences against the enemy, should grant to anyone a right to interfere with those defences in such a manner as to enable a hostile force to enter upon his fortress. It is equally impossible to assume that the Crown would grant any right to any subject to interfere with the defences raised by the Crown against the incursions of sea-water. It seems to me, therefore, that, in the absence of any proof of licence by the Crown to the owner of the land to drain sea-water through the sea-wall, even if the Crown could grant such a licence, the plaintiffs failed to prove their case and the action necessarily fails. If they had no rights, they could not complain of anything that was done by the defendant board. In this kind of claim, as well as in every other claim, the plaintiff cannot succeed without proving his case, and it is essential to the success of their action that the plaintiffs should have proved that they had the rights which they claim. The mere fact that, by the action of the sea, the land on the seaward side of the sea-wall had become higher land than the land on the landward side of the wall, could not possibly give them any right to drain their sea-water through the wall. It seems to me impossible to suppose that the culvert through the wall could have been meant by those who built the wall many years ago—probably the commissioners of sewers—for the purpose of allowing sea-water to flow into the land beyond the wall. It seems probable that, as Mr. Latham thought, it was put in at some time or other for the purpose of what he called a relief-sewer, to allow floodwater to run back from behind the wall to the land in front of the wall, and so to the sea. But, be this as it may, it seems to me quite clear that the plaintiffs failed *in limine* in that they did not prove that they had ever acquired the right which they alleged the defendant board had interfered with.

Many other questions were discussed in the case, but in my judgment it is quite unnecessary to express any opinion with regard to them.

The appeal will be allowed with costs, and judgment entered for the defendants with costs.

SCOTT, L.J. : In this case the Essex Rivers Catchment Board appeal from a judgment of ATKINSON, J., in an action in which they were

defendants, and Mr. Symes and the Jaywick Associated Properties, Ltd., were plaintiffs.

The broad question in the case is whether the plaintiffs and other owners and occupiers of land and buildings in a certain area known as Tendring, which lies outside the ancient sea-wall built as a defence against sea-water, are entitled to drain surface water, including sea-water, through the sea-wall on to the farm lands now lying at a lower level inside the sea-wall. There are subsidiary disputes, arising out of the discovery, in 1931, in the north-west angle of the sea-wall which encloses Tendring on the west, north, and east, of an old brick sluice running through the wall, or, rather, of what remained of it, for when discovered it was seen that 2 ft. of each end had been totally removed at some distant past date. Various disputes arose during 1931-1935, inclusive, directly or indirectly, out of or about this sluice, and certain issues of a subordinate kind were discussed and decided at the trial about it, but they do not affect the main questions of the appeal, and I leave this sluice and its story until a later place in my judgment.

In my view, even if the facts of the case were what the learned judge has found them to be, his judgment would still be wrong in law, on the broad ground that, even on his hypothesis of fact, the plaintiffs would have failed to establish any cause of action. But the entire judgment rests on one particular inference of fact, and that inference is, in my opinion, erroneous. It is therefore proper to consider that part of the case first. It is also desirable, from the public point of view, to correct that inference, as it is one capable of general application on a large part of our coasts, and, if we merely reversed the judgment on its legal side, we should leave what I regard as a serious misconception upon the subject of coastal formation and the effect of tidal action on record as a considered judicial conclusion after an elaborate trial. For these reasons, I think it essential to consider closely the evidence bearing on the judge's main inference. What that was, I will make plain in a few minutes. In order to make sure that what I say is clear, I have added some explanation of what I understand the evidence to mean. If it be thought I am taking judicial notice of facts which call for proof, but were not proved, my answer is that the explanatory matter I have added is all within common knowledge.

Six years ago there was on the Essex coast, about 2 miles west of Clacton-on-Sea, a tract of land, practically sea-shore, where local farmers used to shoot the wild duck which frequented its salt pools. It was just a section of the long ribbon of land, lying above the foreshore and outside the sea-walls, of what are called "saltings" in that part of Essex. The main line of shore there runs roughly east and west. This section lay within the jaws of a wide bay, or recess, in the ancient sea-wall which protected the farm lands behind it from the sea and the incursion of

sea-water. The recess was about 600 yds. wide from east to west and 250 yds. deep from north to south, and faced south towards the sea. Between 1930 and Jan., 1936, when the writ in this action was issued, this tract was developed—if I may use a word which has acquired a sinister meaning for those who want to preserve the beauty of England—as a speculation, into a sort of bungalow town, composed of a gridiron of streets and containing some 800 separate dwellings, intended mainly for summer occupation, the land being built over at a density rate of over 80 houses to the acre. It was literally without any drainage whatever, and no water-supply except a single pipe bringing fresh water to one tap. It consists of a promenade road built on the top of the beach or ridge of shingle and sand thrown up on to the edge of the salting by wave-action, and a series of streets, nearly at right-angles to the promenade, running northwards to the sea-wall.

I have not seen this town of bungalows and shacks, but from the photographs and description in evidence at the trial it must be utterly out of place and a dreadful eyesore on that flat, open coast. The voice of protest was raised at the time to some extent by Mr. D. B. Smith, now chairman of the defendant board, then chairman of the old Maldon, Wivenhoe & Clacton Drainage Board, which was subsequently dissolved under the Land Drainage Act, 1930. Nothing, however, was done by the local authorities or by the Ministry of Health to prevent what strikes me as a gravely regrettable misuse of the coast-land of England. Possibly the matter was considered and a conclusion reached that nothing could be done. There was no evidence at the trial about it. I express no opinion as to whether such preventive action was legally possible or not, as it would not be relevant to the issues before us.

The appeal does, however, raise various questions of general importance in the national interest upon the ancient law of the land as to sea-walls and the protection of our farm lands from sea-water, and the claims of right put forward in this action on behalf of a bungaloid growth like Tendring to rid itself of its surface water, whether fresh or salt, clean or foul, by sending it inland through the sea-wall on to the farm lands beyond, instead of making a sewer out to sea (which it was stated at the trial could have been done quite easily at a small cost) seem strangely out of keeping with the common law view of the function of sea-walls, and it seems to me contrary to the public policy which underlies our law about sea defences that the court should seem in any way to stretch the law in favour of those who are acting contrary to the public interest both by setting up such an insanitary town as has been constructed in the present case and by injuring the amenity of a beautiful sea-coast. The owners of houses or other property there are, of course, entitled to their pound of legal flesh, but they are entitled to no more; and I have come to the conclusion that the learned judge's sympathy for

individual householders has caused him to stretch legal rights in the plaintiffs' favour and, indeed, to invent rights for them which have no justification in either law or public policy.

The plaintiffs are two owners of plots and buildings in the middle of Tendring, neither property being contiguous to the sea-wall. The plaintiff Symes owns two houses, Nos. 30 and 32, Essex Avenue, and lives in one. The plaintiff company is the owner of plots at Brooklands Gardens known as the Clubhouse, the Café and Brooklands Green. The way in which the plaintiffs had derived title is sufficiently set out in the statement of claim, but it should be borne in mind that a Mr. Stedman was owner of all, or almost all, the shares in the Lakes Company, that Mrs. Suffling was his daughter, and that she took her conveyance as trustee for her father. Subsequently he, through her, sold off plots to purchasers, his company as vendors receiving a total price of £40,000, or thereabouts.

The landward limit of saltings is the sea-wall : their seaward limit is at or just above the foreshore, the upper boundary of which is, in England, the mean high-water mark of ordinary tides—not the mean high water of ordinary spring tides, as in Scotland, for spring tides are excluded in our English practice from the computation of the annual average. This upper limit of the foreshore is shown graphically and in words on all large scale ordnance maps. It coincides with the legal meaning of foreshore in England : *A.-G. v. Chambers* (3) and *Mellor v. Walmesley* (4) ; and see COULSON ON WATERS AND LAND DRAINAGE, 5th Edn., p. 21. The band of saltings on the Essex coast is shown on the six-inch ordnance map attached to the official scheme under the Land Drainage Act, 1930, for the new Maldon, Wivenhoe & Clacton Internal Drainage Board, set out in S.R. & O. No. 308 of 1935, and is there coloured purple, as distinct from the area constituting the drainage district, which is coloured pink. Essex saltings are nearly always flat, or nearly flat, apart from ridges or beaches of sand and shingle, parallel to the sea, heaped up on them by wave and wind action. They have common characteristics through some 90 miles of coast-line, being composed of a layer of flat clay, with a cover of salt-loving plants and grasses growing on the sand-ridges and, to a lesser degree, on the drier parts of the clay. The clay is not of the same kind as ordinary land clay. The level of the top of the flat bed of clay is two or three feet higher than the level of the grasslands on the land side of the sea-wall, usually called marshlands, which are also flat, or nearly so ; but the sea-walls when properly maintained keep all salt-water out and preserve the sweetness of the water in the dykes in the marshland—a vital requirement for the cattle which feed there, as the presence of salt in drinking-water is, and was proved at the trial to be, highly dangerous to livestock.

In the case of the Tendring section of salting, the level of the clay

is 8.5 ft. ordnance datum, which is 2 ft. above the level of the marshland. There is there, close against the length of the sea-wall which runs east and west, at its south foot, a ditch the origin of which is not known. It is about 2 ft. deep, and the bottom of it is therefore about level with the surface of the farm lands on the north side of the sea-wall. There is there a dyke of fresh water, part of the system of dykes draining the farm lands into the main river which runs out to the sea at Bond's Sluice some distance away to the west. The saltings, including Tendring, are liable to flooding from the sea whenever spring tides rise above the protecting beach or ridge, especially when the waves are big, and it is this sea-water which the plaintiffs claim the right to drain off by sending it, whether pure or mixed with rain water, through the sea-wall into the fresh-water dyke running through the farm lands at the foot of the sea-wall on the landward side. The plaintiffs claim the right, through predecessors in title, as estate owners of their plots on three alternative grounds of either (a) an easement or other right acquired under the Law of Property Act, 1925, s. 62, or (b) an implied grant of an easement or *quasi*-easement openly used when the land outside and the land inside the sea-wall were both in the same ownership, or (c) a natural right incident to the ownership of the higher land. The learned judge acceded to their claim and gave them a declaration accordingly, with an inquiry into damages, and also granted injunctions both negative and mandatory for the purpose of compelling the defendants to allow and to carry out certain works of construction in order to allow the sea-water from the plaintiffs' and all the other plots of land in Tendring to flow through the sea-wall on to the farmlands behind it.

The statement of claim carefully avoids saying that the water which the plaintiffs claimed the right to discharge through the sea-wall was in part sea-water, but their evidence made it clear that it was. This being so, the plaintiffs' action fails *in limine*. I do not think that a right to drain salt water through a sea-wall on to the farm lands behind it is known to our law; such an act would be contrary to public policy at common law, and I think is expressly or impliedly forbidden by our statute law. Nor in my view can such a right have arisen by reason of any of the facts found by the learned judge, or have been acquired by any of the means submitted by the plaintiffs and accepted by him in his judgment. But, as I think his fundamental findings of fact were also misconceived, and that, for this reason too, his judgment ought to be set aside, I propose now to consider the evidence and to state what I think it proves.

In my view, the questions of fact in the case really turn on the geography of the *locus in quo* and its history, and it is therefore essential to grasp the salient features of the position. Most of them can be ascertained by an examination of the ordnance maps which were put in, but the

significance of the maps was explained very clearly by Mr. Latham, who gave evidence for the defendants. His knowledge and experience of coastal phenomena are obviously both wide and practical and, in the case of the Essex coast, are based on a long period of intimate investigation. The learned judge criticised three passages in his evidence adversely, but I do not regard the criticism as well-founded; and in the most important one I think that the learned judge either did not hear or did not understand what Mr. Latham said. I will return to that passage in a moment. Mr. Latham's evidence strikes me as wholly consistent with the graphic description of the geography of the Essex coast and its leading features, as recorded in the ordnance maps, and with the history which those features tell upon their face. It seems to me also to be wholly consistent with the legal history of sea-walls and other sea-defences in England, both before and since the time of the Statute of Sewers, 1531, when statutory commissions of sewers were first created. Of that history an interesting account, sufficient for present purposes, is contained in the judgments which were delivered in the cases of *Hudson v. Tabor* (5) and *A.-G. v. Tomline* (1). Mr. Latham was the only expert witness called. Although there are here and there questions and answers which point to momentary misunderstandings—sometimes perhaps due to the question or answer not being heard—in all essentials the evidence commands confidence. Besides, it is not the duty of a judge, even an appellate judge, to shut his eyes to everyday experience. To anyone familiar with the sort of coastal conditions which obtain in flat coastal lands like those with which the case is concerned, Mr. Latham's evidence must ring true to reality. In the result, I am obliged to say that certain of the learned judge's conclusions of fact, disagreeing with Mr. Latham, seem to me in themselves incredible, and also inconsistent with the plain inferences to be drawn from the ordnance map; but it is just these conclusions which are the very foundations of his judgment.

The first three or four pages of description contained in the judgment, down to the sentence "There is not the same agreement about the age of the ditch," are common ground. It is in regard to the earlier history of the *locus in quo* that the really material questions of fact arise and that the learned judge has, in my opinion, gone wrong. In considering the history, it is worth noting that, for the purpose of the trial, no archaeological investigation had been conducted into the history of these sea-walls, and no exploratory excavations had been made through the flat clay bed of the salting to see what light a section might throw upon the questions of when and how its surface had come to be higher than that of the land on the north side of the sea-wall, no longer exposed to tidal and storm action; nor to discover the original purpose and earlier history of the ditch at the south foot of the sea-wall. Nor was any

evidence before the court as to when the sea-walls were made, or by whom; that is to say, by private owners or by the Crown; it was just accepted by all concerned that they are "centuries old," as the learned judge put it.

Mr. Latham's evidence is so important to a proper understanding of the facts of the case that I think it best to state it rather fully. At the outset he states his experience and local knowledge, and he says that in 1922 he made a detailed examination of 90 miles of the Essex coast (including the strip in question) on the instructions of the drainage board then just set up. He gave evidence about the comparative levels of the land inside the sea-walls, the marshlands, on the one hand, and of the land outside, the saltings, on the other; and in it occurs the passage which was most adversely criticised by the learned judge. It is as follows:

Q. Will you tell me, from your experience, how do the levels of the saltings of this part of the coast usually compare with the levels on the marshlands behind the sea-wall?

A. They are invariably higher. The marshes have been in [which I am sure is a mistake for "won"] and warped from the sea, and as they dry they settle, over centuries. The saltings remain alluvial and every spring tide goes well over the top of the saltings, and they are consequently always full of water and their level is about 2 ft., in the case of saltings throughout Essex—perhaps in some cases more—above the marshlands.

Q. When the tide flows over the saltings, what happens to the water which becomes deposited on the saltings?

A. As the tide recedes in what I may call normal saltings, the water gets away through the little grips and runnels in the saltings and, as the tide drops, so the water lifts the flap and it drains out. In some cases, notably on that part of the coast and on the River Blackwater, and also Mersey, there is an unstable beach formed over the edge of the saltings of sand, sometimes shingle. That, of course, tends to impound the water when the tide comes over it, and you find shallow pools lying about on the saltings which gradually absorb into the soil or dry by evaporation between spring tides.

Q. I think that you have prepared a little section which illustrates this?

A. Yes. It is a very simple, almost childish, thing, but I think it does show generally what the different levels are, and perhaps it is helpful in this case. I do not think they are in dispute; but they are all on one little sheet.

There is obviously some stenographic error or some confusion where he says "and as the tide drops so the water lifts the flap and it drains out," since that statement is incongruous in the context; it relates to the draining not of the saltings but of the marsh or farm lands behind the sea-wall, "the tidal flap" being the ordinary device at the sea end of every land drain terminating below the level of high water; when it lifts, the fresh water, which has been banked up whilst the tidal flap was closed by tidal pressure, runs out. Mr. Latham's sketch section, put in just after the above passage, does not refer to any sluice, and this makes it unlikely that the above obviously irrelevant remark is accurately

recorded in the transcript. Perhaps it was in answer to some untranscribed question which was interposed. The only safe thing is to treat it as irrelevant in its context. Mr. Latham's sketch is illuminating as a graphic presentation of the salient facts. He has prepared it for two purposes: (i) to show the normal relationship in levels of saltings, sea-wall, marshland, and marshland dyke respectively; and (ii) to show in dotted lines two features particular to Tendring, namely, (a) the rather high actual ridge of sand and shingle on the top of the clay bed at the seaward edge of the salting, which would tend to prevent any quick inrush of the sea until tide or waves rose above the lowest part of the ridge, and (b) the actual ditch running east and west on the south side of the sea-wall and beginning and ending in nothing, about the origin of which there was no direct evidence. His sketch shows both the high-water mark of ordinary tides and the top of the salting (that is, of the clay bed at 8.5 ft. ordnance datum, so that any tide rising more than that height must flow straight over any salting where there is no ridge or beach to keep it out. Where there is such a beach, it is only the higher tides which come over, and he therefore shows also the average level of high water of spring tides throughout the year, which he puts at 10 ft. o.d. This figure was a calculated figure, obtained from the Harwich records, and corrected for Tendring, and evidence was in fact given on these matters. But he was a careful witness and had checked it by personal observations taken at a near point, namely, Mersea Island, 5½ miles away, on three recent spring tides (July 7, 8, and 9) which showed 10.15 ft., 9.93 ft., and 9.89 ft. o.d. respectively. As a tide rising either normally or abnormally, for example through wind round the British Isles or barometric pressure, above 10 ft. o.d. would flow over, so big waves on a lower tide might equally come over. There are passages which almost read as if the learned judge did not fully understand tidal movements and was confusing wave action with tidal rise, and this may perhaps have caused some misconception in his mind; but the witness's evidence is quite clear. He points out that he has shown the level of the marshlands on his sketch at 6.5 ft. o.d. and the level of the saltings at 8.5 ft. o.d., and that the word "salting" applies to the clay only, and not to any sand on it, and that the saltings are usually on this coast dead flat. It is to be noted that in re-examination he explains that this salting clay is different to land clay. He explains that on this shore a shifting beach or ridge of sand and pebbles tends to form under wave or wind action on the top of the saltings clay just above the high-water line of (ordinary) tides; that salt-loving plants grow up over the saltings, chiefly in the sandy ridges; that the ridges slope gradually northward down to nothing at the salting level somewhere short of the sea-wall, and that these ridges are unstable and often quite modern. In his sketch he showed the particular ridge of Tendring tapering out to nothing

about half way towards the sea-wall. On the question of how sea-water normally gets away from a salting, he says that all saltings drain seawards and not through the sea-walls "or you would find the water in the dykes 'salty,' which does not in fact occur," and where there is sand on the salting the water drains gradually seaward through the sand. In cross-examination he says that there is a tendency for the "beach" to "make" in recent years along that coast; that in 1922 the land where Tendring now is was covered with sea-water at spring tides; that the level of the saltings is 8.5 ft. o.d. over many miles; and that if the sea-walls had not been there spring tides would have covered the whole of the marshlands and turned them into saltings. In regard to saltings in general, he says that in his opinion they were not originally covered with sand at all. The learned judge does not seem on these two pages to keep in mind a picture of the real position, namely, (i) that the exceptional flooding of the marshlands may occur through excessive rains, the flood-water being held up by the sea-wall and unable to escape to sea fast enough through a single exit like Bond's Sluice; and (ii) that on the saltings outside the sea-wall all water, whether fresh or salt, runs off with every ebb tide, except where more or less held up by a beach or ridge. He expresses the opinion that when the ditch was originally made the water in it would drain seawards at every ebb tide, the surface of the salting being as low as, or lower than, the bottom of the ditch at its west end, there being there at that time a depression, sloping seawards, in the surface of the salting. In re-examination, he says that in 1922 when he walked over Tendring it was covered with sand to the extent of one half, but that the 1874 ordnance map shows the sand and shingle only just over the edge of the salting, from which he infers that shortly before 1874 there was little sand on the clay. There being no direct evidence as to how or when or why the ditch was made, or what were the levels and slopes of the surface of the salting, I think the learned judge ought to have been guided by Mr. Latham's experience of Essex coastal conditions; and at any rate the onus of proof was on the plaintiffs, and I do not think anything was proved about this ditch which affects our decision in the appeal.

I now deal with the learned judge's criticism upon the passage in Mr. Latham's evidence which I have already quoted. He treats Mr. Latham as saying that after the sea-wall was built the marshland, through drying and shrinking, actually fell—that is, subsided—to a lower level, whilst the land outside the sea-wall, being still subject to tidal flooding, remained wet, and therefore did not shrink or fall, but "kept the level up." Indeed he goes further, and, as it seems to me, without any justification treats Mr. Latham as saying that the bottom of the dykes in the marshland had fallen with, and to the same extent as, the surface. The learned judge easily refutes this supposition of an

actual fall by pointing out that the dykes were always full of water and could not have fallen through getting dry. Having thus laughed Mr. Latham's supposed theory out of court, the learned judge ignores alluvial deposit on the saltings, and thus feels free to conclude that "in the absence of proof to the contrary, he is bound to assume that the natural levels of the land are as we find them"; that is, that the saltings always were, from a time before the building of the sea-walls, 2 ft. higher than the marshlands. This is the basic assumption of fact underlying the whole judgment. From it are deduced the plaintiffs' natural rights to drain on to the lower land. If it is wrong, the foundation of the judgment disappears.

In my view it is wrong. Mr. Latham did not say anything like what the judge thus put on him. What he says is that the marshes were "won and warped from the sea." By that he means that what is now marshland was once either open foreshore, subject to the ebb and flow of ordinary tides, or land just above the foreshore, flooded by spring tides twice a month; that after the walls were built, the land inside was no longer covered by the tide and therefore was able to dry out and "settle"—by which he means "consolidate"—"over centuries." There is not a word to indicate that he thought the 2 ft. disparity of level was ever caused by the marshlands falling. On the contrary, the explanation of the present difference of level on the two sides of the sea-wall is, according to him, that the surface of the sea side was raised by alluvial deposit in the course of the centuries since the walls were built; and I have no doubt whatsoever that this is the correct inference. When the tides flowed over it, the water would at a certain stage of tide drop some of the solid matter in suspension—the essential process of coastal accretion everywhere. The meaning of Mr. Latham's evidence seems quite plain to me. The marshland was no longer, after the building of the wall, wetted by the tide flowing over it; it was left dry in that sense, and able to settle or consolidate; but the land outside the wall remained "alluvial"; that is, subject to alluvial deposit, because it continued to be submerged by any tide which rose above its existing level. The learned judge seems to have missed altogether the word "alluvial," or at any rate not to have grasped its significance. The whole process of accretion on coasts like that of Essex causing an increase of the land upwards and outwards is due to the deposit of solid matter held in suspension by the tidal current; and this alluvial deposition always raises the surface of the land in course of time, often quite substantially; and where the solids in suspension are argillaceous, their deposit of course produces a bed of clay. On this part of the Essex coast this seems a natural origin for the saltings clay of which the witness spoke. I cannot doubt the inference that it was this process of deposit, going on ever since the date when the sea-walls were built, which gradually raised the

level of the saltings all along this shore to the present level some 2 ft. above the old level of the land north of the wall—the level at which, through the cessation of alluvial deposit when the wall was built, the marshlands have ever since remained. This interpretation of the evidence given by the witness tallies precisely with the story which to me seems plainly unfolded by the ordnance maps. My reasons for saying this are these : (i) *ex hypothesi* these walls were built to keep the sea out and allow the land inside to become pasture for cattle ; of this purpose there can be no historical doubt ; (ii) their object being to “ win and warp land from the sea,” they were built as near to the then foreshore as possible ; (iii) it may therefore be presumed (a) that what is now salting was mostly foreshore when the walls were being built ; (b) that in cases where a sea-wall to-day bends landward in a bight like that at Tendring, there was at the time its construction was undertaken a bay or creek of the sea running into the land ; for the fair inference from the maps is that these walls followed the line of the foreshore closely in order to enclose as much land as possible.

In the result, I regard it as conclusively established by the evidence of Mr. Latham and of the ordnance maps, that when the sea-wall was being built the level of the land at Tendring outside the sea-wall was certainly not higher, and all or much of it may well have been lower, than the land inside the sea-wall. I cannot see any real evidence to support the judge’s inference that “ the natural level ” of the land outside the wall was always what it is to-day, and therefore higher than the sea-wall. But this was, as I have already said, the most important foundation of fact upon which he rested his judgment.

The learned judge accepts the evidence of the witnesses that the flooding of Tendring by spring tides “ was not a rarity but something which was not uncommon.” It is therefore not necessary to discuss the evidence ; it is sufficient to recall Mr. Latham’s evidence to the effect that the “ beach ” on the saltings is of recent growth, and that, before the 1874 ordnance survey, there was little of it there to serve as an obstacle to the sea. The increase in size and height of the “ beach ” since then, and the making of Brooklands Road, no doubt now keep out a good deal of the sea-water which would otherwise have come in, but the evidence and the photographs show that large quantities still get over from time to time and flood the flat land in the northern half of Tendring up to the sea-wall. I have now dealt with the facts relevant to the main issue, but I must deal shortly with the facts affecting the subordinate issues to which I referred at the outset.

Early in 1931 the Tendring people (by which term I mean Mr. Stedman and those who were acting under or with him) found the old brick sluice already mentioned. This was at a point near the end of Essex Avenue. The workmen were looking for some way of getting rid of surplus water,

and appear to have noticed that the water in the ditch was getting away somewhere. After poking about they struck some brickwork about two or three feet inside the bank of the sea-wall at the above spot. Mr. Stedman and his people could not find out what the actual position was without seeing more; and they accordingly cut the bank down for the whole width of the wall until the culvert was exposed. It was then found that it was an old brick culvert, bedded in chalk, its invert being about level with the bottom of the ditch and the top of the marshland, that is about 6.5 ft. o.d., but that two or three feet of it had been entirely removed from each end and that the sea end, at any rate, had been puddled, presumably to prevent water getting through from the salting. Mr. Stedman then had the brickwork removed and a box-sluice inserted in its place. Late in 1931, after discussion with the then drainage board, a penstock was inserted at the sea end, so as completely to control the passage of water from the sea side to the land side, and the sea-wall was then made good. The correspondence in the months of Feb. and Mar. and again in Dec., 1931, contains a contemporaneous record of what was done. The only direct evidence about this culvert at any earlier date is that of a farm labourer called Wringe, 48 years old, who was called and said that as a boy he had played on the salting in this locality and used to float little pieces of wood in the ditch, which moved with a current towards the spot where this culvert was subsequently discovered; and that in those days there was a grid at that spot. Mr. Latham said that, when he made his survey of the sea-walls in 1922, he saw no evidence at all of any passage of water through the sea-wall at Tendring, although that would be a thing he was looking for. But the learned judge did not think this evidence sufficient to displace the evidence of the labourer, Wringe, and found as a fact that there was when Wringe played there some free passage through the wall.

As Mr. Latham's evidence was negative, and Wringe's was positive, I do not think we ought to disagree with this finding by the judge: but I cannot agree with his next step. From the discovery of the truncated culvert, and Wringe's evidence, he inferred that both the original purpose and the subsequent use of the culvert was to drain the salt water from the salting into the marshland. This step is a jump which seems to me impossible in law and improbable in fact. It is impossible in law because it offends against the maxim *omnia præsumuntur rite esse acta*. The authority whose duty it was to take care of the wall and to keep the sea out must be presumed to have put a penstock in to prevent any flow in the wrong direction—at least if it knew about it. If the making of the culvert was an unauthorised breach in the sea-wall, done without the knowledge of the authority, no private rights can be born of such an act, which would have been an offence against the law. It is improbable in fact that the culvert should have been either made or used

to let sea-water through, for obvious reasons. Mr. Latham was cross-examined about it, and his opinions as to its probable history and functions are, in view of his great experience, entitled to much weight. He recognised that it was old, but he felt certain that originally it had been equipped with a penstock, which would remain closed to the passage of sea-water through the wall towards the marshlands, except when deliberately and temporarily opened in case of very great floods in the marshlands (from excessive rains), causing the water there to rise above the level of the culvert, that is, to a depth of more than 2 ft. over the marshlands; the penstock would be opened in such a case, and the culvert used as a relief-outlet in aid of the main one existing at Bond's Sluice. Having regard to what he says about the improbability of the farmers allowing there to be an open culvert from the high level of the saltings, because of the certainty of the sea-water backing up their fresh-water dykes and causing grave danger to their cattle, I think it is contrary to common sense to suppose that this brick culvert was either constructed or used without a penstock. That no sign of a penstock was discovered when the remains of the brickwork were removed is no evidence that it had not been there when the sluice was in use; and the complete absence of the last two or three feet of each end of the old culvert points to deliberate removal, and the sealing of the sea end by a puddle of clay shows an intention to prevent its being ever again used. If there was a penstock, it would naturally then be taken away. The learned judge ridiculed Mr. Latham's view that it might have been wanted as a supplementary outlet for floods; but the notion that there could have been, in the old days, as a recognised feature of the sea-wall, an open culvert allowing sea-water to come inland through the sea-wall, seems to me much more ridiculous; and frankly I regard it as an impossible explanation. I therefore think that our only safe foundation of fact in regard to this culvert is to assume that it was constructed in such a way as, with the assistance of a penstock, completely to prevent the passage of water from the sea side to the land side.

The subsequent history of the culvert may be summed up, so far as relevant to our decision, by saying that there was a series of disputes as to the right of the owners of property at Tendring to drain all surplus water, salt or fresh, by it through the sea-wall into the fresh-water dyke on the land side. The learned judge went into the question of whether the old internal drainage board in 1931, or the defendant board, which, pursuant to sect. 6 (1) of the Act of 1930, so far as concerned the sea-wall and the farmland and dykes in the neighbourhood of Tendring took over all the old board's functions, at any later date consented to, or acquiesced in, owners of property in Tendring thus draining their surplus water, salt or fresh, through the sea-wall on to the farmlands beyond. He held that the old board, in the spring of 1931, agreed to

the box-sluice already mentioned being left in the sea-wall. I do not think there is enough evidence to establish any real consent ; the evidence does not amount to anything more than the then moribund board not taking action. As Bond's Sluice was out of order, the tidal stream flowing up from there could pass through the counter-wall into the dykes on the north side of the Tendring sea-wall ; there was no urgency, and they may well have thought the dispute about the box-sluice might stand over.

In the autumn of 1931, the defendant board, having then come into existence, took up the question of the box-sluice and insisted upon a proper penstock being inserted, which would prevent any passage of water through the wall unless it was deliberately opened. The letters at the time show the position, Mr. Stedman agreeing to the board's requirements about the penstock.

In regard to this event, the learned judge held that the sluice thereby became :

an existing drainage work for the purpose of draining all the land on the sea side of the sea-wall, namely, the Tendring section.

With this finding and with the judge's legal conclusions from it, I will deal later, but I see no evidence of a consent by the defendant board to the penstock being opened without the board's permission. There was a dispute again in Jan., 1934, when the wall was cut by Mr. Stedman, and flood water let out from Tendring ; but on Jan. 30, Mr. Stedman wrote promising that the wall would never again be cut.

Nothing material took place thereafter until 1935. What then happened is described by the learned judge in detail in his judgment ; it all appears in the correspondence which passed at the time. It may be summarised shortly. Sea-water flooded Tendring in Sept., 1935, and brought the dispute to a head. Those acting on behalf of the owners of property in Tendring claimed the right to drain sea-water, or any other water, clean or foul, through the wall into the fresh-water dykes in the marshland. The defendants removed the box-sluice and penstock. A Mr. Hobbs cut through the wall and drained all the water off. Then the defendants restored the wall again.

The whole of the correspondence through this autumn shows the two sides at arms length, and the plaintiffs' side taking violent measures to enforce their alleged rights ; but it does not seem to me otherwise relevant. The learned judge passed very severe strictures on the defendants' letter of Jan. 10, 1936, to the Ministry of Agriculture. I am not quite sure that his strictures were well founded, as he seems to have ignored the two facts that the old board made no definite or formal agreement, and that in the autumn of 1931 the defendant board insisted upon having a proper penstock inserted. But even if the censure was fully deserved, it does not affect the rights of the parties.

Even if there were an express consent by one or other board to allow the sea-wall to be breached in order to admit the flow of water through it from the seaward side to the land side, that consent would in my view be inoperative to convey any rights. In my opinion, neither at common law nor by statute can there exist a right on the part of an owner of land outside the sea-wall to send sea-water through the sea-wall on to the land lying within the sea-wall, or to make any breach in a sea-wall which will expose the land on the landward side to the risk of such an event happening. According to the ancient law of the land, sea-defences were constructed for the purpose of keeping the sea out, and not for letting it in. The Crown had a duty, no doubt of imperfect obligation in that the subject had no means of enforcing it, to maintain the sea-defences of the country; and where such defences exist I cannot see how a person becoming entitled to land outside the sea-wall could ever acquire the right to drain sea-water through the sea-wall on to the land within, or to do anything to the sea-wall likely to have that result.

In so far as the King's powers and duties were delegated to statutory bodies under the Statute of Sewers, 1531, and subsequent statutes, the legal presumption must be that the King's prerogative, if any, and his concurrent duties of imperfect obligation, passed from him to the statutory bodies so created, modified, no doubt, by the express terms of the particular statutes creating those bodies.

When in 1930 the whole series of statutes dealing with land drainage—what used to be called “sewers”—and sea-defences was repealed by the general Act of that year, I think Parliament must be presumed to have intended to deal with any residual prerogative rights and duties, and to entrust the whole of those two subjects to the various authorities mentioned in the Act, and also to maintain the general constitutional position in regard to sea-defences which had been built up originally at common law and then taken over and developed by a series of statutes: see the opinions of LORDS DUNEDIN and ATKINSON in *A.-G. v. De Keyser's Royal Hotel* (6), at pp. 526-528 and pp. 537-540 respectively. Thus it appears to me to be an express or implied principle of the Land Drainage Act, 1930, that it is the duty of the relevant board, constituted under the Act, to look to the attainment of its two main objects: (i) to control the flow of inland waters; (ii) to keep out sea-water from farm lands. The Act also, I think, impliedly recognises and enshrines the old common law principle of public policy that our farm lands ought to be protected from the sea. Where they lie below the level of high water, whether at ordinary or only at spring tides, the sea-defences of the country can enjoy no effective legal protection unless the Act contains at least this implication. If this view be right, I cannot see how any person could acquire a substantive right to do that which would defeat the purpose of Parliament in passing the Act; nor can I see how an authority estab-

lished under the Act could give a binding consent contrary to the purpose of the Act. Such a consent would necessarily be *ultra vires*.

It follows from what I have already said that the plaintiffs must necessarily have failed to show any cause of action to support the claim to send sea-water through the wall attaching either to their own title or based on any agreement or consent or acquiescence of the defendant board or its predecessors, the old Maldon Drainage Board. It is true that in their statement of claim they say nothing about sea-water ; but the whole history of what happened, from 1931 down to the issue of the writ, and the evidence at the trial both establish beyond doubt that the real claim put forward by or on behalf of all the owners of land in Tendring was, throughout, to drain whatever surplus water they might have, and from whatever source—sea, rain or dirty house-water—through the sea-wall into the dyke in the farm lands beyond ; and even to be entitled to perforate the sea-wall in order to make their right effective. No such cause of action is in my opinion known to the law. Indeed, I cannot see how there can arise any proprietary right to send any liquid, even the purest rain-water, through a sea-wall in what I call the wrong direction, at any rate, without the intervention by contract or licence of the competent drainage board under the Act, acting in its discretion and within its powers, if there be any occasion where such a position might arise ; but it is unnecessary for the purpose of disposing of the present appeal to decide that question.

I am also clearly of opinion that the natural right of a higher tenement to discharge water on to a lower tenement cannot enure to the benefit of land like these saltings lying outside the sea-wall. I cannot see how it can be said, wherever there has been an extension of the dry land of the country by accretion from the sea through the alluvial deposit of solid matter out of the tidal stream, and new land has gradually grown up outside the sea-wall to a height above the level of the farm lands within the sea-wall, as often happens, that the land outside automatically acquires a right to drain through the sea-wall on to the land within still lying at its ancient level. The proposition has only to be stated to refute itself.

Similar reasoning applies to some aspects of the two alternative bases put forward by the respondents in their statement of claim, namely, the acquisition of a right under the Law of Property Act, 1925, s. 62, and a *quasi*-easement. In relation to these contentions, we listened to an interesting exposition of the law by Mr. Slade for the respondents, and his reasoning may well be sound as applied to the normal inland position ; but I cannot see that the principles for which he contended have any application to the circumstances of the present case, and it is therefore unnecessary to express any opinion upon his contentions.

At the trial, the onus of proof rested on the plaintiffs all through to

establish their cause of action, and on every aspect of proof *prima facie* evidence had to be given by them before the burden could be shifted on to the defendants. I cannot see that it ever was shifted at any stage of the trial ; but be that as it may, I am clear in my own mind that there are certain inferences which can alone properly be drawn from the evidence as a whole, and I group them under two heads : (i) (a) When the present sea-wall round three sides of Tendring was being erected, the line chosen for its site was at, or only just above, the then line of foreshore, and followed its contour. The maps, indeed, look as if the tidal area once extended in a north-easterly direction close up to the hamlet of Jaywick (north of which the ground begins to rise), what is now known as the counter-wall being the sea-wall of those days. The Mill Dam area and the creek at Osyth illustrate the sort of thing I have in mind, and demonstrate the way in which the Essex sea-walls habitually follow the sinuosities of the foreshore, enclosing the maximum of useful land behind them. I think this guess is probably the historic truth, and that the sluice at the point A through the counter-wall was only made after the new land, gradually formed in what my Lord has called "the caterpillar," had been enclosed by the present sea-wall. But be my guess right or wrong, and whether the counter-wall was built before or at the same time as the sea-wall, the only safe inference about the present sea-wall is that, when built, it was put close to the foreshore and followed its then sinuosities, that is, it bends to the north at each end of the horseshoe. (b) At some unknown date after the sea-wall was built, alluvial accretion followed in the bay enclosed by the wall, and the land gradually grew upwards and also outwards, so as to conform to the general east and west line of the shore, and Tendring was thus made. (c) Quite recently, since a date only shortly before the ordnance survey of 1874, the beach on the top of the salting, where Brooklands Road now runs, was thrown up by wind and wave action. (ii) The ditch at the south foot of the sea-wall was in all probability first made at a time when water in it would drain away by gravity seawards as the tide ebbed, and the culvert may quite possibly have been made at the same epoch. How far the alluvial clay bed had then grown up, and how long the depression in its surface, which Mr. Latham discussed, lasted, seem to me immaterial. I only mention these matters to show they have not been ignored.

The questions of law raised by the appeal were conveniently stated by counsel for the appellants, and I do not think that counsel for the respondents challenged the way in which he stated them : (1) Can the owner of a salting have a legal right to drain salt water through a sea-wall into fresh-water dykes in the land behind the sea-wall ? (2) Can the principle applicable internally in England, that the owner of land on a higher level has a right to drain water on to the lower land of his

neighbour, still apply where the water so sent on to the lower land (a) is salt, and (b) is sent there from the seaward side of the sea-wall? To both questions, for the reasons I have already explained, I answer: No! Mr. Beyfus pointed out that, assuming the possibility of affirmative answers, the plaintiffs had put both the first two contentions on alternative ground of (i) implied grant, (ii) *quasi-easement*, and (iii) natural right of property attaching to the higher land. From these secondary propositions I have already expressed my dissent. (3) I do not think it necessary to discuss the third issue posed by Mr. Beyfus: "Even if the previous questions could be answered in favour of the plaintiffs, have they in fact acquired any such right?" But I think it is desirable to dispose of the three subordinate issues which were much discussed at the trial and before us, as, if the plaintiffs' arguments were right, they would destroy much of the value of the Act of 1930. Assuming the plaintiffs' cause of action to be established, as the learned judge held, was he right in saying that the defendants had no statutory defence under the Land Drainage Act, 1930, for their interference with the plaintiffs' right? I number the three points in series with the other issues. (4) The first was that the ascertainment of the quantum of compensation, due to the plaintiffs by reason of the defendants having interfered with their rights, was a statutory condition precedent to the exercise by the defendants of any such powers of interference, and that no such compensation proceedings had been taken. (5) The second was his finding, to which I have already referred, that when the penstock was added to the box-sluice in the autumn of 1931, the whole became "an existing drainage work," and that under the Act the defendants had power to maintain or improve it, but not to alter it. Finally, (6) he held that in any event the defendants had exercised their powers: in so unconscionable, harsh, and unreasonable manner as to put their acts wholly outside the authorisation of their statute and make them *ultra vires*.

As regards (4), I can find no provision in the Act making the assessment of compensation for injury caused by the action of a drainage board a condition precedent to the board's right to take the action which *ex hypothesi* caused the injury and conferred on the party injured the right to compensation. The only provision conferring the right to compensation is contained in sect. 34 (3):

Where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under this section, the board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Land Clauses Acts.

In that subsection there are no words to make the assessment of compensation a condition of the right of entry, and subsect. (4) expressly

authorises entry by a drainage board on private land for the purpose of "maintaining existing works." I can see no ground at all for the fourth contention.

As regards the fifth and sixth points, my view is that the only executive action taken by the defendants was to maintain an existing drainage work, namely, to repair a hole in the sea-wall, the right to perforate it being the bone of contention between the parties. I do not agree that the box-culvert and its penstock constituted "an existing drainage work." The sea-wall was the existing drainage work, and by the removal of the culvert the defendants maintained it, or improved it. The word "otherwise" at the end of sect. 34 (1) (b) should not be limited by the *ejusdem generis* principle: that would be inconsistent with the dominant objects of the Act. The defendants are the catchment board and not a drainage board, but sect. 6 (1) confers on the catchment board exclusive authority to exercise all the powers conferred by the Act on drainage boards as defined by sect. 1 of the Act:

so far as concerns the main river, including the banks thereof, and drainage works, in connection with the main river.

The powers of a drainage board in relation to works are to be found in sect. 34 (1):

Every drainage board acting within its district shall have power: (a) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work; (b) to improve any existing works, that is to say, to deepen, widen, straighten, or otherwise improve any existing watercourse, or remove mill-dams, weirs, or other obstructions to watercourses, or raise, widen, or otherwise improve any existing drainage work; (c) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district: Provided that a catchment board shall not, by virtue only of this subsection, be taken to be authorised to do any work otherwise than in relation to the main river.

The powers of a drainage board under sect. 6 (1) were duly transferred to the defendant board under sect. 4 (3) by the Minister's confirmation of the scheme submitted by them. The main river became vested in the defendants pursuant to sect. 6 (3) and the above scheme. The defendants were sued as the catchment board exercising the powers of the drainage board in relation to the sea-wall and dykes leading to the main river under the above provisions of the Act and order. The plaintiffs did not dispute that the defendant board had been duly constituted, nor that the water-course, which flows out into the sea at Bond's Sluice, is the "main river" in connection with which the defendants were to perform the function of a drainage board.

In my view, there is no doubt that the sea-wall in question is for

statutory purposes a part of the main river. "Main river" and "banks" are defined thus in sect. 81 :

"Main river" includes any structure or appliance for controlling or regulating the flow of water in or out of the channel, and situate therein or in any part of the banks thereof other than any such structure or appliance which is vested in or controlled by an internal drainage board; "banks" means banks, walls, or embankments adjoining or confining, or constructed for the purposes of or in connection with, any channel or sea front and includes all land between the bank and low-water mark.

These definitions in truth go beyond the mere office of definitions proper, and, when read into the relevant sections, have the effect of substantive enactments. The sea-wall in question is thus now, and has been since the issue of the catchment map, in the sole and exclusive jurisdiction of the defendant board acting as a drainage board for all executive purposes under the Act. I note that this was also the view of the Ministry of Agriculture. I think the sea-wall is "a structure for controlling," and possibly it might be added that during the time when it had a sluice through it with a penstock it was also "for regulating the flow of water in . . . the channel (that is of the main river) and situate in any part of the banks thereof." The sea-wall is also within the definition of "bank" as an "embankment adjoining or confining, or constructed for the purposes of or in connection with, any channel or sea front." It is therefore "an embankment . . . in connection with the channel of the main river" and also a "drainage work in connection with the main river" within sect. 6 (1).

The Act is, as I have already said, intended to deal not only with inland drainage but with the whole problem of defence against the sea. In that regard its object is to establish an efficient system of boards and powers and duties right round our coasts in order to prevent not only actual encroachment of the sea, but also the passage of salt water on to the farm lands inside the sea-defences—very often lying at a lower level than the accreted land outside—and particularly to prevent the infiltration of sea water into the fresh-water supplies in the dykes where livestock go to drink. This purpose is made manifest by the definitions of "drainage" as "including defence against water"; of "water" as "including sea-water"; and of "land" as "including water."

There are also three general considerations which are germane: (i) the wide powers of supervision and default action given to every catchment board by sect. 7 over internal drainage boards; (ii) the dominant position assigned to every main river (see sect. 2 (4)); (iii) the obvious intention of Parliament to get rid of all the old methods, powers and bodies concerned with drainage, sewers, sea-walls and the whole business of defence against the sea, and to make a complete new code of law upon the whole subject, all the old statutes being repealed; and how old and how

numerous they were is shown by a glance at the seventh schedule.

The above considerations lead me to the conclusion that it was a main purpose of the Act to entrust a very wide measure of executive discretion to these new drainage boards and *a fortiori* to the catchments boards, who not only are made the primary executive authority wherever a main river is concerned, but also have to discharge the general duty of supervising the drainage boards. I cannot see, on this basis, that the defendants have exceeded their statutory discretion in any respect whatever under sect. 34 (1) (a) or (b); that any claim to compensation arose even if they were acting under para. (b); or that in either case they were guilty of such conduct as the learned judge thought. They seem to me just to have been doing their duty; and I should like to add an emphatic protest against arguments that the powers of executive authorities entrusted by Parliament with important executive duties should be construed so as narrowly to limit their discretion. I think the *ratio decidendi* in *Patent Agents Institute v. Lockwood* (7) and *Baird (Robert), Ltd. v. Glasgow City Corpn.* (8), the latter case concerning a question of bye-laws under the Petroleum Act, is directly applicable to the executive discretion of a catchment board under the Drainage Act, 1930: see particularly the observations of the late LORD TOMLIN at pp. 41 and 42 of the latter case.

For the reasons I have given—stated, I fear, at excessive length—I think that the appeal should be allowed.

EVE, J.: The plaintiffs claim as owners of freehold tenements, formerly part of Cockett Wick Farm at St. Osyth in the county of Essex and known as the Tendring section, to be entitled, in common with other owners of land and premises forming part of the same section, to discharge the surface water from time to time accumulating on the said section by means of a sluice or culvert, and allege that, in the months of Oct., Nov., and Dec., 1935, the defendants wrongfully and in breach of the plaintiffs' said right caused the said sluice or culvert to be completely obstructed and stopped up, and that, as a result of the defendants' said wrongful acts, the surface water could no longer be discharged from the Tendring section as theretofore and had accumulated thereon, with the result that the premises on the Tendring section belonging to the plaintiffs respectively had, with the other premises thereon, been flooded and damaged, and the plaintiffs had been unable to obtain access thereto and had suffered damage. They claim (a) a declaration that the defendants are not entitled to stop up the said sluice or culvert or so to obstruct the same as to cause a nuisance or an injury to the plaintiffs; (b) an injunction restraining the defendants from so stopping up or obstructing the said sluice or culvert; (c) a mandatory order upon the defendants to remove the existing obstruction; and (d) damages.

By way of defence, the defendants put the plaintiffs to prove their title, and deny that the Tendring section stands on higher ground than a section known as the Grassland section, and that any surplus water accumulating on the Tendring section was at any time, save as thereafter mentioned, discharged into a dyke on the Grassland section by means—as the plaintiffs had alleged in the statement of claim—of a ditch on the seaward side of a sea-wall and of a sluice or culvert running through the sea-wall.

The plaintiffs' case is that, on the completion of their respective purchases, they became entitled, in common with the owners of other lands and premises forming part of the Tendring section, to the right to discharge the surface water from time to time accumulating on the Tendring section by means of the said sluice or culvert into the said dyke on the landward side of the said sea-wall.

The initial difficulty which faces the plaintiffs is that this case has been launched and brought to trial without any evidence being produced in support of the existence, prior to the conveyance, of any such privilege or easement as is alleged in or of any such implied grant as is put forward in the statement of claim.

The burden of establishing the evidence of a state of things capable of passing, by the conveyances to the purchasers, the existence and enjoyment of the rights alleged in the statement of claim, rests on the purchaser, and, unless it is established that their rights were being exercised by the plaintiffs and their predecessors, there was no continuity in the exercise of the rights, and nothing in the nature of an easement capable of passing to the several purchasers. There is no evidence of the existence of the sluice or culvert being known until quite recent times, and when it was in fact disclosed to the parties it had obviously ceased to function for a lengthened time as a watercourse.

In my opinion, the evidence fails altogether to prove the existence, at the respective dates of the conveyances to the plaintiffs, of any such rights or easements as they are seeking to establish in these proceedings. I agree also with the judgments read by my Lords.

The action ought to have been dismissed, and the appeal from the judgment must be allowed.

Appeal allowed.

Solicitors: *Tamplin, Joseph, Ponsonby, Ryde & Flux*, agents for *W. Hilliard & Ward*, Chelmsford (for the appellants); *Leonard Tubbs & Co.* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

GUMBRELL v. SWALE RURAL DISTRICT COUNCIL.

KING'S BENCH DIVISION (Hawke, J.), **December 2, 1936.**]

Public Health—Building regulations—Temporary buildings—Movable structure—Converted omnibus—Motor-lorry—Public Health Acts Amendment Act, 1907 (c. 53), s. 27.

The plaintiff was the owner of land on which were two caravans on wheels, one an obsolete omnibus, and the other a motor-lorry; both were adapted for use for human habitation and the plaintiff had used them from time to time as living accommodation. The bus was found to have been brought to the place where it stood for the purpose of a cheap and handy dwelling. It stood apparently on firm ground on a plateau on top of a hill, but owing to the state of the soil down the side of the hill it was found to be nearly if not quite impossible to remove it. The motor-lorry, although adapted for use as a bedroom and used as such, was found to have been brought there in the first instance for agricultural purposes. The plaintiff did not apply for permission under the Public Health Acts Amendment Act, 1907, s. 27, to erect the caravans as temporary buildings. The local authority purporting to act under their powers under the same section pulled down the caravans. In an action for damages for trespass:—

HELD: the bus was and the motor-lorry was not a temporary building within sect. 27 of the Act of 1907, and the plaintiff was entitled to damages in respect of the motor-lorry.

[EDITORIAL NOTE.] The definition of the term "temporary building" is here considered again and the deciding factor in the present case is the purpose for which the movable structure was brought upon the land, that is to say, whether it was originally intended as a dwelling-place. There is thus a distinction between an omnibus brought upon land to be used as a dwelling and a motor-lorry primarily intended to be used as a lorry.

AS TO TEMPORARY BUILDINGS, see HALSBURY, 1st Edn., Vol. 23, Public Health, pp. 427-429, paras. 831, 832; and FOR CASES, see DIGEST, Vol. 38, pp. 187, 188, Nos. 260-266.]

Case referred to:

(1) *Ruislip-Northwood Urban District Council v. Lee* (1931), 145 L.T. 208; Digest Supp.

ACTION for damages for trespass.

The plaintiff was the owner of land on which were two caravans on wheels, one an obsolete omnibus, and the other a motor-lorry; both were adapted for use for human habitation and the plaintiff had used them from time to time as living accommodation. The plaintiff had not applied for permission under the Public Health Acts Amendment Act, 1907, s. 27, to erect the caravans as temporary buildings and he had failed to comply with an undertaking which he had given that he would, within 14 days, either pull down or remove the caravans or apply for permission to erect them under sect. 27. The defendants therefore pulled down the caravans. The plaintiff alleged that the defendants had wrongfully entered his land and pulled down the two caravans, which he said were movable and not temporary buildings, and he claimed

damages. The defendants contended that the caravans were temporary buildings and that they had acted within their powers under sect. 27 of the Act of 1907.

The Public Health Acts Amendment Act, 1907, s. 27, so far as it is material, is as follows :

(1) Before any person erects or sets up a temporary building he shall apply to the local authority for permission so to do. The application shall be accompanied by a plan. . . .

(4) If any such building is begun, erected or set up without such application accompanied by such plans, sections, and specifications as this section requires . . . the local authority may cause the building to be pulled down or removed, and any expense incurred by them in and about the pulling down or removal of the building may, at their discretion, be recovered summarily as a civil debt from the owner of the building or from the person erecting or setting up the building.

John McGuckin for the plaintiff.

C. Erskine Simes for the defendants.

HAWKE, J.: The complaint is that the defendants, who are a statutory authority, have broken up a motor-lorry and a bus belonging to the plaintiff. It is agreed that if these things were temporary buildings within the meaning of the Public Health Acts Amendment Act, 1907, s. 27, they were the right people to deal with the matter, that they had taken the right steps to justify them in dealing with the matter, and although it is suggested that there was some excess in what was done, it is agreed that the real question is whether these things were temporary buildings. I have come to the conclusion that one was and that the other was not. I will just say why. As to the definition of temporary buildings, I accept, and very gratefully, what MACKINNON, J., said, in the case of *Ruislip-Northwood Urban District Council v. Lee* (1). I say gratefully, because it has been of great assistance to me to read that judgment, having regard to the fact that I have to decide what I think as to the motor-lorry may be a very near thing. I have no doubt about the bus. I think it was brought to the place where it stood for the purpose for which it always existed there, a convenient, cheap and handy kind of dwelling. I think it was used as a dwelling, and I think it was meant to be a dwelling; I think it was meant to be so, in the words of MACKINNON, J., permanently to the extent to which that structure could be a permanent residence there. I have no hesitation in saying that I think that was a temporary building in the sense of the statute and that the defendants were entitled to do something. I think that they honestly came to the conclusion when they saw it, that the thing was really not removable having regard to the place in which it had been put. It stood apparently on fairly firm ground on a plateau on the top of a hill; but I can quite believe, and do believe the evidence, that when you came to moving it away down the hill, you would soon

find yourself barred, owing to the nature of the soil down the side of the hill and owing to the time of the year at which it was done. I can quite believe that it would have led to all sorts of trouble to remove that thing down the side of the hill when one remembers that all the drainage from some parts of that plateau and the drainage all the way down the side of the hill must have deposited itself at the bottom and he would be doing a very risky thing if he tried to move the bus out. I am not satisfied that it was absolutely impossible to get it out, but I think it was very nearly so. I think that the plaintiff is entitled to no damages with regard to the bus. If I should be wrong, the plaintiff is entitled to damages, because it is just possible that he could have got it down instead of smashing it up, but the damages would be very small. It was an ancient London General Omnibus Company bus of very small value, and of course, it could not have been got out without some effect upon it. However, I think that the defendants were within their rights in what they did there, and there will be no damages in respect of that.

Now with regard to the lorry, there is no doubt whatever that it had been adapted at a particular moment for use as a sort of bedroom. What comfort anyone could get out of it, I do not know, but that is not a matter with which I have to concern myself or with which I should be entitled to concern myself. It got very near to being a temporary dwelling, but the reason why I am not satisfied that it had got to that critical period in its possible existence is this. It is not like the bus; it was not brought there for the purpose of affording shelter and residence. It was brought there, as I believe, in the first instance, because it was a convenient thing to have on an estate where it was hoped that some day building would take place, and there was timber which the plaintiff was entitled to remove. I think he brought that machine there in the first instance for the purpose of removing timber and for other agricultural purposes, and although he did sleep in it at week-ends, I do not think I can say that it had definitely ceased to be a motor-lorry. I think it remained a motor-lorry, and I do not think I could fairly say that it had reached the stage when it had ceased to be a motor-lorry and had become a residence. That being so, there is a cause of action with regard to that.

Damages, £24 15s. Costs for the plaintiff except in so far as they were increased by the action in connection with the bus.

Solicitors: Adrian de Fleury & Co. (for the plaintiff); Kingsford, Dorman & Co. (for the defendants).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

Re GARDNER'S WILL TRUSTS, BOUCHER v. HORN.[CHANCERY DIVISION (Bennett, J.), **December 1, 1936.**]

Evidence—Admissibility—Trust of income as directed—Written statement by trustee as to directions—Death of trustee—Admissibility of statement. Charities—Charitable trust—Purpose unascertainable—General charitable intention—Application under scheme approved by court.

E. G. by her will gave to R. B., her sole executor, all her residuary real and personal estate for the purpose of creating a fund known as the "E. G. Charity," the income of which was "to be expended by him as I have directed." E. G. died in Nov., 1934, and her will was duly proved by the executor, R. B. Before he died in Apr., 1935, R. B. made a statement in writing as to the purpose or purposes for which E. G. told him to hold her residuary estate:—

HELD: (i) the statement in writing made by R. B., not being against his immediate pecuniary or proprietary interest, was not admissible in evidence.

(ii) E. G. had by her will disclosed a general charitable intention, and the fund must be disposed of in accordance with a scheme to be settled by the court.

[EDITORIAL NOTE.] The real question in this case is whether the statement made by the trustee as to the testator's directions for the application of a trust fund was against his interest and so admissible in evidence after his death. It is held that a trustee has not such a pecuniary or proprietary interest in his trust fund as to make the statement admissible in evidence after his death.

AS TO DECLARATION AGAINST INTEREST, see HALSBURY, Hailsham Edn., Vol. 13, pp. 585-588, paras. 656, 657; and FOR CASES, see DIGEST, Vol. 22, pp. 102-109, Nos. 728-811.]

Cases referred to:

- (1) *Ward v. Pitt (H. S.) & Co., Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K.B. 130; 22 Digest 100, 700.
- (2) *Blackwell v. Blackwell*, [1929] A.C. 318; Digest Supp.
- (3) *Smith v. Blakey* (1867), L.R. 2 Q.B. 326; 22 Digest 105, 754.
- (4) *Price v. Torrington (Earl)* (1703), Holt, K.B. 300; 22 Digest 110, 816.
- (5) *Mercer v. Denne*, [1905] 2 Ch. 538; 22 Digest 382, 3907.
- (6) *Higham v. Ridgway* (1808), 10 East 109; 22 Digest 98, 688.
- (7) *Williams v. Geaves* (1838), 8 C. & P. 592; 22 Digest 103, 739.
- (8) *Re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876; 8 Digest 310, 908.
- (9) *Re White, White v. White*, [1893] 2 Ch. 41; 8 Digest 249, 89.
- (10) *Mills v. Farmer* (1815), 1 Mer. 55; 8 Digest 348, 1423.
- (11) *Moggridge v. Thackwell* (1792), 1 Ves. 464; 8 Digest 336, 1247.

ADJOURNED SUMMONS.

Before the questions raised by this adjourned summons as amended were argued, an objection to the admission of certain evidence fell to be decided. By her will, which was dated July 4, 1925, Edith Gardner appointed her friend Robert Bromhead to be the executor thereof, and gave to him all the residue of her estate:

for the purpose of creating a fund to be known as the "Edith Gardner Charity," the income of which is to be expended by him as I have directed.

The testatrix died on Nov. 18, 1934, and the said Robert Bromhead died on Apr. 12, 1935. Before he died, he executed a document in the form of an affidavit, in which he set out the directions given to him by the testatrix as to the objects of the trust of her residuary estate. There was no other evidence as to what those objects were, but the societies named in the document were, on the advice of the Attorney-General, joined as defendants to the present summons, and on their behalf, as well as on behalf of the Attorney-General, it was argued that the document was admissible, its inadmissibility being upheld on behalf of those persons interested in an intestacy.

A. P. McNabb (*C. Lyttelton Chubb* with him) for the plaintiffs, the executors of the will of Robert Bromhead and, by representation, of the will of the testatrix, stated the facts.

C. E. Shebbeare, for the first defendant, one the next of kin of the testatrix.

M. J. L. Beebee, for the second defendants, the secretary of the Bristol Benevolent Institution, the secretary of the Anchor Society, Bristol, the secretary of the Dolphin Society, Bristol, and the secretary of the Grateful Society, Bristol, the institutions and charities claiming to be interested in the trust of the residuary estate of the testatrix.

A. Andrewes Uthwatt, for the Attorney-General.

Shebbeare : I object to this statement being read. It is not an affidavit, nor a declaration of trust, nor a statutory declaration, since it is not in the proper form. Nor can it be a dying declaration, which must be made in immediate expectation of death, since it was made 5 months before Mr. Bromhead's death.

BENNETT, J. (after referring to *Blackwell v. Blackwell* (2)) : You can have a secret trust. The only question is how you can prove it.

Shebbeare : There is nothing in this piece of paper, which was plainly not contemporaneous with the will, to connect it with the will. In these circumstances, the only ground on which the document could be admitted would be because it fell within the rule as to declarations by deceased persons. That means that it must either have been made in the course of duty, or be shown to be against interest. It cannot be said to be against Mr. Bromhead's interest, because the will shows that he is not intended to take beneficially. Nor could he, as executor, have any interest in the testatrix's property, even if it were undisposed of, since the Administration of Estates Act, 1925, s. 49 (b). It is also impossible to say that the document was made in the course of duty. For the meaning of course of duty, see *Smith v. Blakey* (3), which deals with the leading case of *Price v. Torrington (Earl)* (4), and *Mercer v. Denne* (5), at p. 565.

Beebee : I concede that the document is not admissible unless it comes within one of the exceptions to the rule against hearsay evidence, but

I say that it comes within the exception of declarations against proprietary or pecuniary interest. See STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, Art. 28, p. 37. A declaration may be against the pecuniary interest of the person who makes it, if it charges him with a liability, and this document imposes a liability on Mr. Bromhead by giving the charities named in it the rights of *cestuis que trust*, to whom he would be accountable as trustee.

BENNETT, J.: *Higham v. Ridgway* (6) states the principle to be applied. The statement there was admissible because it contained a note at the end of the entry that the person making it had been paid.

Beebee: And here the person making the statement is saying that he is accountable for his dealings with this estate to certain named societies. Apart from this, he could have been accountable only to the Attorney-General, and the fact that he would have been liable to somebody else has nothing to do with the effect of this declaration.

BENNETT, J., referred to *Williams v. Geaves* (7).

Andrewes Uthwatt: See *Ward v. Pitt (H. S.) & Co.* (1), at p. 137, for the four things which have to be proved to make a document admissible as being against interest. It is not necessary for the charities named in the document to prove their claim against the will. The only person with whom they are concerned is the trustee. If an action had been brought against the executors of the deceased executor, Robert Bromhead, by the charities named in the document, claiming that they were the beneficiaries under the will, the executors would have had no answer. The named charities could prove that they were the *cestuis que trust* on the executors' own admission.

BENNETT, J.: It seems an odd thing that in a court of equity a trustee should be prevented from coming to the court and saying he is a trustee for certain persons. But if the testatrix's next of kin sued the executors, would this piece of paper be evidence against them?

Andrewes Uthwatt: Not formally. But suppose there was a trust of realty, and no writing to prove it, as required by the Statute of Frauds. It would be open to the trustees not to plead the statute, and in that case the trust would be established, as it would not be open to a third party, who denied its existence, to come forward and say that the trust was not proved because there was no writing. Once the trust is proved against the trustees, it is proved against the world.

Shebbeare, in reply: But the plaintiffs are not here as representatives of Robert Bromhead. They are here as representatives of the testatrix, and they are not bound by the admission of an intermediate trustee.

BENNETT, J.: There is a preliminary⁴ objection which has to be

decided as to the admissibility in evidence of a written statement made by a gentleman named Bromhead in the following circumstances.

The testatrix made her will in 1925, and appointed her friend Robert Bromhead sole executor, and gave to him all her residuary real and personal estate for the purpose of creating a fund known as the "Edith Gardner Charity," the income of which "is to be expended by him as I have directed." The testatrix died on Nov. 18, 1934, and her will was proved by Mr. Robert Bromhead on Jan. 1, 1935. Before he died, he made a statement in writing as to the purpose or purposes for which the testatrix told him to hold her residue. He died on Apr. 12, 1935, and the plaintiffs to this originating summons are his executors, whose solicitor has made an affidavit in which he has exhibited the written statement made by Mr. Bromhead, after the testatrix's death, as regards the persons who were to be his *cestuis que trust*. It is objected that that statement is inadmissible because it does not fall within any of the exceptions to the rules of evidence which exclude hearsay evidence. It is suggested on behalf of the *cestuis que trust* that the statement is admissible on the ground that it is within one of the exceptions, being a declaration against the interest of the person making it. In my judgment, it is not such a declaration. It is clear from the terms of the testatrix's will that the executor was to hold the residue of her property not as a beneficiary but as a trustee. LORD SUMNER, as HAMILTON, L.J., in *Ward v. Pitt (H. S.) & Co., Lloyd v. Powell Duffryn Steam Coal Co.* (1), at p. 137, states the conditions that have to be fulfilled before a declaration made by a deceased person may be admitted as evidence upon the ground that it is a statement against the deceased person's interest. He states four essential conditions. The second is that it is essential that the fact should have been to the deceased's immediate prejudice, that is against his interest "at the time he stated it." If it may be construed for his interest or against it, or may only be against his interest in certain future events, it is inadmissible. The fourth is that the interest to which the statement must be adverse must be a pecuniary one, or, which is only a species of the same genus, a proprietary one.

In my judgment, the statement made by Mr. Bromhead fails to satisfy either the second or the fourth of HAMILTON, L.J.'s, essential conditions. It is plain on the face of the will that Mr. Bromhead was not to take beneficially, but was to take as a trustee, and it seems to me not possible to say that a statement made by him, not upon oath, as to who were his beneficiaries, when he must have been a trustee, was either against his interest when he made it, or to his immediate prejudice when he made it, or that the statement is adverse to a pecuniary or proprietary interest of his own. He had none, having regard to the terms of the will, and never could have had any pecuniary or proprietary interest in the testatrix's residuary estate.

But is there any other ground upon which the document can be admitted in evidence? On the face of it, I can see none, but Mr. Andrewes Uthwatt, for the Attorney-General, suggested that it might be used if the persons named in it took proceedings against the present plaintiffs, as trustees of the testatrix's will, claiming that they held the testatrix's residuary estate in trust for them. There is no authority for that proposition, and I am not prepared to hold, in those circumstances, that such a document as the one now before me can be admitted. So I propose to reject it.

The question asked by the summons whether the will showed a general charitable intention was then argued.

Shebbeare: I agree that the words "I give my property to charity" would be a good charitable gift, and that that would have been the effect of this will if it had stopped at the words "Edith Gardner Charity." But it goes on to say that the income must be expended in a particular way, i.e., "as I have directed," and that is a very different matter, as the objects for whose benefit she directed the income to be applied might not be good charitable objects at all. Charity in the popular sense has a much wider meaning than charity in the legal sense. It cannot be assumed that there was an intention that the fund should be divided amongst legal charitable objects. No case has gone so far as to say that the mere creation of a fund which is called by the testator's own name to which is added the word "Charity" is a good charitable gift, when the testator goes on to say that the fund is to be expended for purposes which cannot be ascertained.

Andrewes Uthwatt: There is a clear charitable intention on the face of the will to devote the whole of the fund to charitable purposes.

BENNETT, J.: Is there any authority for the proposition that a gift of property upon trust to apply the income of it to charity would be applied *cy près*?

Andrewes Uthwatt: See TUDOR ON CHARITIES, 5th Edn., p. 130. It is quite clear that once it appears from the construction of the will that there is an expressed intention to give property to charity, there is a good charitable gift. It is not an unusual thing to infer a charitable intention from the description of the fund it is proposed to establish. See *Re Davis, Hannen v. Hillyer* (8). It may be inferred from the name of the institution itself that it is charitable and what the purposes of the charity are. See *Re White, White v. White* (9).

BENNETT, J.: But is it a matter for administration *cy près* if all that is known is that the testator intends his property to be administered for charity?

Andrewes Uthwatt: It is not *cy près*. The property must be administered under a scheme. See TYSSSEN'S CHARITABLE BEQUESTS, 2nd Edn., p. 201.

Shebbeare : I say it is a matter for *cy près*.

Beebee : I agree. See TYSEN, p. 196.

BENNETT, J., referred to *Mills v. Farmer* (10), and *Moggridge v. Thackwell* (11), and TUDOR, p. 129.

BENNETT, J. : I have already read the provision in her will by which the testatrix gave the residue of her estate to Mr. Bromhead with the intention of creating a fund the income of which was to be expended as she had directed. There is no evidence as to what the testatrix had told her executor, Mr. Bromhead, and therefore the court is unable to say what the intention of the testatrix was with regard to the disposition of the income of the fund which was to be known as the "Edith Gardner Charity." The question, therefore, is whether, from the terms in which the residuary gift is given, the court is able to find that the testatrix had, with respect to her residue, a general charitable intention. If, from the language of the gift, it is possible to hold that she had, then the law is that the income is to be applied in accordance with a scheme which the court settles. If it is not possible to arrive at the conclusion that the testatrix did have a general charitable intention, then, in the circumstances, the residue will go, as undisposed of, to the testatrix's next of kin. The question whether the testatrix did have a general charitable intention is a conclusion to be drawn solely, I think, from the terms of the gift. It is a gift of the income of a fund which is to be known as the "Edith Gardner Charity." I feel no doubt at all but that, when there is a gift so described, although it is not possible to find what the purposes were which the testatrix had in mind, those purposes were charitable, in other words, that she has disclosed from the language she has used in making the gift, a general charitable intention, and I so hold.

Upon that conclusion, the income of the fund must be disposed of in accordance with a scheme to be settled in chambers.

Andrewes Uthwatt : The scheme I would suggest would be to divide the income between the four named charities.

BENNETT, J. : For this purpose am I allowed to look at this document ?

Shebbeare : The document is not consistent with the will. The will says income is to be applied. The document says the capital is to be distributed at once.

BENNETT, J. : I now direct the vesting of the fund in the official trustee of charitable funds, with directions that the income is to be applied equally among the four named charities. The schedule will provide for the transfer to the official trustee of charitable funds of the residue of the testatrix's estate and for the payment by the trustee of the income in equal fourth parts to the four persons named in the piece of paper. I appoint Mr. Shebbeare's client to represent the testatrix's

next of kin. The costs of all parties as between solicitor and client are to be paid out of the testatrix's estate.

Solicitors: *Stanley & Co.*, agents for *Stanley Wasbrough & Co.*, Bristol (for the plaintiff and first defendant); *Watson, Sons & Room*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, Bristol (for the second defendant); *Treasury Solicitor* (for the Attorney-General).

[Reported by C. M. YOUNG, Barrister-at-Law.]

Re HOLLAND & WEBB, LTD.

[CHANCERY DIVISION (Crossman, J.), November 16, 1936.]

Companies—Practice—Reduction of capital—Consolidation of capital reduced—Scheme of arrangement—Form of minute for registration.

A company with a share capital consisting of preference shares of £1 each and ordinary shares of £1 each, desiring to reduce its capital, approved a scheme by special resolution whereby the issued preference shares and ordinary shares of £1 each (which were fully paid up) were to be reduced to an equivalent number of preference shares and ordinary shares of 10s. each. These 10s. shares were then to be consolidated in such a manner that every two of such preference and ordinary shares respectively should constitute one £1 fully paid preference or ordinary share as the case might be. The court was petitioned to sanction the scheme:—

The court sanctioned the scheme and approved a form of minute for registration.

[EDITORIAL NOTE.] The case is somewhat similar to that of *Re Harrods (Buenos Aires), Ltd.*, [1936] 2 All. E.R. 1651, Digest Supp. The case is included to show the exact form of minute required in such a case.

FOR ORDER CONFIRMING REDUCTION OF CAPITAL, see HALSBURY, Hailsham Edn., Vol. 5, pp. 182-186, paras. 325-330; and FOR CASES, see DIGEST, Vol. 9, pp. 166-168, Nos. 1004-1030.]

PETITION for an order sanctioning a scheme of arrangement and a reduction of capital. The company, Holland & Webb, Ltd., had at the date of the petition a nominal share capital of £287,858 divided into 50,000 preference shares of £1 each and 237,858 ordinary shares of £1 each, 38,596 of the said 50,000 preference shares and 62,142 of the said 237,858 ordinary shares having been issued and fully paid, the remaining shares being unissued. The half yearly balance sheet as at Mar. 31, 1936, showed a large reserve fund and capital assets in excess of the company's requirements. At an extraordinary general meeting held on Mar. 6, 1936, a special resolution was passed approving a scheme for the reduction of the capital by £50,369 and the consolidation of certain shares in the manner set out in the minute for registration approved by the court on the petition, the form of which is hereinafter set out.

A. F. Topham, K.C., and *Arthur Sims* in support of the petition.

H. S. G. Buckmaster for certain preference shareholders who opposed the petition.

CROSSMAN, J., sanctioned the scheme and approved of the minute for registration in the following terms :

The capital of Holland & Webb, Ltd., was by virtue of a special resolution of the company and with the sanction of an order of the High Court of Justice, dated the 17th day of November, 1936, reduced from £287,858, divided into 50,000 preference shares of £1 each and 237,858 ordinary shares of £1 each to £237,489 divided into 11,404 preference shares of £1 each, 38,596 preference shares of 10s. each, 175,716 ordinary shares of £1 each, and 62,142 ordinary shares of 10s. each. At the date of the registration of this minute all the said preference shares and ordinary shares of 10s. each had been issued, and were deemed to be fully paid up, and all the preference shares and ordinary shares of £1 each were unissued. A special resolution of the company has been passed to the effect that upon the said reduction of capital taking effect the said 38,596 preference shares of 10s. each be consolidated into 19,298 preference shares of £1 each and that the said 62,142 ordinary shares of 10s. each be consolidated into 31,071 ordinary shares of £1 each.

Solicitors : *Torr & Co.*, agents for *Tutin & Co.*, Nottingham (for the Company) ; *Field, Roscoe & Co.*, agents for *Perry, Parr & Ford*, Nottingham (for the preference shareholders opposing).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

LIVERPOOL CORPORATION AND OTHERS v. LANCASHIRE COUNTY COUNCIL AND OTHERS.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.J.J.),
October, 29, 30, 1936.]

Local Government—Local taxation licences—Distribution of proceeds between county and county boroughs—Local Government Act, 1929 (c. 17), s. 85 (5).

An order was made in 1891 which provided for the equitable distribution of the proceeds of local taxation licences and certain grants between the Lancashire County Council and the councils of certain county boroughs. By the operation of the Local Government Act, 1929, the grants were discontinued, but the proceeds of the local taxation licences remained distributable. The question was raised by special case whether upon the proper construction of the Local Government Act, 1929, s. 85 (5) the order ceased to have effect altogether or only so far as it related to the discontinued grants :—

HELD : the proper construction of the subsection was that it required a new agreement to be entered into in the manner therein prescribed.

[EDITORIAL NOTE.] This case turns upon the construction of the Local Government Act, 1929, s. 85, and is practically confined thereto. The question at issue is the necessity for a re-adjustment of the distribution of the proceeds of local taxation licences. The method of distribution in force before the passing of that Act applied to a composite fund made up of the proceeds of such licences and certain grants to the county. By the 1929 Act the grants ceased to be a part of the fund for distribution and the question to be decided is whether a completely new agreement as to distribution must be made.

FOR THE ADJUSTMENT OF FINANCES BETWEEN COUNTIES AND COUNTY BOROUGHES, see HALSBURY, Hailsham Edn., Vol. 21, pp. 102, 103, para. 177 ; and FOR

THE LOCAL GOVERNMENT ACT, 1929, s. 85, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 10, p. 937.]

Case referred to :

(1) *Swan v. Pure Ice Co., Ltd.*, [1935] 2 K.B. 265 ; Digest Supp.

APPEAL from a judgment in favour of the defendants delivered by LUXMOORE, J., on Apr. 22, 1936, and reported in [1936] 2 All E.R. 62.

On Nov. 15, 1933, the corporation of the city of Liverpool commenced an action by writ of summons against the county council of Lancaster, claiming a declaration that, notwithstanding the provisions of the Local Government Act, 1929, an order made on Oct. 21, 1891, by the commissioners appointed under the Local Government Act, 1888, determining the equitable adjustment respecting the distribution of the local taxation licences and probate duty grant (as amended from time to time), had continued to be operative since the coming into force of the Act of 1929, and would continue to be operative in respect of local taxation licences included in that equitable adjustment and not discontinued by the Act of 1929 unless and until a new financial adjustment was made under the Local Government Act, 1888, s. 32 (6). They also asked that the rights of the parties under the order of 1891 be declared. The plaintiff corporation received a larger revenue from this source under the order of 1891 than under the Act of 1929. The parties concurred in stating a special case for the opinion of the court as follows. The questions propounded for that opinion were :

(a) Whether the said order of 1891 amended as before stated has since Apr. 1, 1930, continued and continues to be operative and binding upon the plaintiffs and defendants with respect to the proceeds of the local taxation licences which remain leviable by the said councils or (b) Whether the said order of 1891 as so amended ceased to have effect as from Apr. 1, 1930, not only with respect to the discontinued grants comprised therein, but also with respect to the proceeds of the said local taxation licences so leviable by the said councils, and in such event (c) Whether a new financial adjustment of the proceeds of the said local taxation licences leviable by the said councils is necessary and ought to be made in the manner provided by sect. 85 of the said Act of 1929.

After hearing argument, LUXMOORE, J., considered that his decision must necessarily affect the rights of a number of county boroughs which were affected by the 1891 order, and he therefore ordered that these authorities be joined, two as co-plaintiffs and fourteen as co-defendants. The writ and special case were amended accordingly, but the new parties were content to adopt the previous argument and, subject to appeal, to abide by the decision of the court.

The Local Government Act, 1888, constituted county councils and created county boroughs ; it regulated the financial relationship which was to exist after Mar. 31, 1888, between the exchequer, the counties, and the county boroughs within them, and the contributions which each

was to make to the union officers. By sects. 20-27 it provided that the inland revenue commissioners should pay into the Bank of England, to a "local taxation account," such sums as might be ascertained to be the proceeds of the duties collected by them in each administrative county in England and Wales on the local taxation licences, and that those amounts should be certified by the commissioners and paid out of the local taxation account to the county council concerned. The commissioners were to pay into the local taxation account four-fifths of one-half of the sums collected by them in respect of probate duties—the "probate duty grant"—and this was to be distributed among the English and Welsh counties in proportion to the share which each county had received during the financial year ending Mar. 31, 1888, out of the exchequer grants in aid of local rates, which grants were to be discontinued after the passing of the Act. All sums from time to time received by a county council in respect of duties on local taxation licences and the probate duty grant were to be paid into the exchequer contribution account of the county fund. Sect. 32 (1) provided for equitable adjustment between each county and its county boroughs respecting the distribution of these funds; the adjustment was to be made by agreement within twelve months after the appointed day between the various councils or, if they did not agree, by the commissioners appointed under the Act, and was to provide for the liability of a borough to contribute to any expenses incurred by the county on its behalf; and, save as provided by the Act, any existing liability on either side was to cease after the appointed day and an equitable provision for the cessation was to be made in the adjustment. Subsect. (3) laid down that the adjustment should have regard to the existing financial relations of the counties and boroughs, so that neither kind of authority was placed in a worse position than before. Subsect. (6) provided that if after 5 years from the date of an adjustment either side satisfied the Local Government Board that the adjustment had become inequitable and that the councils could not agree on a new adjustment, the boards should appoint an arbitrator who should make a new equitable adjustment. Sect. 62 (1) gave the authorities power to make agreements for adjusting their financial relations.

On Oct. 21, 1891, the commissioners made an order directed to the Lancashire County Council and the county boroughs (except three which did not then exist), prescribing in detail the manner in which the aggregate proceeds of the local taxation licences and probate grants payable out of the local taxation account should be distributed between the counties and the county boroughs by way of equitable adjustment. This order was amended from time to time as the county boroughs extended and new ones were constituted.

The Finance Act, 1894, s. 19, replaced the probate duty grant by a

portion of the proceeds of the estate duty derived from personal property. The Finance Act, 1907, s. 17, enacted that this estate duty grant should be paid out of the Consolidated Fund, that the proceeds of the duties on local taxation licences should be paid into the exchequer instead of into the local taxation account, and that the Consolidated Fund should pay into the local taxation account a sum in compensation for the loss of the duties chargeable under the Locomotives on Highways Act, 1896, s. 8 (1). By the Finance Act, 1908, s. 6, amended by the Finance Act, 1921, the power to levy the specified duties on local taxation licences was transferred to county councils from a date to be fixed by Order in Council, but the transfer was not to affect any equitable adjustment then in force. An Order in Council (S.R. & O. 1908, No. 844) fixed the date at Jan. 1, 1909, and made provision for each county to receive its proper share, with an appeal to the Local Government Board. Later Finance Acts and other Acts provided for payment from the Consolidated Fund into the local taxation account of the duties on certain licences, including local taxation licence duties, instead of the actual proceeds of these duties.

Immediately before Apr. 1, 1930, when the Local Government Act, 1929, came into force, the moneys affected by the commissioners' order of 1891 were (a) the produce of the estate duty grant, (b) the sums payable under the Finance Act, 1907, and other Acts in respect of local taxation licences not collected by county and county borough councils, and (c) the proceeds of the local taxation licences collected by the county and county borough councils. Most of these sums varied from year to year. On Apr. 1, 1930, there was no application pending by any of the parties to vary the 1891 adjustment, and all the parties had accepted it up to that date as a fair and equitable adjustment. The Local Government Act, 1929, transferred to the counties and county boroughs the powers and duties of poor law authorities and made county councils highway authorities. It made provision for a new system of grants to local authorities, known as "block grants" because they are not appropriated to any particular service. Sect. 85 provided that the grants payable out of the Consolidated Fund, the grants in aid of certain health services, and certain other grants, should be discontinued after Mar. 31, 1930, and that the local taxation account and exchequer contribution account of every county and county borough should be wound up as soon as possible after Apr. 1, 1930.

Sect. 85 (5), on the interpretation of which this appeal turned, laid down that :

Where, immediately before the appointed day [Apr. 1], there is in force a financial adjustment between any spending authorities with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect, and if and so far as, having regard to the exchequer grants payable under this part of this Act, any new financial

adjustment is necessary, a new financial adjustment on an equitable basis shall be made by agreement between the spending authorities, or, in default of agreement, by a single arbitrator appointed by the Minister.

Sect. 86 provided for the "block grants" or general Exchequer contributions, and sect. 88 apportioned them among the county and county boroughs in proportion to their weighted populations, as calculated according to rules set out in a schedule. Sects. 90 and 96 provided for additional exchequer grants to councils in certain events; sect. 105 provided that all sums received by a county council by way of exchequer grant or of proceeds of local taxation licence duties could be applied to general county purposes, and the sections of the earlier Acts dealing with the discontinued grants were repealed.

The question before LUXMOORE, J., was, therefore, whether the 1891 order had any effect since Apr. 1, 1930. He made a declaration that the order of 1891 did not remain in force with regard to the proceeds of the local taxation licences; that a new financial adjustment was necessary in respect of those proceeds, and that it ought to be made in the manner provided by the Act of 1929, s. 85.

The plaintiffs appealed.

Sir Stafford Cripps, K.C., H. P. Glover, K.C., G. Granville Slack, and Kenneth Diplock for the plaintiffs.

Tyldesley Jones, K.C., and Ralph Etherton for the defendants.

Cripps, K.C.: The learned judge has construed only the first part of sect. 85 (5), and has completely disregarded the second half. He was not entitled to look merely at the first half and to say that the intention of the whole subsection is that the financial adjustment of 1891 shall cease to have effect. Admittedly, if the subsection is read as not limited to discontinued grants, a difficulty is raised, because for this interpretation it is necessary to read the subsection as saying "Such financial adjustment shall cease to have effect with respect to the discontinued grants." If, however, the subsection is read as a whole with the rest of the section of the Act, and of the whole code, the intention of Parliament becomes clear, viz., to bring to an end the financial adjustment as far as it affects the discontinued grants, but to give local authorities an opportunity to amend or alter the financial adjustment, or to have a new financial adjustment, with regard to the non-discontinued grants, the sums which are collected locally; because the method of arriving at the amount of the exchequer grant might in some cases—as it is not the same as the old basis upon which the discontinued grants were given—make it unfair to continue the old financial adjustment with regard to the non-discontinued grants. Parliament therefore left the way open for a new financial adjustment with regard to the exchequer grants payable under the Act, and provided machinery for making it. Parliament had to proceed in that way because under the Act of 1888, s. 32, an authority

which wanted a quinquennial revision had to show that the existing distribution was inequitable. An authority might well find it impossible to complain to the Minister that, because of the new system of exchequer grants which Parliament had laid down, its financial adjustment had ceased to be equitable. Therefore, under sect. 32, in this single matter of the reaction of the new system of block grants upon the surviving discontinued grants, an authority might have been prevented from obtaining a new financial adjustment. The Act therefore, like the Act of 1908, lays down that if it is necessary, because of the new provisions, to have a new financial adjustment, the machinery which it provides shall be followed. For general purposes, on the other hand, it specifically continues the machinery of the Act of 1888, s. 32, by which an authority can obtain a quinquennial adjustment on other grounds. So interpreted, the whole section is given a plain and sensible meaning.

The phrase "having regard to the exchequer grants payable under this part of the Act" means that a local authority's loss through a discontinued grant is to be determined with regard to the adjustment in force between the spending authorities for the standard year. In considering what Lancashire County had lost, the legislature did not intend to consider what they had actually been paying out of the local taxation account, but how much they retained out of it in view of their financial adjustment. If it be insisted that the exchequer grant payable, so far as it covers the loss due to the discontinuation of the grant—that is, as to 75 per cent. in the first period—is to be calculated on the basis of the financial adjustment, the assumption follows that the remaining sums will continue to be calculated upon that basis, for otherwise there would be no relation between the two calculations to give an equitable result. In the second period only 50 per cent. of the loss is covered, in the third only 25 per cent., and in the final period nothing.

It might be that if in fact the exchequer grant were made up, it would cease to be equitable to divide the remaining sums on the basis of the financial adjustment, because the relationship between the amount of the exchequer grant and the remaining sums collected in the year would become more and more distant as the exchequer grant was based less and less upon the same financial adjustment. In those circumstances one of the county boroughs might wish to ask the Minister for a new financial adjustment because, either in the first, the second or the third period, the basis of the exchequer grants made it no longer equitable that the original sum still remaining in the financial adjustment should be distributed in the percentages there set out. It is only on that ground and on no other that a local authority can ask the Minister for a new financial adjustment under sect. 85 (5): "having regard to the exchequer grants payable under this part of this Act."

If, on the other hand, only the first half of the section is read, the

absurdity is reached that in every case where a financial adjustment covers a discontinued grant, the financial adjustment automatically comes to an end, and there is no machinery for obtaining a new one. A new adjustment can only be obtained when, having regard to the exchequer grants, it can be shown that a new financial adjustment is necessary. On that reading there is no value in the continuation by sect. 32 of the power to have a quinquennial review of the financial adjustment.

In interpreting a statute, other things being equal, preference should be given to the logical and sensible reading of the words in question: *Swan v. Pure Ice Co., Ltd.* (1) This court would not lightly put on the section an interpretation abolishing the principles which have long regulated the relations between county councils and county borough councils.

GREENE, L.J.: There are therefore two powers of revision: the former adjustment, which continues to exist *pro tanto*; and side by side with it, and continuing for an indefinite period, this new power given by the second half of subsect. (5).

Cripps, K.C.: There is no limit of time, because the basis of the block grant is being changed over a period of 17 years. Parliament, however, contemplated that there would be cases in which an authority could not wait for 5 years and might immediately require a new adjustment. It might not be easy for an authority to obtain a new adjustment under sect. 32 (6) on the ground that the Act laid down block grants the distribution of which amongst the various county boroughs made the financial adjustment inequitable. Parliament may be taken to have laid down the new block grants after due consideration, and the Minister might well consider that they were perfectly equitable.

Tyldesley Jones, K.C.: There is no difficulty in the construction of sect. 85 (5) except in the phrase "having regard to the exchequer grants payable under this part of this Act." Even those words create no difficulty in the present case, because it is agreed that the answer to the first question for the court determines the answer to the third: whether a new financial adjustment is necessary, and it is only in regard to the third question that the words become difficult. I do not know what those words mean; the plaintiffs' argument does not elucidate them. The plaintiffs' interpretation of the section as meaning that the financial adjustment shall cease to have effect only so far as the discontinued grants are concerned must be wrong. A financial adjustment which applies solely to a discontinued grant must itself cease to have effect. To enact that if the subject matter of a financial adjustment were discontinued the grant should cease to have effect would be superfluous and absurd. Parliament knew well that a large number of adjustments dealt not only with discontinued grants but also with other revenues such as local taxation licences, and that when the grants were discontinued a large part of the fund would disappear and the question would arise

as to what was to happen to the remainder. It therefore enacted that the whole adjustment should cease to have effect. The necessity for a new adjustment which is a condition precedent to the jurisdiction of the arbitrator must necessarily be determined by the court. If the equitable adjustment related to discontinued grants only, no new adjustment would be necessary. Where there exists an equitable adjustment which includes a discontinued grant and everything that remains, it is always necessary to make a new adjustment.

It is not permissible to interpolate qualifying words into a passage of which the language is already perfectly plain. It is intelligible that Parliament, knowing the existence of these composite funds which included continued and discontinued grants alike, found it necessary to say that the whole equitable adjustment should disappear. The first branch of the subsection cannot be construed with reference to the second branch. The subsection deals with much more than the discontinued grants, because the new equitable adjustment which it directs to be made clearly cannot be an adjustment of the discontinued grants but must be of something which will remain to be adjusted.

Cripps, K.C., in reply.

LORD WRIGHT, M.R. : ROMER, L.J. will read the judgment of the court.

ROMER, L.J. : At the date of the passing of the Local Government Act, 1929, the financial relations between counties and county boroughs in respect of certain grants in aid and other matters were governed by what are known as equitable adjustments. These adjustments had their origin in the Local Government Act, 1888, s. 32, which directed that equitable adjustments should be made by agreement, or in default of agreement by commissioners, respecting (among other things) the distribution of the local taxation licences and probate duty grant, between a county and the county boroughs situate within it which were constituted as such by the Act. The local taxation licences referred to were the amounts collected in a county by the commissioners of inland revenue. The probate duty grant was the county's proportion of four-fifths of one-half of the probate duties collected by the same commissioners. Both the local taxation licences and the probate duty grants were to be paid into the local taxation account and distributed among the counties, each county receiving, as regards the former, the amount collected in the county, and, as regards the latter, its proportion of the total sum distributable ascertained as provided in the Act. Sect. 32 (3) of the Act specified certain matters to which regard was to be had in making the equitable adjustment. Subsect. (6) provided for quinquennial revision of an adjustment by an arbitrator appointed by the Local

Government Board in default of agreement in any case where it was shown to the satisfaction of the board that the adjustment had become inequitable.

On Oct. 21, 1891, the commissioners appointed under the Act of 1888 made an order adjusting the distribution of the proceeds of the local taxation licences and the probate duty grant among the county of Lancaster and the various county boroughs of Lancashire. The order recites the intention of the commissioners to adjust the other financial relations between the county and the county boroughs by separate and subsequent orders. The scheme of the order was to treat the proceeds of the licences and the grant as one aggregate fund out of which the county and county boroughs were to receive in the first instance fixed sums amounting in the aggregate to £462,942, the balance being distributed according to a table of percentages. Certain other grants were made by subsequent statutes, but it is not necessary for the moment to refer to them. By the Finance Act, 1894, s. 19, a portion of the proceeds of the estate duty on personal property was substituted for the probate duty grant. By the Finance Act, 1908, s. 6, the power to levy the duties on certain local taxation licences was transferred to county councils, and the sums collected by them were to be subject to the equitable adjustments made under the Local Government Act, 1888.

The result of this legislation was that at the date when the relevant provisions of the Local Government Act, 1929, took effect the moneys subject to the adjustment order of Oct. 21, 1891, were (a) the estate duty grant, (b) sums payable in respect of local taxation licences not collected by the councils, (c) proceeds of local taxation licences collected by councils.

The Local Government Act, 1929, introduced a new system of grants in aid. Certain grants (called in the Act "the discontinued grants") were to cease to be payable and in their place annual contributions towards local government expenses (usually referred to as "block grants") were to be made direct to counties and county boroughs. The amount of these grants was to be fixed in accordance with a scheme laid down in the Act. We need not state the details of that scheme. It is sufficient to say that it introduced an entirely new method of fixing the amount of the grants in aid which the various authorities were to receive, and had no relation to the principles (what ever they may have been) by which equitable adjustments had been made by the commissioners under the Act of 1888, although those adjustments had for certain limited purposes to be taken into account in ascertaining the amounts of the block grants. The discontinued grants included the grants referred to under letters (a) and (b) above, namely, the estate duty grant and the sums payable in respect of local taxation licences not collected by

councils and also certain other grants, including in particular the grant in respect of which the order of Apr. 23, 1891, hereinafter referred to, was made. The result, therefore, was that the only sums dealt with by the order of Oct. 21, 1891, which were not included in the discontinued grants were those lettered (c) above, namely, the proceeds of local taxation licences collected by councils.

In these circumstances a question has arisen between the plaintiffs in this action, who are the corporations of Liverpool, Manchester and Salford, and the defendants, who are the county council of Lancashire and the other county boroughs in that county, as to the effect of sect. 85 (5), of the last-mentioned Act upon the order of Oct. 21, 1891. It is contended on the part of the plaintiffs that the order remains operative as to the local taxation licences still being collected by the plaintiffs and defendants, and has only ceased to have effect so far as regards the discontinued grants. The defendants contend, on the other hand, that the order has ceased to have any effect at all. It was for the purpose of having that question determined that this action was instituted, and in due course came before LUXMOORE, J., in the form of a special case. The learned judge decided the question in favour of the defendants, and from that decision an appeal is brought by the plaintiffs to this court.

The question, therefore, that arises on this appeal is as to the construction that ought to be placed upon the Local Government Act, 1929, s. 85 (5). The earlier part of this subsection is in these terms :

Where immediately before the appointed day, there is in force a financial adjustment between any spending authorities with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect.

Pausing there, it would seem to be reasonably clear that the order of Oct. 21, 1891, as from time to time amended, did constitute immediately before the appointed day a financial adjustment between the several spending authorities who are parties to this action "with respect to" some of the discontinued grants, namely, the estate duty grant and the sums payable in respect of local taxation licences not collected by those authorities themselves ; and none the less because it was also a financial adjustment in respect of the proceeds of the local taxation licences that were being collected by the authorities. If the intention of the legislature had been to determine every adjustment only so far as it related to any of the discontinued grants it is extraordinarily unlikely that it would have used the language that appears in the subsection instead of expressing that intention, as it could so easily have done, in plain terms. But apart altogether from this consideration, it is urged on behalf of the respondents to the appeal that it is highly improbable that the legislature had any such intention in fact ; for in making the order of Oct. 21, 1891, the commissioners appointed by the Act of 1888 were dealing with an

aggregate fund consisting of the proceeds of the local taxation licences and probate duty grants, and the legislature in the year 1929 would not, it is said, readily assume that the proportions in which this aggregate fund was allotted by the commissioners to the various bodies affected by the order would have been the proportions in which they would have allotted any particular integer of such aggregate fund.

It should be noted in this connection that the order itself contains the following recital :

Whereas the said commissioners propose by the present order to adjust the distribution of the proceeds of the local taxation licences and probate duty grant and propose by separate and subsequent orders to adjust the other financial relations between the said county and county boroughs.

We have not been supplied with the details of these other financial relations of the separate and subsequent orders made by the commissioners in respect to them. But the recital does seem to give some indication that the proportions fixed by the order would not necessarily have been the proportions that the commissioners would have thought to be equitable in adjusting the other financial relations between the parties, and that if some other integer had been added to the aggregate fund with which the commissioners were dealing the proportions fixed by the order might well have been different from what they in fact were. In this connection reference may usefully be made to the Customs and Inland Revenue Act, 1890, and the Local Taxation (Customs and Excise) Act, 1890. By sect. 7 of the former of those Acts it was provided that certain duties therein mentioned and called the local taxation (customs and excise) duties should be divided in the same proportions and paid to the same local taxation accounts and should be ascertained as to proportions and otherwise in the like manner as the proceeds of the probate duties applicable to local purposes was then by law divided, paid and ascertained, and that the proceeds so paid should be appropriated as Parliament might thereafter direct by any Act passed in the then present session. It was accordingly enacted by sect. 1 of the latter of the two Acts to which we have referred that after payment out of the English share of such duties of a sum for the purposes therein mentioned the residue should, unless Parliament should otherwise determine, be distributed between county and county borough funds and applied under the Local Government Act, 1888, as if it were part of the English share of the local taxation probate duty and should be the subject of an adjustment between counties and county boroughs according to sect. 32 of the said Act by the commissioners under that Act. It is to be noticed that the legislature did not think fit to enact that the duties should be divided in the same proportions as those already fixed, or to be fixed, by the commissioners in respect of the probate duty. If, as the legislature seems to have thought, the addition

of another integer to an aggregate fund comprised in an adjustment might possibly make it necessary to adopt new proportions, so too the elimination of an integer from the aggregate fund might make it inequitable to continue to apply the proportions to what remained. In point of fact, the adjustment under these two Acts was effected by an order of the commissioners dated Apr. 23, 1891, and this order provided for the distribution of Lancashire's share of the duties in question among the county and the county boroughs according to a percentage table which was the same as that subsequently adopted in the order of Oct. 21, 1891. This, however, is immaterial. The point is that the legislature contemplated that the adjustment of the duties dealt with by these two 1890 Acts would not necessarily be the same as the adjustment of the probate duty. It does, therefore, seem improbable that the legislature should have intended in such a case as the present to annul the adjustment so far only as it related to the discontinued grants, and leave the adjustment still operative as to the proceeds of local taxation licences collected by the councils themselves. The appellants contend, however, that the later words of subsect. (5) to which attention has not yet been called, show that this was in truth the intention of the legislature and are consistent only with the construction they ask the court to adopt. The latter part of the subsection is in these words :

and if and so far as, having regard to the exchequer grants payable under this part of this Act, any new financial adjustment is necessary, a new financial adjustment on an equitable basis shall be made by agreement between the spending authorities, or, in default of agreement, by a single arbitrator appointed by the minister.

Now, it is said on the appellants' behalf that, if in a case like the present the whole financial adjustment ceases to have effect, a new financial adjustment will inevitably be necessary, whereas if the financial adjustment only ceases to have effect as far as it relates to the discontinued grants, a new financial adjustment may or may not be necessary. The words "if and so far as necessary" are therefore, so runs the argument, appropriate only to the latter of these two constructions. It is, however, to be observed that the first part of the subsection is not concerned only with cases like the present. It applies to every financial adjustment "with respect to any of the discontinued grants," and covers, therefore, an adjustment that deals exclusively with a discontinued grant. When such an adjustment ceases to have effect it is obvious that no new adjustment will be necessary. So that the words "if and so far as necessary" are properly used even if the respondents' contention should prevail. It was, indeed, argued on the appellants' behalf that on that construction no effect can be given to the words "so far as." But those words would seem to be ineffective even if the appellants' construction be adopted. Whether a new adjustment becomes necessary by reason of an existing adjustment having been revoked altogether by the sub-

section or by reason of its only having been revoked so far as it related to a discontinued grant, the extent of the adjustment necessary will be the same.

We may here refer to a contention put forward on the part of the respondents that upon the appellants' construction and in cases like the present a new adjustment may or may not be desirable or equitable, but cannot be necessary, whereas upon their own construction a new adjustment is necessitated by reason of the positive enactment in the Local Government Act, 1888, s. 32 (1) requiring that an equitable adjustment of the proceeds of the local taxation licences shall be made and of the fact that the machinery provided by that Act for making such an adjustment is no longer available. It is true that sect. 32 of the Act of 1888 remained in force after the Act of 1929 so far as it affected the proceeds of the local taxation licences collected by the county and borough councils, the section having been repealed by the latter Act so far only as it related to the discontinued grants (see Part IV of Sched. 12 of the Act). But, in our opinion, where an existing adjustment has become inequitable a new adjustment is not merely desirable, it is necessary. That seems to have been the view of the legislature in 1888. For in sect. 32 (6) of the 1888 Act it is provided that where the Local Government Board are satisfied that an adjustment has become inequitable and the councils concerned are unable to agree then the arbitrator appointed by the board shall, not may, make a new equitable adjustment. There seems no reason to suppose that the legislature held a different view when passing the Local Government Act, 1929.

So far we have been considering the words "if and so far as any new adjustment is necessary" as though they were unqualified in any way. In fact, however, they are qualified by the words "having regard to the exchequer grant payable under this part of this Act." It is very difficult to understand what the legislature intended to effect by these words. Whether the construction put forward by the respondents or that put forward by the appellants be accepted the necessity for a new adjustment arises in cases like the present, not by reason of the exchequer grants, but by reason of the existing adjustment having come to an end in whole or in part. In these cases, however, the existence of the exchequer grants might affect materially the terms of the "new financial adjustment on an equitable basis," if they could properly be taken into consideration; and it is possible that by the use of the words in question the legislature merely intended to make it clear that this might be done. But, however this may be, we cannot find in those words any justification for not giving the words "with respect to any of the discontinued grants" in the earlier part of the subsection their ordinary meaning and treating them as though they were "so far as it relates to any of the discontinued grants."

The appellants placed some reliance on the fact that the Act of 1929 only repealed sect. 32 of the Act of 1888 so far as it related to the other financial relations between the spending authorities would seem to have been necessary in any view of the case. For whether the contention of the appellants or that of the respondents be accepted, any adjustment in force immediately before Apr. 1, 1930, relating solely to the proceeds of the local taxation licences leviable by the councils remains unaffected by the Act and no new financial adjustment will be required under the subsection. That existing adjustment might, however, thereafter become inequitable for some reason or another, and unless sect. 32 (5) remained in force no new adjustment could be made.

For these reasons we are of opinion that the questions submitted to the court by the special case were rightly answered by LUXMOORE, J., and that this appeal should be dismissed.

Appeal be dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *F. Venn & Co.*, agents for *Walter Moon*, Town Clerk, Liverpool (for the plaintiffs); *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, County Solicitor, Preston (for the defendants).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

EXECUTORS OF JOHN HARGREAVES, LTD. v. BURNLEY CORPORATION.

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **December 2, 3, 1936.**]

Mines—Land purchased by agreement—Mines not purchased—Public undertaking—Enfranchised copyholds—Custom of manor—Right to compensation—Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (c. 37)—Waterworks Clauses Act, 1847 (c. 17), ss. 22, 23.

Under conveyances made in 1879, 1922, and 1927 the defendant corporation acquired land for the purposes of sewage works and a gas undertaking. So far as the present case was concerned, these lands were enfranchised copyholds subject to a custom whereby the lord of the manor had the right to work mines subject to making compensation for damage done including that arising from subsidence. The plaintiff company were the lessees of the minerals under such enfranchised copyholds and also under the adjoining land. In 1934 the plaintiffs gave the corporation notice in writing that they desired to work seams of coal under or within 40 yds. of such enfranchised copyholds. The defendants gave no counter-notice under the Waterworks Clauses Act, 1847, s. 23, to treat for the payment of compensation for such mines, and it became lawful for the plaintiffs to work the mines. In an action for a declaration as to the rights of the parties, the Vice-Chancellor of the County Palatine of Lancaster, after making a declaration of the plaintiffs' right to work the mines and let down the surface subject to payment of compensation for damage done including damage due to subsidence provided the plaintiffs did no wilful damage and did not work the mines in an unusual manner, added that the defendants were not entitled to any greater protection in respect of the greater weight imposed upon the land by their sanitary works except where they had acquired a prescriptive right of support for such works:—

HELD: (i) the defendants not having served a counter-notice, their rights in relation to the minerals were the same as those of their vendor and were therefore governed by the custom of the manor.

(ii) the addition to the declaration stated above could not be supported.

[EDITORIAL NOTE.] The substantial question here is whether the doctrine of *Manchester Corpn. v. New Moss Colliery, Ltd.* (3) applies to enfranchised copyholds, and it is held, applying that doctrine to the case of such land, that the undertakers are bound by the custom of the manor and take the land with all the rights and burdens that their vendor had or was subject to at the time of purchase.

AS TO NOTICE TO WORK MINERALS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 63-67, paras. 59-61; and FOR CASES, see DIGEST, Vol. 11, pp. 152-158, Nos. 346-381.]

Cases referred to:

- (1) *Pountney v. Clayton* (1883), 11 Q.B.D. 820; 34 Digest 610, 86.
- (2) *Great Western Ry. Co. v. Bennett* (1867), L.R. 2 H.L. 27; 11 Digest 152, 349.
- (3) *Manchester Corpn. v. New Moss Colliery, Ltd.*, [1906] 1 Ch. 279; *revid. sub nom. New Moss Colliery, Ltd. v. Manchester Corpn.*, [1908] A.C. 117; 11 Digest 154, 356.
- (4) *Consett Waterworks Co. v. Ritson* (1889), 22 Q.B.D. 702; 11 Digest, 64, 901.
- (5) *Caledonian Ry. Co. v. Sprot* (1856), 27 L.T. O.S. 264; 11 Digest 161, 403.
- (6) *London & North Western Ry. Co. v. Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97; 11 Digest 152, 345.

APPEAL AND CROSS-APPEAL from a judgment of SIR COURTHOPE WILSON, K.C., Vice-Chancellor of the County Palatine of Lancaster, delivered on Apr. 6, 1936.

The plaintiffs were lessees of the Arley Mine and the Lower Mountain Mine, which lay under the Duck Pits Sewage Works and the gas works of the defendants, the corporation of the county borough of Burnley, at a depth respectively of 215 yds. and 497 yds. The plaintiffs claimed the right to work these mines under certain freehold and certain enfranchised copyhold lands. There was no dispute that they had the right to let down the surface of the freehold land without paying compensation to the surface owner. The copyholds were conveyed to the defendant corporation by three conveyances: a piece of 5 acres odd forming part of the site of the sewage works by deed dated May 1, 1879, and two small pieces of land forming part of the site of the gas works by two deeds dated respectively May 19, 1922, and Aug. 26, 1927. The first piece of land was purchased from the copyholder and the deed expressly reserved the mineral rights, but the lord of the manor was not a party to it. The plaintiffs' mining lease was granted by the lords of the manors under which their workings ran.

On Mar. 21, 1934, the plaintiffs, proceeding under the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, which incorporates the Waterworks Clauses Act, 1847, gave the defendant corporation notice in writing that they intended, within 30 days to work the Arley and Lower Mountain coal seams under or within 40 yds. of the first piece of land (the sewage works), and the Lower Mountain Coal seam under or within 40 yds. of the second and third pieces of land (the gas works). The corporation did not give a counter-notice under the Act of 1847, that they would treat for compensation for the coal in those seams, and the plaintiffs thereupon claimed a declaration that they were entitled to work both seams in accordance with sect. 23 of the 1847 Act, and that if in so doing they caused damage to the corporation's works, the corporation should not be entitled to compensation. The corporation denied in their defence that the lord of the manor had any right to let down the surface, and said that on their purchase of the first piece of land they had acquired all the rights to compensation which their vendor had possessed, and that the words in sect. 23 of the 1847 Act, "as if this Act and the special Act had not been passed," kept alive all rights of compensation which would in that event have been enjoyed by the surface owners. They denied that any right to compensation for surface damage which they had previously enjoyed had been abrogated by the Act of 1883. In regard to the second and third pieces of land, the copyholds, they contended that the plaintiffs either had no right to let down the surface, or had no such right except subject to compensation.

At the hearing the parties agreed that the custom of the manors to pay compensation was as stated in the judgment of SLESSER, L.J.

The learned Vice-Chancellor said in his judgment that the main question was whether the provisions of the mineral code applied to the exclusion of all other rights of the parties when the undertakers did not give the counter-notice of their willingness to pay compensation, as had been held under the corresponding sections of the Railway Clauses Consolidation Act, 1845, ss. 78, 79, or whether under sect. 23 of the 1847 Act they were remitted to their common law rights. The words "as if this Act had not been passed" had been held to mean that the parties were remitted to their common law rights: *Manchester Corpn. v. New Moss Colliery* (3), and the words referring to wilful damage and working in an unusual manner were introduced to give some express protection to public utility undertakers even though they refused to buy the special protection afforded by sect. 22. He therefore held that the parties were remitted to their common law rights, which depended on the custom of the manors to pay compensation. He held that the plaintiffs were at liberty to exercise their right of working the mines and in so doing to let down the surface, subject to the obligation to make compensation for any damage done, including that arising from subsidence in accordance with the agreed custom of the manors. He also held that the compensation was limited to the support of the land in its natural state unless a prescriptive right to an easement of support in its non-natural condition could be proved: *Pountney v. Clayton* (1); *Manchester Corpn. v. New Moss Colliery* (3). He made an order as follows: (i) the plaintiffs were entitled to work the mines and minerals under the freeholds in the terms of the conveyances; (ii) regarding the copyholds, the plaintiffs as lessees of the lords of the manors were entitled to let down the surface subject to making compensation to the defendants for any damage done, provided that the plaintiffs should not do wilful damage to the defendants' sanitary works nor work the mines in an unusual manner, but the defendants should not be entitled to any greater protection in respect of the greater weight imposed on the land by reason of their sanitary works except where the defendants had acquired a prescriptive right of support for those works. Both parties appealed, the corporation against the limitation of their right to compensation, and the plaintiffs against the order that they should pay any compensation at all.

Cyril Radcliffe, K.C., and *J. H. Stamp* for the appellants.

F. K. Archer, K.C., and *C. E. R. Abbott* for the respondents.

Radcliffe, K.C.: At any rate since the 1883 Act, a court of law would hold that, as between the plaintiffs and the corporation, the mines beneath the sewage works are governed by the mineral code of the Act of 1847. This case has nothing to do with the conditions under which rights to support are acquired, nor with the distinction between the right

to support at common law for the surface in its natural state and the right to support for a surface burdened by buildings which can only be acquired by prescription. It concerns merely the custom under which the occupier can withdraw support subject to the obligation to compensate the surface owner for damage done to whatever is on the surface at the time. It was held in *Manchester Corpn. v. New Moss Colliery, Ltd.* (3) that where land is acquired by agreement for purposes of constructing waterworks under a special Act which incorporates the Waterworks Clauses Act, 1847, and the undertakers purchase all the mines and minerals under the land so taken, they acquire all the rights of support from the minerals under adjacent lands which the vendor had at common law at the time the land was taken. The present appellants have not a right at common law, but have the agreed customary right. In such a case the Waterworks Clauses Act, 1847, ss. 18-27, do not take away a common law right of support from minerals under adjacent lands nor give the owners of such minerals any greater right to work them so as to let down the surface of the land taken by the undertakers than they had against the vendor before the land was taken. Nothing in the Act of 1847 sets the undertaker free from the obligation to compensate the surface owner. That decision of this court, which was unanimously affirmed in the House of Lords, is a conclusive authority in favour of the appellant corporation. The statute imposes the additional burden of the two conditions that the mine occupier may not cause wilful damage or work the mines in an unusual manner. In *L. & N.W. Ry. Co. v. Howley Park Coal Co.* (6) the Court of Appeal were at pains to point out the difference between the working of the Railway Clauses Act and the Waterworks Clauses Act, 1847, and that in *Manchester Corpn. v. New Moss Colliery, Ltd.* (3) they had stressed the importance of the words "as if this Act and the special Act had not been passed."

Archer, K.C.: This case is distinguishable from *Manchester Corpn. v. New Moss Colliery, Ltd.* (3). In that case the corporation had bought the mineral rights as well as the surface, and therefore acquired whatever rights to support they would have acquired at common law. If, however, an undertaker purchases the surface but not the minerals, then the code applies, with all its restrictions on the acquisition of right to support. Unless this court holds that the decision in *Pountney v. Clayton* (1) is incompatible with the decision in the *New Moss* case (3), then *Pountney v. Clayton* (1) applies here.

SLESSER, L.J.: In this case the facts are as follows. The plaintiffs, Executors of John Hargreaves, Limited, are a colliery company, having their registered offices at Burnley. The defendants are the mayor, aldermen and burgesses of the borough of Burnley. The plaintiffs

are lessees of the lords of the forest of Pendle and the manor of Ightenhill for the residue of a term of 40 years from Sept. 29, 1924, of the coal lying beneath and in the neighbourhood of the land comprised in the conveyance of 1879 and such parts as were formerly copyhold of the lands comprised in the conveyance of 1922 and the conveyance of 1927, and they are lessees of a Mr. Reginald Arthur Tatton for the residue of a term of 30 years from Nov. 1, 1912, of the coal lying beneath and in the neighbourhood of such parts as were always freehold of the lands comprised in the conveyance of 1922 and the conveyance of 1927. They are also lessees of the coal lying beneath and in the neighbourhood of the land comprised in the conveyance of 1879, and such parts as were formerly copyhold of the lands comprised in the conveyance of 1922 and the conveyance of 1927. In the present case, we are not concerned with the freeholds, but only with such of the demised premises as are enfranchised copyholds. The reason for the distinction will appear clearly when the matters to be considered are explained.

Taking these conveyances separately, first of all with regard to 1879, the position was this : on May 1, 1879, a Mr. Robert Townley Parker entered into an agreement with the corporation, because the corporation had acquired under the authority of an Improvement Act certain main and branch sewers in the borough, and had applied to Mr. Parker for a grant of land to enable them to construct thereon certain works for the disposal of their sewage ; and by the conveyance Robert Townley Parker granted to the corporation a certain parcel of land being copyhold of the forest of Pendle, some 5 acres, situated near Burnley, known by the name of Duck Pits.

At the time of the conveyance of 1879, as against Robert Townley Parker, the lord of the forest of Pendle, to whom I have referred, had certain rights to get the minerals lying under the lands comprised in the conveyance, and there was during the case an agreement as to the particular custom obtaining in the manor and in the forest, to which I shall have to refer, subject to the rights and obligations of the lord and the copyhold tenant respectively, in regard to the working of the minerals.

The custom which was agreed was this :

That it is the custom of the manor and forest that the mines and minerals belong to the lord, who has the right to work them, subject to making compensation to the copyholders for any damage done, including that arising from subsidence.

That being the situation in regard to the conveyance of 1879, there was also a further conveyance of 1922 as to other land which was required by the corporation for the purposes of a gas undertaking, they having powers of purchase, by agreement under the Local Government Board's Provisional Orders Confirmation (No. 3) Act, 1919. That land was purchased from Mr. Reginald Arthur Tatton, but, so far as the freehold was concerned, there was a reservation to Mr. Tatton of all mines or

minerals that might be found under the said plot of land, and with regard to the copyhold at a place called the manor of Ightenhill, subject to powers of working mines reserved by the deed by which the land was enfranchised in the lord, in the same terms as those I have already stated in regard to the reservation in the conveyance of Robert Townley Parker.

With regard to 1927, there again as regards the copyhold there is the same reservation to the lord.

In the case of all the conveyances which we have to consider, there is the custom of the manor and forest :

That the mines and minerals belong to the lord, who has the right to work them, subject to making compensation to the copyholders for any damage done, including that arising from subsidence.

The various works having been erected on the property, the sewage and gas works, the company proceeded to work the minerals, and came under or within 40 yds. of the land comprised in the conveyance of 1879, and within 40 yds. of the land comprised in the conveyance of 1922 and the conveyance of 1927. On Mar. 21, 1934, the plaintiffs gave to the corporation notice in writing that they were desirous of working the Arley and Lower Mountain seams of coal under or within 40 yds. of the land comprised in the conveyance of 1879, and another seam of coal under or within 40 yds. of the land comprised in the conveyances of 1922 and 1927. The reason why that notice was given is to be found in two Acts of Parliament in particular, the Waterworks Clauses Act, 1847, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883.

Dealing with the latter Act first, because it is under the latter Act that the works here of sewage and lighting are brought into the ambit of the Waterworks Clauses Act—it is sufficient to say that by sect. 2 :

The expression “sanitary work” means any existing or future building or work constructed by or vested in or under the control of a local authority under the powers or for the purposes of so much of the principal Act or of any general or local Act or provisional Order as relates to the construction or maintenance of any works of sewerage, drainage, sewage disposal, lighting, or water supply, and includes any fixtures, pipes, fittings, or apparatus connected with any such work, and belonging to or used by the local authority.

By sect. 3 :

The provisions of the Waterworks Clauses Act, 1847, ss. 18-27 (both inclusive), with respect to mines, shall, in relation to any sanitary work of a local authority be deemed to be incorporated with this Act and with the Sanitary Act under the authority of which such sanitary work has been or is constructed or is maintained, with the following modifications.

Sect. 4 provides :

Except as in this Act provided, a local authority shall not by reason only of anything contained in the Sanitary Act under the authority of which a sanitary

work has been or is constructed or maintained be deemed to have acquired or to be entitled to or to be bound to acquire or make compensation for any right of support for such sanitary work as against any person owning or working or being lessee or occupier of or entitled to work or otherwise interested in any mine ;

with the rest, we are not concerned.

I now turn to consider the provisions of the Waterworks Clauses Act, 1847, in so far as they are relevant as applied by the Act of 1883, to the works erected by the Burnley corporation in the present case. For that purpose, I find it convenient to turn to sect. 22 of the Act of 1847, which provides :

Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be under ground and shall be described in the map or plan which shall be so kept and deposited as hereinbefore mentioned, or within the prescribed distance, if any, [there was, in fact, in this case, no distance prescribed] and if no distance be prescribed with 40 yds. therefrom, be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice in writing of his intention so to do, 30 days before the commencement of working.

That was the notice duly given on Mar. 31, 1924. Then :

Upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected.

Nothing turns on that. It is the fact that in this case no counter-notice, if I may use the expression, by the undertakers was in fact given. Sect. 23 provides that :

If before the expiration of 30 days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, and to drain the same, by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner.

Such counter-notice not being given, as far as the statute is concerned the undertakers became free to go on working within 40 yds., and subject to their not doing wilful damage or not working in an unusual manner it was lawful for them to continue to work the minerals. But it is said on behalf of the defendants that, although that may be so, the words of sect. 23, that it shall be lawful to work the mines as if the Act and the special Act had not been passed, preserved to the parties all the rights and obligations which they might possess at common law by assignment from their predecessors, and that these statutory provisions do not operate to prevent such an assignment.

The first thing to consider, before one decides what are the rights which they do possess at common law, is whether that contention is

well founded. In my view, it is not possible to say that these words "as if this Act and the special Act had not been passed" have not produced a specific and recognised legal consequence. In my opinion, the effect of those words has been decided in the House of Lords in a manner which is binding upon us, and although I agree that some of the earlier authorities, as, for example, the observations made in the case of *Pountney v. Clayton* (1), particularly by BOWEN, L.J., at p. 844, and in the *Great Western Ry. Co. v. Bennett* (2), might, if considered by themselves, lend support to the view that the statutory provisions contained in sect. 23 produce the effect of an exclusive mineral code, excluding the possibility of assignment of common law rights, and, therefore, if the rights were given and the counter-notice was not availed of, no other rights at common law could enure, yet, as I read the decision in the House of Lords, it is not possible any longer to sustain that view.

The view of the exclusive effect of the mineral code found favour in the court of first instance in the case of *Manchester Corp'n. v. New Moss Colliery, Ltd.* (3), in the words of FARWELL, J., at p. 293. His Lordship, after considering the Waterworks Clauses Act, particularly noticed that in the Waterworks Clauses Act, 1847, in contradistinction to the Railways Clauses Act, 1845, the words "as if this Act and the special Act had not been passed" were in the Waterworks Clauses Act and not in the Railways Clauses Act, and said that he agreed with the statement of the law by SMITH, J., in *Consett Waterworks Co. v. Ritson* (4), that there is no real distinction as to the Railways Clauses Act in this respect—there being no other difference—and goes on to say that these words "as if this Act and the special Act had not been passed" are necessarily implied in the Railways Clauses Act, and their insertion in the Waterworks Clauses Act adds nothing to the clause.

FARWELL, J., continues, at p. 292 :

The legislature foresaw that, in the case of railway and waterworks undertakings, peculiar conditions would exist with respect to mineral rights. It would be obviously unjust to deprive the mineral owners of their property without compensation, but there was great difficulty in most cases in assessing any immediate value that would be fair, and moreover, in mineral districts the amount of compensation, if mines had to be purchased out and out in the first instance, might be so large as to render the construction of the undertaking financially impossible. It therefore appeared good to them to alter the common law by which a purchaser buying land acquires with it such rights as are necessary for its use for the purpose for which it is bought and which the vendor can convey, and (in the case of waterworks) the law by which undertakers, who are authorised to execute works, are under no liability for any loss arising from the proper construction and use of those works.

Then he follows the law as it had been enunciated in *Caledonian Ry. Co. v. Sprot* (5). But in my view it is impossible to read the judgments in the House of Lords or in the Court of Appeal in the *New Moss* case (3), and not see that the view there expressed by FARWELL, J., that the

effect of the legislation is to produce an exclusive mineral code and to oust the common law, is wrong.

I will deal, first of all, with one or two observations in the House of Lords, and then mention others which appear in the Court of Appeal, as I read them, to the same effect. First of all, in the House of Lords in the *New Moss Colliery* case (3), dealing expressly I think with the argument of Mr. Cripps, as he then was, supporting *Pountney v. Clayton* (1) and the view of FARWELL, J., LORD LOREBURN, L.C., in terms seems to take a different view. At p. 122 he says this :

No doubt the present appellants were bound to give notice under sect. 22. But what is the consequence of their having done so and no counter-notice having been given ? For that we must look to sect. 23. It seems to me that the effect of sect. 23 is as follows : The mine owner is authorised to work into the belt as if the Act of 1847 and the special Act had not been passed—that is to say, if he has apart from the Acts a right to let down the surface he may do so. If he has no such right, then the Acts do not enable him to do so. In any case he must not wilfully damage the works or work his mines in an unusual way.

Now, if these Acts had not been passed, the owner of the pink land would have had indisputably a right for lateral support of his surface in its natural state against the owner of minerals beneath the yellow land, and I am quite unable to see how this right has been destroyed.

Here, of course, we are not concerned with lateral support, but the matters which are dealt with in the custom found in this case are apt to be considered in relation to this case in respect to the right of subjacent excavation.

LORD ATKINSON, at p. 125, says this :

It appears to me that the owner of the minerals under Lord Stamford's land, provided he did no wilful damage and did not work his mines in an unusual manner, could work them so as to let down the surface of Lord Stamford's land if he so desired, because though sect. 23 provides that the mines may be worked "as if this Act and the special Act had not been passed," yet, according to the several authorities cited, the plaintiffs never acquired the right to have the surface supported.

That is bearing on the actual land of Lord Stamford ; but coming to the land of the adjoining owner, he says this :

But with regard to Taylor's lands none of that reasoning applies. There the plaintiffs had the right of lateral support vested in them by the purchase from Taylor, and as the words "as if this Act and the special Act had not been passed" cannot operate to vest in the plaintiffs a right in reference to Lord Stamford's land which they never had, so neither can it operate to deprive them of the right they had acquired and would, if the parties were remitted to their original positions, have been entitled to enjoy and enforce.

I will not deal further with the details of the case, because, as I read it, despite the argument of Mr. Archer, the observations there seem to me to be perfectly general in principle, and I cannot see any difference in principle whether the question is as to whether the common law

right is to be applied to a severance of subjacent mineral or a right to work subjacent mineral, or a right to lateral support within the area of 40 yds., contemplated by the Act when notice has to be given.

Similar language is to be found in the judgment of VAUGHAN WILLIAMS, L.J., at p. 574, in the Court of Appeal, where he says this :

The position of the New Moss Colliery upon the failure of the corporation to give a counter-notice of their willingness to compensate for such mines and thus to stop the working of them, is, in my judgment, that the New Moss Colliery is remitted to its common law rights, namely, that they may work their mines as if this Act and the special Act had not been passed, so that no wilful damage be done to the works of the undertakers, and so that the mines be not worked in an unusual manner.

At p. 577, COZENS-HARDY, L.J., says this :

Sect. 23 seems to me to leave the parties to their common law rights, in the events which have happened, and I shrink from holding that anything which has happened has deprived the corporation of that right which they admittedly had at common law in respect of Taylor's land.

VAUGHAN WILLIAMS, L.J., is at pains to say that he agrees with the views expressed by COZENS-HARDY, L.J.

Now, it being agreed in the present case what the common law rights as between the lord and the tenant would have been, the only question which remains is whether those rights have now effectually been passed to the present plaintiffs and defendants. Despite the argument of Mr. Archer, it seems to me that the language of sect. 23, "as if this Act and the special Act had not been passed," puts the parties in exactly the same position now with regard to this matter as were Mr. Parker and the defendants in the one matter and Mr. Tatton in the other. I cannot see that any distinction is possible.

One has to consider now what is the common law position as between those parties. The colliery company had inherited the rights of the lord, and those rights are rights to work, subject to a certain condition. There is under this custom no right to support left, whatever rights to support might or might not have arisen generally in relation to the rights of the copyhold tenant, and the rights of the lord to work the minerals, in regard to support.

In this case, as I read it, any question of support is excluded because it says the lord has the right to work, subject to making compensation to the copyholder for any damage done.

That being the position, it only remains to say that the learned Vice-Chancellor, in his judgment, instead of giving, as I think he ought to have done, a declaration in the terms sought in para. 2 of the statement of claim, in general terms, has qualified the declaration in the following manner. He has said :

With regard to the enfranchised copyholds declare that the plaintiffs as lessees

under the lords of the manor of Ightenhill and the forest of Pendle are entitled during the currency of their leases to work the mines thereunder and in so doing to let down the surface subject to making compensation to the defendants for any damage done thereby including that arising from subsidence provided that the plaintiffs shall not do any wilful damage to the defendants' sanitary works and shall not work the mines in an unusual manner.

So far, I think, the declaration is right, and is supported for the reasons I have already stated. But he goes on to say :

But the defendants shall not be entitled to any greater protection in respect of the greater weight imposed on the land by reason of their sanitary works except where the defendants have acquired a prescriptive right of support for such works.

That part is objected to by Mr. Radcliffe, for the appellants, and Mr. Archer does not dispute that he cannot support that qualification. It is unnecessary, in those circumstances, to consider in any detail the reasons why the learned Vice-Chancellor came to the conclusion that that qualification should be inserted there ; but, if I may say so, there seems to have been a confusion of thought, in that he seems to be considering questions in regard to the right of support and the right of protection which are really not in issue in this case at all.

The question for us to consider, and on which the declaration is sought, is the right to make compensation, and in the declaration it is dealt with by leaving out all the words after the words " in an unusual manner " in the second paragraph.

As I have already said, no question arises here in regard to the position of the freeholders, and it is not necessary to express any view about that. The result will be that the appeal will succeed in so far as it seeks to omit those later words which have been objected to. The cross-appeal must be dismissed.

ROMER, L.J. : I agree, and have little to add, because, notwithstanding the interesting argument we had from Mr. Archer, it seems to me reasonably plain that this case is governed by the decision of the House of Lords in *Manchester Corpn. v. New Moss Colliery, Ltd.* (3).

It is important to see what was decided in that case. There a waterworks company had purchased two plots of ground which adjoined one another, and on those two plots of ground they constructed a reservoir, partly on one plot and partly on the other. One plot was acquired from a gentleman who is referred to as Mr. T., and it is called the T. land. The other plot was acquired from Lord Stamford and Warrington, and is called the S. land. The waterworks company purchased not only the surface of the T. land, but the minerals underneath it. They purchased the surface only of the S. land, excluding the minerals underneath. Lord Stamford and Warrington reserved the minerals on the conveyance of the surface, with full power to work the minerals even though it let down the surface, but without paying any compensation.

It is plain from what I have said that the minerals under the T. land were not the subject of the code relating to minerals which is contained in sects. 22 and 23 of the Waterworks Clauses Act, 1847, but the coal under the S. land was, and that coal included a strip of coal 40 yds. wide which adjoined the coal under the T. land and, therefore, from the point of view of the surface of the T. land, that 40 yds. of coal under the S. land was within the code to which I have referred.

Notice was given by the owners of the coal under the S. land of their intention to work, in accordance with the provisions of sect. 22 of the Act. No counter-notice was served by the waterworks company and, therefore, sect. 22 came into operation, which provides that in such a case it shall be lawful for the owner of the mines to work them "as if this Act and the special Act had not been passed," with some qualification which it is not necessary to mention.

Now, it is plain that both in the Court of Appeal and in the House of Lords it was decided that those words which I have just read gave to the mine owner a right to work the mines to such an extent as he is enabled to do under his common law rights. That is to say, his rights outside this code contained in sects. 22 and 23. SLESSER, L.J., has called attention to passages in the judgments of VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J., in the Court of Appeal, and to the speeches of LORD LOREBURN, L.C., and LORD ATKINSON in the House of Lords, and it is unnecessary for me to repeat them.

Then this question arose, as it must arise in every similar case: What are the common law rights of the owner of the mine? It has been held in several cases, perhaps the best known one of which is *Great Western Ry. Co. v. Bennett* (2), that where an undertaker similar to the undertakers in the case of the *New Moss Colliery* case (3) (although in point of fact the undertakers in that case, I think, were a railway company), purchases for the purposes of his undertaking the surface of land from a vendor who owns both the surface and the minerals, the minerals being reserved out of the conveyance, as is necessary, having regard to the code relating to minerals contained in the Railway Clauses Act (in that case, the Waterworks Clauses Act in this case), no implication of a right of support is to be made in favour of the undertaker purchasing the surface; because it is said that the rights of the surface-owner and of the mine-owner in such a case are governed solely by this code, which regulates the relations between them exclusively.

It was sought to be argued in the *New Moss Colliery* case (3) that a similar reasoning should induce the court to hold that when the T. land was bought with the minerals underneath it no right of support from the 40 yds. of coal under the S. land had been bought as well. In other words, it was said that, even in cases where the undertakers purchase a surface which has been separated from the minerals underneath before

the sale, there does not pass to them with the surface any right of support from the minerals subjacent and adjacent to minerals which belong to their vendor.

That was the argument put before the House of Lords. That argument was rejected both by LORD LOREBURN, L.C., and by LORD ATKINSON. LORD LOREBURN, L.C., said this, at p. 121, after referring to *Bennett's case* (2), which he described as a case which was decided upon Railway Clauses :

... that the statutory purchaser in such case cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters by which alone rights of the company and the mine owners are regulated. In *Bennett's case* (2), the question was between undertakers who had compulsorily purchased the surface and the vendor who had retained the minerals. I cannot see what relevancy that decision has to the present case.

Then he refers to the fact that the purchase of this land in this particular case was voluntary. But, apart altogether from that, he says, at p. 121 :

Further, in buying the pink land the corporation bought not only the surface, but also the minerals underneath [that is, the T. land, which is coloured pink] and bought therewith the right to lateral support from the yellow land which the pink land had always possessed. I do not understand how a decision as to the rights created between vendor and purchaser upon the separation of surface from underlying minerals can govern the rights between the owners of two plots of land between whom there is no privity of contract.

What he says about the owners of the two plots of land applies equally to owners of a surface plot and owners of mines between whom, equally, there is no privity of contract. So it was held in that case, and it was necessary for their decision so to hold, that when the undertakers, the waterworks company, bought the T. land (the pink land, as it is described), they did, notwithstanding the mineral code and the Waterworks Clauses Act, purchase with the surface a right of support from the 40 yds. wide strip of coal adjoining the T. land, under the S. land.

So far as there is anything to be found in *Pountney v. Clayton* (1), which is inconsistent with the decision of the House of Lords, that decision can no longer be regarded as an authority. I say that, because there has been, and perhaps, always will be, considerable dispute as to whether BOWEN, L.J., really did decide anything contrary to what I have stated to be the decision of the House of Lords in the *New Moss Colliery case* (3).

It follows from what I have been saying that, applying the *New Moss Colliery case* (3) to the present one, so far as the copyhold land is concerned (as it is the only land with which we are concerned), when the Burnley corporation bought it there passed to the Burnley corporation such rights in relation to the minerals as had been possessed by their

vendor ; that is to say, thenceforth the position between them and the Lord of the Manor would be the same as it was between their vendor and the Lord of the Manor before the conveyance ; subject to this : that the code contained in sect. 22 of the Waterworks Clauses Act, 1847, now applicable to the sewage and gas undertakings of the Burnley corporation by virtue of the Act of 1883, would apply, that when a notice had been served under that code and no counter-notice had been served by the Burnley corporation, then the parties were relegated to their rights in relation to the minerals ; which rights were as I have stated.

I agree, therefore, that this appeal succeeds. As regards the cross-appeal, it will, of course, fail.

GREENE, L.J. : I agree. In my opinion this case is covered by the decision in the *New Moss Colliery* case (3).

I will say in a few sentences my reason for so thinking. Three typical cases may be taken. The first case is where the owner of surface and minerals sells the surface to an undertaker, reserving the minerals. In that case, the principles laid down in the *Great Western Ry. Co. v. Bennett* (2) apply and operate in this way : that no implication arises such as would arise in an ordinary case, that the purchaser of the surface acquires a right of support ; the reason being that the parties are contracting—or, rather, one is making and the other is receiving the grant—in relation to and in contemplation of a statutory code which gives the necessary protection, and accordingly there is no ground in such a case for raising the ordinary implication.

The second case is where a person acquires land, and acquires with it what passes on every ordinary conveyance as one of the incidental rights of land, namely, a right of support from adjacent land.

Those two cases were the two cases which came under discussion in the *New Moss Colliery* case (3). Lord Stamford and Warrington's land fell under the first case ; Taylor's land fell under the second case, and the contest arose with regard to Taylor's land and the rights which the undertakers had as the owners of Taylor's land. If one thing is clear from that decision—and for my own part I do not find in any part of the decision the difficulties which Mr. Archer suggested were there—I venture to think it is this : that when the corporation acquired Taylor's land they acquired at the same time a right of support from the adjacent minerals.

LORD ATKINSON says, on p. 125 of the report, in referring to Taylor's land :

There the plaintiffs had the right of lateral support vested in them by the purchase from Taylor.

Indeed, I have some difficulty in seeing how it could have been argued in that case that by some means, for which there is no real ground in the

statute, the undertakers, when they acquired Taylor's land, did not acquire it with the ordinary common law right.

The third case is this : where the undertaker acquires the surface of land from a surface owner who is not the owner of the minerals, by reason of the circumstance that the surface and the minerals have previously become separated. Let me suppose that in that case when the severance took place the surface owner acquired or reserved expressly a right of support. When the undertaker acquires surface land of that character, with that right attached to it, I can see no reason whatsoever why the principle that applied to Taylor's land in the *New Moss Colliery* case (3) should not apply. The two cases, to my mind, are precisely similar : in each case the grantee is acquiring land, in each case that land, at the time when he acquires it, enjoys a right of support in relation to other land—in Taylor's case, that other land was adjacent ; in the case I am now discussing, it is subjacent ; but I cannot see any reason at all for drawing a distinction based on that difference, and, in my judgment, the two cases are precisely similar.

It is quite true that, in the present case, we are not dealing with a right of support in the surface owner, we are dealing with a case where the lord under the custom of the manor had the right to extract minerals, and, in doing so, to let down the surface, making compensation to the copyholder. But I cannot see why that right to have compensation should not pass to the undertaker acquiring the surface just as much as the right of support from adjacent minerals in Taylor's case, and just as much as the right of support from subjacent minerals in the third of the three cases which I have discussed.

In my judgment, therefore, when the *New Moss Colliery* case (3) is examined, the reasoning in that case is a complete answer to the present question.

I may add one further observation : the argument which was put before us by Mr. Archer really involved this : that when the corporation acquired the copyhold surface lands the result was that the mineral owner, who was not a party to the conveyance and had nothing in the world to do with the transaction, thereby by good fortune became freed from the obligation, under which he had previously laboured, to make compensation for damage which he might do to the surface in working the minerals. And, more than that, the argument involves this : that not only was he to be freed from the compensation which he would have had to pay to the surface owner, but he was himself to acquire the right to compensation if the surface owner wished to stop him working. The only *quid pro quo* which he was to give for this assumed statutory wind-fall was that he was deprived of the right of doing wilful damage or working in some unusual manner. It is worth noticing that that very argument was advanced in the *New Moss Colliery* case (3). It was

argued there in relation to Taylor's land that when Taylor's land was acquired all the pre-existing rights of the owner of that land, in reference to support from adjoining lands, were swept away ; just as in the present case it is argued that when the surface of the copyhold land was acquired by the corporation, the pre-existing right of the owner of that surface to receive compensation if the mining owner let down the surface was swept away.

The two arguments are precisely parallel. In the *New Moss Colliery* case (3), that argument was dealt with by LORD LOREBURN, L.C., in a passage which I will read, at p. 122 :

It was strenuously argued by Mr. Cripps that the Waterworks Clauses Act, 1847, operates to obliterate all pre-existing right to support for the surface from minerals, either subjacent or adjacent [these are the important words] to the works, whenever lands are purchased by virtue of the Act. I can see no ground for such a contention. It would involve a free gift to neighbouring mineral owners of a most valuable right, and a ruinous withdrawal from the undertakers of rights most essential to the safe maintenance of waterworks, without compensation, and, so far as I can see, without reason.

That is the argument in the present case, that, for no reason which one can see, a right, which on an ordinary purchase would have passed, does not pass—a right affecting a third party, not a party to the conveyance. The fact that a third party is concerned is the circumstance which distinguishes this case and the *Great Western Ry. Co. v. Bennett* (2). The argument that on a conveyance to which the mineral owner is not a party the mineral owner becomes freed from an obligation to which he was subject before, is one which, in my opinion, was quite clearly negatived in the *New Moss Colliery* case (3), and that decision governs this.

With regard to the matter which arose on the defendants' appeal in this case as to the form of the order of the learned Vice-Chancellor, I have nothing to add to what has already been said.

Solicitors : *Harry Plowman*, Town Clerk, Burnley (for the appellants) : *Southern, Ritchie & Southern*, Burnley (for the respondents).

Appeal allowed. Cross-appeal dismissed.

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

HUGHES (INSPECTOR OF TAXES) v. BANK OF NEW ZEALAND.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
December 7, 8, 9, 10, 1936.]

Income Tax—Non-resident trader—Interest on government securities—Interest on securities of foreign and colonial companies—Expenses of earning profits exempt from tax—Income Tax Act, 1918 (c. 40), s. 46, Sched. C, r. 2 (d), Sched. D, miscellaneous Rules, r. 7 (2)

The Bank of New Zealand had a branch in London and was assessed in respect of profits arising from the trade carried on there. Five per cent. War Loan, 3 per cent. India Government stock and securities of two colonial companies had been purchased out of the floating capital of the London branch. The interest on the War Loan was paid without deduction of tax, and the interest on the other securities had been paid less tax, but the amount of the tax had been repaid on the ground that there was no residence in the United Kingdom:—

HELD: (i) the interest on the War Loan was exempt from tax, because the exemption given by Income Tax Act, 1918, s. 46, is an absolute exemption.

(ii) the interest on the India Government stock was exempt from tax, because it was only taxable under Sched. C, and in that schedule, r. 2 (d), is also an absolute exemption.

(iii) the dividends of the colonial companies were exempt, because Sched. D, Miscellaneous Rules, r. 7 (2) applied the above absolute exemption in Sched. C to them.

(iv) the expenses incurred by the bank for the purpose of earning profits which were exempt from income tax were properly included in arriving at the balance of profits and gains.

(v) Sched. C, r. 2, is incorporated into the Miscellaneous Rules applicable to Sched. D by r. 7 (2) thereof.

[EDITORIAL NOTE.] The position of a bank having only a branch in the United Kingdom is treated quite fully in this case. The exemption of certain War stocks from income tax by statute is held to be an absolute exemption and a similar construction is placed upon Sched. C, r. 2 (d), in regard to dividends on securities of a foreign state or a British possession which are payable in the United Kingdom where the owner thereof is not resident therein. Within the same exemption are brought the dividends of shares in foreign companies owned by non-residents, because Sched. C, r. 2 (d) is incorporated into Sched. D, Miscellaneous Rules. The most difficult question in the case is whether the expenses of earning these non-taxable dividends ought to be excluded from the expenses allowed as a deduction against profits. This, however, is also decided against the revenue authorities and the expenses may be deducted in full.

FOR THE LAW ON THE POINTS RAISED, see HALSBURY, Hailsham Edn., Vol. 17, p. 11, para. 10, and p. 380, para. 779; and FOR THE CASES, see DIGEST, Vol. 28, pp. 32-37, Nos. 166-198; and FOR THE INCOME TAX ACT, 1918, s. 46, Sched. C, r. 2 (d), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 444.]

Cases referred to :

- (1) *Cadbury Bros., Ltd. v. Sinclair*, [1934] 2 K.B. 389; 18 Tax Cas. 157; Digest Supp.
- (2) *Liverpool & London & Globe Insurance Co. v. Bennett*, [1912] 2 K.B. 41; *affd.* [1913] A.C. 610; 6 Tax Cas. 327; 28 Digest 60, 305.

- (3) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; Digest Supp.
- (4) *Thompson v. Trust & Loan Co. of Canada*, [1932] 1 K.B. 517; Digest Supp.
- (5) *Kirke's Trustees v. Inland Revenue Comrs.* (1926), 136 L.T. 582; Digest Supp.
- (6) *Brown v. National Provident Institution, Ogstone v. Provident Mutual Life Assocn.*, [1921] 2 A.C. 222; 28 Digest 62, 316.
- (7) *Dow v. Merchiston Castle School, Ltd.* (1921), 8 Tax Cas. 149; Digest Supp.
- (8) *Union Cold Storage Co., Ltd. v. Jones* (1923), 8 Tax Cas. 725; 28 Digest 53, 270.
- (9) *Strong & Co., Ltd. v. Woodifield*, [1906] A.C. 448; 5 Tax Cas. 215; 28 Digest 57, 290.
- (10) *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1931), 15 Tax Cas. 761; Digest Supp.

APPEAL from a judgment of LAWRENCE, J., delivered on May 1, 1936, and reported in [1936] 2 All E.R. 125, dismissing the appeal of the Crown and the cross-appeal of the Bank of New Zealand against a decision of the special commissioners for income tax purposes.

The respondent bank resided in New Zealand and not in the United Kingdom. It had a branch office in London and was admittedly liable for income tax under Sched. D on the profits of the trade exercised at the London office. Among the assets of the London branch in the year ending Mar. 31, 1928, were included holdings of 5 per cent. War Loan, India Government 3 per cent. stock, and securities of two colonial companies: the Grand Trunk Pacific Ry. and the Auckland Electric-power Board. All the interest received on these holdings during the year ending Mar. 31, 1928, was included in the trading receipts in the profit and loss account of the London branch. The interest on the War Loan was paid without deduction of tax. The interest on the India Government stock and on the holdings in the two colonial companies had been taxed by deduction in the ordinary course, but the tax deducted had been repaid to the bank on the ground that it was not resident in the United Kingdom, without prejudice to any of the questions raised on the appeal. As a result of the trading operations of the branch, it always collected larger amounts of money than it paid out on behalf of the head office. It retained the balances due to the head office and used the moneys for trading, and included in its accounts the profits derived from their use. The Crown admitted that in computing the Sched. D tax due on the profits of the business carried on in London the bank was entitled to deduct, in addition to the general expenses of the London office, a due proportion of the interest paid by the bank on money borrowed in New Zealand and of the general expenses incurred by the head office in New Zealand, as representing the cost of obtaining the money by the use of which in London the trading receipts were earned. The

amount to be so deducted had been agreed between the parties subject to the following questions, which were in dispute :

(a) Whether, if the interest on the securities mentioned above was excluded from the trading receipts brought into the computation, any deduction should be allowed for the cost of obtaining the money by the use of which such interest was earned; and

(b) Whether, in addition to the interest and expenses admitted by the Crown, a further allowance should be made, on the ground that a part of the profits included in the accounts of the London branch should not be treated as profits of a trade exercised by the bank within the United Kingdom in view of the operations of the head office in obtaining the money used in London.

The bank contended before the special commissioners that the interest on the 5 per cent. was exempt from income tax under the Income Tax Act, 1918, s. 46 (1); that the interest on the India Government stock was exempt under Sched. C, Gen. Rules, r. 2 (d), and that this exemption extended to interest on securities of colonial companies by virtue of Sched. D, Misc. Rules r. 7 (2); that these exemptions were absolute and unlimited, and that the interest exempted could not be taxed indirectly by inclusion in trading receipts; that in arriving at the balance of the profits or gains of its trade in London under Sched. D, Case I, the bank was entitled to deduct all the expenses incurred in earning those profits without regard to their taxation under other schedules or exemption; that the whole cost of obtaining the money used in earning the profits of the London trade was allowable as a deduction, although a part of the profits was exempted from income tax; and that a part of the profits received by the London branch was attributable to the operations of the bank in New Zealand and should be excluded from the computation.

The Crown contended that the interest on the securities formed part of the receipts of the trade exercised in the United Kingdom and could therefore be properly included; that the provisions of the 1918 Act and the rules excepting certain interest paid to persons not resident in the United Kingdom did not exclude any trading receipts of a trade exercised in the United Kingdom; that in any event Sched. D, Misc. Rules, r. 7, was mere machinery for assessment and collection and did not extend the exemption conferred by Sched. C, Gen. Rules, r. 2 (d) to interest on securities of colonial companies; alternatively, that if the profits must be diminished by these exemptions, only the net profits derived from the securities should be excluded, and the cost of obtaining the money used in earning the interest omitted from the trading receipts should not be allowed to be deducted as a mere expense; that all the profits included in the computation arose from the exercise of trade in the United Kingdom by the use of money in London, and that

no deduction was allowable other than the actual cost to the bank of earning such profits.

The commissioners decided as follows :

1. The produce of the bank's holdings was a trading receipt, and the cost of earning it was a trading expense, of the business carried on by the bank in London.

2. Apart from any exemption, interest and dividends on securities and possessions out of the United Kingdom which form part of the trading receipts of a business carried on in the United Kingdom can be included in the computation of the profits of that business under Sched. D, Case I, where they have not suffered tax under Case IV or Case V.

3. The exemptions in the Income Tax Act, 1918, s. 46, and Sched. C, r. 2 (*d*), must be regarded as conferring immunity from tax on the interest on the 5 per cent. War Loan stock and the India 3 per cent. stock—whether as interest or as a component part of the profits of the bank's business.

4. As to exemption of interest or dividends on the stocks, shares or securities of foreign or colonial companies no question can arise as to the exemption of such income except as a component part of the profits of a trade carried on in the United Kingdom; Sched. D, Misc. Rules, r. 7 (2) must be construed as applying Sched. C, r. 2 (*d*), to dividends of foreign and colonial companies, and therefore the dividends on the stock of the two colonial companies, as well as those on the 5 per cent. War Loan and the India 3 per cent. stocks, must be excluded from the computation of the bank's profits for assessment under Case I.

5. The bank was entitled to deduct in its Case I computation the whole of the expenses of the trade carried on by it in London, notwithstanding that some of the receipts earned were excluded on the ground of exemption.

6. Only the actual cost incurred by the bank, whether in London or New Zealand, in earning the trading receipts of the London branch could be set off against those receipts in arriving at the assessable profits arising to the bank from the trade exercised by it in London, and no further deduction could be allowed on the ground that a notional profit should be attributed to the bank's operations in New Zealand.

The Crown appealed from the commissioners' decision, and a special case was stated for trial in the King's Bench Division. LAWRENCE, J., held that the Income Tax Act, 1918, s. 46, applied to interest on War Loan the beneficial ownership of which was in the respondent bank; that Sched. C, r. 2 (*d*), exempted the Indian securities from tax; that Sched. D, r. 7 (2), incorporated the provisions of Sched. C, r. 2 (*d*), and therefore protected the colonial securities; and that the expenses which were attributed by agreement to the profits of the London branch, and which were impliedly found by the commissioners to have been exclusively laid out for the purposes of the bank's trade in London, could not be excluded merely because some part of the profits to earn which those expenses had been incurred were exempt from income tax. He therefore confirmed the whole of the finding of the commissioners.

The Crown appealed.

Reginald P. Hills (the Attorney-General, *Sir Donald Somervell, K.C.*, with him) for the appellant.

A. M. Latter, K.C., and *J. S. Scrimgeour* for the respondents.

Hills : The Income Tax Act, 1918, s. 46, only exempts interest as such, and not if it is held by a trader and can be assessed under Sched. D as one of the component parts of the trade. By sect. 49 (2) this interest is assessable under Sched. D, Case III. The Crown can elect as between cases, and it therefore elects to tax this interest under Case I as a component part of a trade. Sect. 46 refers only to interest held by a person who is not a trader : *Liverpool & London & Globe Insurance Co. v. Bennett* (2). The effect of Sched. C, r. 2 (d), is to take the interest on the Indian securities out of Sched. C and leave them at large, so that they can be dealt with under Sched. D as a trading receipt in the hands of a trader. Rule 2 (d) therefore has no effect on the interest. Sched. D, r. 7 (2), merely applies to the machinery provisions of Sched. C : *Fry v. Salisbury House Estate, Ltd.* (3). In that case, LORD ATKIN said, at p. 456 :

I find it impossible to conceive that these various commissioners had an option to encroach upon the duties of one another, or that the taxpayer was exposed to having his income freed from the restrictions and exemptions imposed by statute under one schedule in order to be subject to a different set of restrictions and exemptions imposed by statute under another schedule.

Sched. D, Case IV, has always been interpreted as applying only to non-residents, and if this interest on the colonial stocks was charged under that case, there would have been no reason for exempting it by reference, as is said to be done by para. (2). Sched. D, Cases I and II, r. 3, which provides that no sum shall be deducted in respect of disbursements or expenses not being money wholly expended for the purposes of the trade, are intended to exempt only money wholly expended for the purposes of earning profits brought into charge : *Strong & Co., Ltd. v. Woodfield* (9).

Latter, K.C. : The exemption conferred by the Income Tax Act, 1918, s. 46 (1), in respect of the interest upon persons not ordinarily resident in the United Kingdom, is absolute and unconditional, and is not qualified by any proviso that it shall not apply to such interest when it forms part of the profits of a trade. The Crown has no option in dealing with such interest. The *Liverpool & London* case (2) does not apply to income which is exempt from tax. In that case the interest was taxable either under Case IV or Case I at the option of the Crown ; here the income is entirely exempt from tax and cannot be charged under any case. The India stock is taxable only under Sched. C and cannot therefore be taxed under Case I. The Crown has an option to elect between the cases of Sched. D, but not between schedules : *Fry v. Salisbury House Estate, Ltd.* (3) ; *Thompson v. Trust & Loan Co. of Canada* (4). The exemption conferred on non-residents by Sched. C, r. 2 (d), is absolute, and does not have the effect of taking the

income out of Sched. C and enabling it to be taxed under Sched. D, Case I.

The dividends from foreign and colonial companies, if entrusted to a paying agent in the United Kingdom, can only be taxed under Sched. D, Misc. Rules, r. 7, Rule 7 (2) provides that all the provisions of Sched. C, including the exemption of non-residents, are to apply in such a case: Finance Act, 1924, s. 27. The expenses incurred for the purpose of earning the interest and dividends which, it is submitted, are exempt from tax, are nevertheless expenses wholly and exclusively laid out for the purposes of the bank's trade within Sched. D, Cases I and II, r. 3 (a), and must be deducted for the purpose of arriving at the profits of this trade in so far as they are taxable.

Hills in reply.

LORD WRIGHT, M.R.: In this appeal the court are all agreed what their decision ought to be. It is a case of importance and of complexity and involves four points which are to a large extent separate and distinct, though two of them have common aspects. The taxpayer here, the Bank of New Zealand—the respondent on this appeal—is a bank registered and resident in New Zealand; it carries on, and at all material times did carry on, its banking business in London, but not so as to be resident or ordinarily resident in the United Kingdom. It carries on its banking business at a branch office in London, and there is no question but that, in respect of profits arising from the trade exercised at the London branch office, it is assessable to income tax under Sched. D, Case I. The two main questions which have to be decided are, first: what limitations are to be imposed upon those profits? That involves an investigation of certain exemptions which, it is claimed, have to be applied in considering what are the assessable profits under Case I. Then there is a second main question, which arises in the event of the first question being decided against the revenue authorities, and that is: what deductions are permissible under the rules in order to ascertain the balance of profits and gains under Case I?

There are comparatively few facts which I need detail. There is a summary or skeleton statement of the financial position of the bank, so far as is material for the purposes of this case—that is to say, a statement of the material receipts and expenses of the London branch. That summary of accounts refers to four sets of receipts on the credit side. One is interest on 5 per cent. War Loan, amounting to £75,621; the second is interest on India 3 per cent. stock, which amounts to £1,500; then there are two other items which go together: one is interest on Grand Trunk Pacific Railway bonds, which is £412, and the other is interest on Auckland Electric-power Board bonds, £1,023. These four figures are the items about which the dispute centres. On the other

side, there are set out working expenses and various other expenses, and a particular matter to which I need refer here is an item : " Interest and expenses paid in New Zealand in respect of money borrowed in New Zealand and used at the London branch." That total figure is £112,868 ; but we are only concerned here with a proportionate amount of that figure, namely £41,262, which is said at this stage in the case to be in respect of money borrowed in New Zealand and used in the purchase of the following assets of the London branch—and then are set out the four sets of receipts to which I have already referred. I am not quite clear that that is quite accurate, because the £112,868, and therefore the £41,262, seem from a subsequent part of the case to include not only the cost of obtaining the money, which had been borrowed in New Zealand, remitted to London and used for the purchase of these particular bonds, but also an *aliquot* proportion of the overhead expenses of the London branch. I mention that in passing.

The main charge here is for interest. The money used for the purchase of these various securities in London was part of the floating capital used by the bank in its trading at its London branch, and it is not necessary to consider why. It is a matter of ordinary business. As a matter of accounting between the two sections—between the London branch and the main office—the London branch was debited with these interest charges. They retained these moneys out of amounts collected and used these balances due to the head office, so far as they retained them, in the ordinary course of their banking business, either for making loans or for purchasing bills or securities in London, the profits derived from that use of the money being included in the accounts of the London branch. One other thing I may mention : the four securities to which I have already referred are different in certain incidents in their character. The War Loan was dealt with by being paid without deduction of tax, and was not assessed to tax at all so far. The interest on the India Government stock and on the securities of the two colonial companies had been taxed by deduction in the ordinary course—that is to say, by the agents who were entrusted by the Indian Government or the various companies with the payment in this country of the interest on the securities. The tax deducted has been repaid to the bank on the ground that it was not resident in the United Kingdom, but without prejudice to any of the questions raised on the appeal.

The general position is this : that if the Crown succeed on their claim that these four sets of securities are all liable to taxation under Sched. D, Case I, the interest will amount to £78,556, and that is the first main question divided into three branches, because different considerations apply to the three classes of securities. Then, if that is decided against the Crown, a further point arises whether the £41,262 which is treated as paid in respect of the money invested in the securities ought to be

excluded in ascertaining the balance of profits and gains under Sched. D, Case I, or whether any part of that should be so excluded.

The special commissioners before whom the case came and LAWRENCE, J., before whom it came on appeal, have both decided against the Crown and in favour of the taxpayer, the bank. I think it is convenient to deal with these three points separately, though the second and third points do to some extent overlap. I may say at once that a great many cases have been cited to this court and a great many arguments have been adduced. If I do not refer in detail to all those cases or to all those arguments, it must not be thought that I have failed to do so out of any disrespect to, or from any disregard of, the cases and the arguments, which I have considered to the best of my ability. But it seems to me that many of these authorities and many of these contentions do not really assist in coming to a conclusion on the matters before the court, and I have therefore felt it best to decide the case as far as I can on the construction of the relevant sections and on the broad principles which it appears to me to be necessary to apply in construing these sections.

I shall deal first with the matter of the War Loan, because that depends on a quite different set of sections. The position is this : it is not denied by the Crown that the War Loan interest, as interest, is immune from taxation, and therefore cannot be taxed as interest either under Sched. C or under Sched. D, Case III. The exemption under the sections to which I shall refer in a moment is admitted, but it is said that the revenue authorities are entitled to disregard the possibility of taxing under the other schedules or cases, or to disregard the immunity under the other schedules or cases, and to fix their attention on Sched. D, Case I ; and they claim that they are entitled on any view to tax under that case. The question which arises more particularly in the two following classes of interest, but which also arises here (or perhaps arises equally in all three), is that the bank is not a resident but is a trader, and it is therefore said that an exception which only applies to it as a non-resident has no bearing at all upon the claim to immunity in respect of its position as a trader, because, as is well known, the essence of liability—having no other complications under Sched. D, Case I—in questions of this sort is that the taxpayer is carrying on a trade in this country, and it does not matter whether he is resident or not ; the essential feature is that he is trading in the country. That is under rule 1 (a) (iii). It is necessary to consider what is the exemption relied on by the respondents here. That is to be found, as the law now stands, in the Income Tax Act, 1918, s. 46. I ought perhaps to read that section, as it is so important in this case. It seems to me to be perfectly clear in its terms, taking it as it stands in the Act of 1918. It is in these terms :

Where the Treasury have before the commencement of this Act issued or may

thereafter issue any securities which they have power to issue for the purpose of raising any money or any loan—

then follow the material words—

with a condition that the interest thereon shall not be liable to tax or super-tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest of securities issued with such a condition shall be exempt accordingly.

Then there is a provision as to the securities forming part of the investments of a foreign insurance company. That provision I do not think throws any real light on the question here. There is, however, another section to which I ought to refer, and that is sect. 49 (2) :

The Treasury may direct that any exchequer bonds, issued under their authority during the continuance of the present war and a period of 6 months thereafter, and any securities issued under the War Loans Acts, 1914 to 1917, or any Act amending those Acts shall be issued, or shall be deemed to have been issued, subject to the condition that the interest on the bonds and securities shall be paid without deduction of tax, and the interest shall be so paid accordingly, but any such interest shall be chargeable under Case III of Schedule D.

I think it is useful, without going into the history of this particular line of legislation too minutely, to refer to one section in the Finance (No. 2) Act, 1915, namely, sect. 47, which was reproduced in a section of the Act of 1918 which I have just read ; but be it noted that the Finance (No. 2) Act, 1915, s. 47, has not been repealed, and must therefore be read along with sect. 46 of the Act of 1918 :

The Treasury may, if they think fit, during the continuance of the present war and a period of 12 months thereafter, issue any securities which they have power to issue for the purpose of raising any money or any loan with a condition that neither the capital nor the interest thereof shall be liable to any taxation, present or future, so long as it is shown in manner directed by the Treasury that the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom, and securities issued with such a condition shall be exempt accordingly.

That was slightly modified in the Finance Act, 1916, s. 44, but for immediate purposes it is necessary, I think, only to refer to sect. 46 of the Act of 1918 in this connection. Sect. 46 is in my opinion a perfectly general exception ; the language is unqualified. It says that the securities are not to be liable to tax or super-tax if the Treasury have issued them subject to the condition which is stated. We have been supplied with a copy of the prospectus issued by the Treasury, dated 1917, as an illustration of what the course is to be taken in these cases, and this is what it says :

Stock and bonds of these loans and the dividends payable from time to time in respect thereof, will be exempt from all British taxation, present or future, if it is

shown in the manner directed by the Treasury that they are in the beneficial ownership of a person who is neither domiciled nor ordinarily resident in the United Kingdom of Great Britain and Ireland. Further, the dividends payable from time to time in respect of stock and bonds of these loans will be exempt from British income tax, present or future, if it is shown in the manner directed by the Treasury that the stock or bonds are in the beneficial ownership of a person who is not ordinarily resident in the United Kingdom of Great Britain and Ireland, without regard to the question of domicile.

I do not read that as throwing any light on the construction of sect. 46, but it does seem to me to state correctly what sect. 46 means, and to give effect to its terms. If, notwithstanding what I regard as the clear language of this section, it was construed as merely relating to interest as interest—which is the expression used in argument by Mr. Hills as defining its meaning—with the consequence that the owner of the securities (in this case the bank) can only escape taxation if the tax is sought to be imposed upon him under Sched. D, Case III, and that he is liable to be taxed under the provisions of Sched. D, Case I, then it seems to me that a result is being reached which is quite contrary to the apparent meaning of the particular legislation and which, to my mind, involves the very serious frustration of what I imagine the parties, taking the securities from time to time, might be assumed to have contemplated. It is not necessary to consider what effect a provision of this sort might have upon individuals in determining them to put their money into this class of security, and the section avails for anyone who fulfils its conditions, whether they are private individuals in a small way or whether they are big national or colonial banks or business institutions, such as the bank in question. The section was inserted in 1915, when it was undoubtedly desired to attract subscriptions to loans which were being put forward, as we well remember in those critical years of the war. It seems to me that it would be rather deplorable if, notwithstanding what I regard as the clear language of sect. 46, the owner, not being ordinarily resident in the United Kingdom, were still taxed on this money as part of his trading profits, and in my view that is not the true construction of the section. It is not introduced in respect of any particular schedule; it is quite general, and that it is quite general is made even more apparent when reference is made to the Finance (No. 2) Act, 1915, s. 47. I see no ground at all consistent with ordinary principles of construction for cutting down its meaning and treating it as only applicable to Sched. D, Case III, the case under which, by sect. 49, War Loan securities were taxable if they were taxable at all. If they are not taxable at all, then obviously they can neither be charged under Sched. D, Case III, nor under any case of Sched. D at all. As I say, the matter is purely one of construction, and I do not think there is any authority which throws any direct light on a matter of this sort. A reference has been made to the case of *Cadbury Bros.*,

Ltd. v. Sinclair (1), where effect was given to an Act of Parliament—an old Act of 1660—which provided in respect of a particular piece of land that it should be immune from every charge under any public tax. The question arose in a somewhat curious way. Cadbury Bros., who were occupying the land in question as lessees for the purposes of their business, were held to be debarred from deducting the annual value of the land. In their capacity as occupiers of the land it was claimed that they were entitled to deduct, in estimating their profits and gains, the annual value of the land which they so occupied for the purposes of their trade, and it was held that if they were allowed to do that they would be, as occupiers, indirectly taxed to pay a sum of money or otherwise charged in respect of the lands contrary to the Act of Charles II—that is the Act to which I have just referred—and it was held that they were entitled so to deduct it. It was argued that as this land was not separately assessed and charged under Sched. A, because exempted from taxation under the Act of Charles II, therefore the annual value could not be deducted under the well known provisions of Sched. D, Case I; and, as I say, that contention was rejected as involving a contravention of the Act giving the immunity. Equally, in my opinion, there would be a contravention of sect. 46, construed, as I construe it, in wide terms and as a general exemption, if, notwithstanding sect. 46, the bank was taxable in respect of its War Loan under Sched. D, Case I, as part of their trading receipts.

In my opinion the effect is that these receipts and interest are taken entirely for these purposes out of the taxable income of the bank in this country. Mr. Hills' ingenious argument started with the proposition that sect. 46 only related to interest as such, and he further, praying in aid sect. 42 (2), contended that the interest in question was transferred to Sched. D, Case III, that the effect of sect. 46 was merely to debar the Crown from enforcing that charge, and that the Crown was therefore free to charge under Sched. D, Case I, as part of the trading profits, notwithstanding sect. 46, which he said was irrelevant in this connection; and he relied very strongly on the well known proposition that the revenue authorities, in certain cases, may elect under which case of Sched. D—because that is all he is concerned to argue in this court—they will charge the taxpayer.

He relied on the case of the *Liverpool & London & Globe Insurance Co. v. Bennett* (2). In that case, which is very familiar, an insurance company which carried on businesses here and abroad had very large investments in foreign states, as they were required to have under the relevant laws of the states as a condition of carrying on an insurance business there. They did not bring the interest on those investments home to this country. They received it abroad and they did not remit it here. Under the law as it then stood, under the Act of 1842, Sched. D,

Case IV, the duty to be charged was only to be computed on the full amount of the sums, so far as the same could be computed, which had been or would be received in Great Britain in the current year without any deduction or abatement. What the revenue authorities did was to ignore the question of charging under Case IV, because if they had gone to that particular cupboard they would have found that the cupboard was bare; but they decided to charge under Case I, and all the three courts who tried the case decided that they were entitled to do so. It is sometimes put on the footing that where you have, as you have in Sched. D, a number of cases, all cases of the same schedule and the same tax, and those cases overlap, as they do in certain events and in certain matters, and it is more beneficial to the revenue authorities to proceed under one case rather than under the other, they can choose which case they proceed under. For instance, if they proceed under Case I they will be able to tax traders who are non-resident, but they will be bound to allow against the amount of the interest, in a case such as that in question, the expenses of the business. The interest is part of the receipts and has to be brought into account and, on the other side, the expenses of the business will have to be brought into account. On the other hand, if they charge under Case IV, they will not be subject to abatement by reason of expenses; they will recover on the basis of the actual interest recovered. In this particular case there was the wider and more convincing reason that there was no taxable subject under Case IV, but that, in my opinion, throws no light upon a case like the present. There was no exemption or exclusion in question in that case; it was simply a question of the content of the subject matter of charge under Case IV. In the case now in question, according to my construction of sect. 46, there is a definite exclusion from all taxation, and there can be no question at all of taxing either under Sched. D, Case III, or under Case I. Whichever cupboard the revenue authorities go to in the circumstances of this case, they will find it entirely void for purposes of taxation so far as this War Loan is concerned. I agree, therefore, with the decision of the commissioners and the court below.

The next part of the case involves rather different considerations, but again it raises the same question—namely, whether the bank is exempted from taxation by the provisions of the Act in such a way that it cannot be taxed under any specific schedule—in this case Sched. C—because it is a non-resident; and, as in the previous case, whether the revenue authorities, notwithstanding such exemption as exists, are still entitled to charge under Sched. D, Case I, on the footing that the interest in question constitutes profits of a non-resident trader. The position here depends on the general rules of Sched. C. The interest of the India stock in question constitutes profits payable out of the public revenue. There are certain rules applicable to Sched. C which define the content

and nature of the charge. The first body of rules is called general rules. I need not refer to r. 1, but r. 2 is relied on as embodying the exemption. It says: "No tax shall be chargeable in respect of" certain items, and the first is:

(a) The stock, dividends or interest transferred to accounts in the books of the Bank of England in the name of the Treasury or the National Debt Commissioners in pursuance of any Act of Parliament, but the Bank of England shall transmit to the special commissioners an account of the total amount thereof; (b) the stock, dividends or interest belonging to the Crown in whatever name they may stand in the books of the Bank of England; (c) the stock, dividends or interest of any accredited minister of any foreign state resident in the United Kingdom.

The content of (a) has not been very precisely defined by either side but it is perfectly clear that (b) and (c) are dealing with an absolute exemption. Then comes (d), which is material for the purposes of this case:

The interest or dividends on any securities of a foreign state or a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the commissioners of inland revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom.

Then there are other provisions which I may ignore, but I think r. 3 ought also to be looked at. It is in these terms:

Any bank carrying on a *bona fide* banking business in the United Kingdom shall be relieved, by repayment or otherwise, from tax under this schedule in respect of the interest on any securities which the bank proves to the satisfaction of the special commissioners to represent subscriptions by the bank to any Government loan issued for the purposes of the present war either before or after the passing of this Act, and the bank shall include the amount of any such interest in the computation of its profits or gains for the purpose of assessment under Case I of Sched. D.

That r. 3 affords a striking contrast to the rule which I have just read in r. 2. In the first place it is limited to tax under this schedule, and in the second place it provides in terms that the amount of such interest is to be included in any assessment under Sched. D, Case I. It is contended on behalf of the bank accordingly that r. 2 (d) is not a tax limited to charges under Sched. C, but is general in the exemption which it gives, and that therefore the same result follows in connection with the India stock—namely, that the owner can claim an exemption if he is able to show to the satisfaction of the commissioners of inland revenue that he is not resident in the United Kingdom.

There are other rules to which I may refer, under the heading:

Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are entrusted.

That will deal with cases under r. 2 (d). There are elaborate provisions

setting out, among other things, the way in which the tax in a case of this sort has to be dealt with. In the first place, the person responsible for collecting the tax is the person entrusted with the payment of the dividends, and he is under an obligation to make returns to the inspectors appointed by the commissioners of inland revenue, and the special commissioners are to have all necessary powers to examine and check the books and accounts of dividends :

and shall assess and charge the dividends at the rate of tax in force at the time of payment, but reduced by the amount of the exemptions (if any) allowed by them, and shall give notice of the amount so assessed and charged to the person entrusted with payment—

that is to say, the agent or nominee of the foreign or colonial government who is the person responsible to pay the dividends on behalf of the person entitled thereto and to pay the tax to the general account of the commissioners. That in itself is in one sense machinery, but it has this effect : that the tax is not directly chargeable upon the owner of the security but is chargeable upon the person entrusted by the foreign or colonial government with the duty of paying in England the interest. Though it may be that anyone who is exempt from a liability to pay may have that exemption made effective in the returns provided by the person entrusted with the payment, it is not excluded, and it seems to be recognised as proper practice that, if a deduction has in fact taken place, the owner may on appropriate proceedings claim a repayment of the tax deducted. That was done in the present instance, as it is stated in the case :

The interest on the India Government stock and on the securities of the two colonial companies had been taxed by deduction in the ordinary course, but the tax deducted therefrom had been repaid to the bank on the ground that it was not resident in the United Kingdom but without prejudice to any of the questions raised on the appeal.

That being the general position, it is contended on behalf of the Crown that, though this provision is effective as regards charges under Sched. C, it has no effect at all as regards an alternative claim under Sched. D, Case I. While Mr. Hills has conceded in this court, on the basis of *Fry v. Salisbury House Estate, Ltd.* (3), that he cannot contend that the Crown has a right of election between Sched. C and Sched. D, yet he says it is not necessary so to contend in this case, because under the terms of Case III, r. 1 (c), these are

profits on securities bearing interest payable out of the public revenue other than such as are charged under Sched. C.

Admitting, as he does, that they are not chargeable under Sched. C, he uses that sub-rule as bringing the matter within the purview of Sched. D, and then he says that the revenue authorities have the right

of election to tax under Case I or Case III of Sched. D, under the item "profits on securities bearing interest payable out of the public revenue other than such as are charged under Sched. C." I do not, however, follow that his argument is that the exemption would not also apply to the revenue when placed in Case III. If that is so, the curious result would follow that the exemption takes the profits out of Sched. C and transposes them to Sched. D, Case III, without destroying the exemption which would still apply; although, according to the argument, it is limited to Sched. C, with the only practical result that it gives the Crown in that event an option to a charge under Sched. D, Case I. But for various reasons I cannot accept that argument, which appears to me to be very artificial and not well founded.

The real and final argument against the view which Mr. Hills put forward is, however, to my mind this: that the exemption under Sched. C, r. 2 (*d*), is an unlimited exemption, as unlimited as the exemption which I have already discussed in the case of War Loan. I think that appears from the mere language of Sched. C, r. 2 (*d*), but if there were any doubt about it I think that doubt would be resolved by the consideration that this Act is a consolidation Act and that Sched. C, r. 2 (*d*), is, as I think, merely repeating the exemption which was given for the first time to securities of this class in the Finance Act, 1910, s. 71. That exemption, which is unlimited in language, cannot be taken as appertaining to any particular schedule, except on the ground, of course, that there could be no charge on these particular securities except under Sched. C; but the section itself, in subsect. (2), runs in these terms:

Income tax shall not be payable in respect of the interest or dividends of any securities of a foreign state or a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the commissioners that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom.

That seems to me to cover any question of income tax in respect of the interest or dividends in question. I think that the effect of that provision is reproduced in the words:

No tax shall be chargeable in respect of—(*d*) the interest or dividends on any securities of a foreign state or a British possession,

and as I regard the exemption in sect. 71 (2) as unlimited, so I construe the exemption in Sched. C, r. 2 (*d*), of the Act of 1918, as equally unlimited. The effect of the exemption is not changed by the mere fact that, for purposes of drafting, there is a different arrangement, and because r. 2 (*d*) is placed in the position where it is. That, I think, sufficiently disposes of the objection, and makes it unnecessary to consider any further the somewhat artificial suggestion that the only effect of Sched. C, r. 2 (*d*), is to remove the tax from Sched. C and put it into

Sched. D. Mr. Hills, as I understand, has accepted the position, so far as this court is concerned, that there can be no interchange as between one schedule and another. He treats that point as decided by this court in the case of *Thompson v. Trust and Loan Co. of Canada* (4), and he accepts, so far as this court is concerned, the views expressed by LORD ATKIN in *Fry v. Salisbury House Estate, Ltd.* (3), at p. 455. I should like to read a short passage from that judgment, because it is peculiarly applicable to the whole of the argument of Mr. Hills in this case. At p. 454, LORD ATKIN says :

The scheme of the Income Tax Acts is and always has been to provide for the taxation of specific properties under schedules appropriated to them, and under a general Sched. D to provide for the taxation of income not dealt with specifically.

I observe the words "not dealt with specifically," because these taxes are dealt with specifically in the Act of 1918 under Sched. C, and therefore Sched. D on that basis cannot apply at all. LORD ATKIN proceeds at pp. 454 and 455 :

Schedule A provides for the taxation of income derived from property in land B for income derived from the occupation of land ; C for income derived from Government securities ; E for income derived from employment in the public service. It is unnecessary to go further back than the Income Tax Act of 1842, the provisions of which were incorporated in every Customs and Inland Revenue or Finance Act up to 1918, when the present Consolidation Act was passed. I need not repeat the familiar schedules altered and extended by the Act of 1853. It is only necessary to refer to sect. 100 of the Act of 1842, which defined the tax to be imposed under Sched. D. . . . "The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules A, B, or C, and to every description of employment of profit not contained in Sched. E."

My Lords, nothing could be clearer to indicate that the schedules are mutually exclusive ; that the specific income must be assessed under the specific schedule ; and that D is a residual schedule so drawn that its various cases may carry out the object so far as possible of sweeping in profits not otherwise taxed. For this reason no doubt the actual schedule was drawn in the widest terms.

Then LORD ATKIN proceeds, after quoting the above words :

Such language covers income from land in Sched. A and from Government securities in Sched. C. Its true meaning is made apparent by sect. 100. Moreover, the dominance of each Sched. A, B, C and E over its own subject matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income dealing with allowances and exemptions, with the mode of assessment and with the officials whose duty it is to make the assessments. Thus, under A and B the assessment and collection is regulated by the general commissioners ; under C the assessment is by commissioners specially appointed for the purpose ; under E the assessment and collection are made in the departments or by the officers of the public corporations concerned ; while under D the assessment is regulated by additional commissioners. I find it impossible to conceive that these various commissioners had an option to encroach upon the duties of one another, or that the taxpayer was exposed to having his income freed from the restrictions and exemptions imposed by statute under

one schedule in order to be subject to a different set of restrictions and exemptions imposed by statute under another schedule.

Later on, at p. 456, LORD ATKIN says :

I am of opinion that income derived by a trading company from investments of its funds, whether temporary or permanent, in Government securities must be taxed under Sched. C, and cannot for the purposes of assessment under Sched. D be brought into account.

I will not read any more of that passage, which, I venture to think, is of great importance in considering the various arguments advanced in this case. It is, I think, quite wrong to say that Sched. C, r. 2 (*d*), is merely dealing with the machinery of collection ; not only does it contain an exemption, but, by its terms, it gives a right of repayment if necessary to a person who is not resident in the United Kingdom, and the various rules as to interest, and so forth, which are set out in the second and third sets of rules under Sched. C, are rules which, as LORD ATKIN points out, deal with substantive matters, namely, the imposition of the charge, and the responsibility for paying the charge upon the person entrusted, and various ancillary rights and responsibilities which flow from that position.

On this point as a whole, my conclusion is that the words of Sched. C, r. 2 (*d*), are sufficient to embody a complete and general exemption in respect of all taxation under the Act of 1918. I am, of course, in this judgment here as in other places not dealing with super-tax at all, but with matters arising on what used to be called "ordinary income tax."

I pass now to the third head, namely, the question of the securities of the two colonial companies. That raises a different question, because in order to deal with that case it is necessary to arrive at a conclusion as to the meaning of Sched. D., Misc. Rules, r. 7 (1). If the construction of that rule is held to be of a particular nature, its effect will simply be to throw the income of these particular securities into the same class and into subjection to the same rules as I have held should be applied in regard to foreign and Dominion securities. Whether or not that is so, is a matter not without difficulty, but I have come to the conclusion in agreement with the commissioners and the learned judge that r. 7 (1) has that effect, and that, therefore, the same conclusion applies to these securities as that which applies to those which I have last been discussing.

There are, however, various matters to be considered in order to justify that conclusion. Rule 7 (1) appears, as I have indicated, in the body of miscellaneous rules, but I do not think that the position in which, for reasons of draftsmanship or for convenience, a provision appears in an Income Tax Act can in any way be treated as decisive of the scope and effect of the provision. I should like to refer to a passage from LORD SUMNER's judgment in *Kirke's Trustees v. Inland Revenue*

Comrs. (5). LORD SUMNER there and the House of Lords were dealing with the question as to the right of repayment of excess profits duty, and the language which had to be construed was this (p. 583) :

Where any person has paid excess profits duty, the amount so paid shall be allowed as a deduction in computing the profits or gains of the year which included the end of the accounting period in respect of which the excess profits duty has been paid ; but where any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received.

That was found in the Income Tax Act, 1918, Sched. D, Cases I and II, r. 4 (1). LORD SUMNER, dealing with it, says this, at p. 586 :

The express mandatory terms of the sentence show in carefully chosen language that he [that is, the person who enjoys this advantage] is to submit to something by reason of his having previously enjoyed this advantage in the shape of repayment of an amount previously paid by way of excess profits duty. Something which is not a profit, but is only a money repayment, something which may not result in a profit because although trading goes on there is so great a loss on the year that this repayment does not make up the deficit ; something which may not be a trading profit, because trading has ceased altogether, nevertheless is to be treated as profit and as profit for the year.

Then LORD SUMNER, a little later, proceeds :

I think, therefore, that the word " treated " is an apt word to impose a charge.

Then, later, LORD SUMNER says :

The only difficult point in the case, I think, is the effect of transferring the section, which was one of the paragraphs headed " Income Tax " in the Finance (No. 2) Act of 1915 into the Consolidated Income Tax Act of 1918. The section then becomes one of the rules applicable to Sched. D, and it has been argued, not without force, that the true charge in the Income Tax Act is to be found in the first clause, and that the rules are only modes of applying the charge previously expressed. The conclusion is drawn that this paragraph being only a rule, does not operate to prevent the principle of construction of that charge laid down in *Brown's* case (6), from applying, and accordingly the repayment is taken out of any charging words. If it is right to hold that " treated as profit " involves chargeability as profit, then the mere fact that these words are words of charge additional to the charge at the commencement of the schedule does not prevent them from being effectual as a charge or render that part of their full meaning surplusage. All that has happened is that there are two statements as to chargeability, and the words " treated as profit for the year " still contain a specific charge.

I rely on that statement as involving this, that the court must consider the exact language and effect of a provision such as that now in question in r. 7 (1), though the fact that the provision merely appears in one of the rules and not in a part of the Act which is ostensibly and specifically of a charging character is something which ought to be borne in mind, and even, to some extent, raises the presumption that no charge is intended, yet if the effect on the true construction of the rule is that it

does embody a charge, then the rule must be construed accordingly. Now, I think that r. 7 (1) cannot be construed in any other way than as imposing a charge with limitations and qualifications.

The income of the securities in question here is dealt with in the same way as the income of the securities which come within Sched. C. The person—a bank, or other financial agent—is entrusted by the foreign or colonial company with the sums out of which he has to pay the interest on the various bonds, and it is natural and proper that such an agent should be accountable to the revenue, just as in the case of foreign and colonial government securities, and that the same system of dealing with the income should be given effect to. It is said that that is merely machinery, but I do not agree. There is involved, first, the responsibility of the agent, then his relief from responsibility if he pays over the amount of the income tax to the revenue authorities; and, finally, the right of either an allowance or repayment in favour of any owner who is under the Act exempt from liability. All these matters go far beyond cases of mere machinery, and I think that the general effect and intention of r. 7 (1) is to put these securities, for the purposes material to be considered in this case—that is to say, a method of payment and, where necessary, an allowance of repayment and exemption—on the same footing as the securities, foreign or colonial government securities, which I have considered as coming under Sched. C. Rule 7 (1) begins by a positive and mandatory provision; I need not read it in detail, but it deals with this type of securities and so forth, and says that where any interest arising out of such securities is

entrusted to any person in the United Kingdom for payment to any persons in the United Kingdom [that is the exact position so far under Sched. C in these matters] the same shall be assessed and charged to tax under this schedule [that is, under D] by the special commissioners.

That finds the assessing authority, and it provides that the person to be assessed and charged to tax is the person entrusted, and that therefore imposes the charge on such a person. It is impossible to say that it is mere machinery. Then it proceeds in cl. 2:

All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and entrusted to any person (other than the National Debt Commissioners or the Bank of England or the Bank of Ireland) for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under this rule.

Now, it is to be noticed at once that the extension is without qualification: “All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends,” and so forth. The argument which has been put forward is that the rules which are so extended are to be read in a limited sense. If you go back to Sched. C, there are

first general rules applicable to C, and then there are "Rules as to interest, etc., payable out of public revenue to or through the Bank of England or the Bank of Ireland, or by the National Debt Commissioners." These obviously cannot apply to the securities dealt with in r. 7 (1) of the miscellaneous rules to which I am referring, and they are expressly excepted in r. 7 (2). Then there are a number of "Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are entrusted." These rules are applicable to the income from the securities that I am now dealing with, and they set out the various provisions as to the person being entrusted with the payment, and so forth—provisions of a character to which I have already referred. No doubt all these things are brought in under r. 7, but there is nothing in r. 7 (2) which limits the scope and the extension. "All the provisions of Sched. C relating to the tax to be assessed and charged" are to be extended, and I cannot see any reason at all why those general words should not include the general rules *mutatis mutandis*. For instance, Sched. C, Gen. Rules, r. 1 is:

Tax under this schedule—(a) shall extend to all profits arising from interest, public annuities, dividends and shares of annuities payable in the United Kingdom—

and so forth; that is obviously inapplicable. But r. 1 (b) is:

[Tax] shall be charged by the commissioners designated for that purpose by this Act; and (c) shall be paid by the persons and bodies of persons respectively entrusted with payment, on behalf of the persons entitled thereto.

These are clearly applicable, though, to some extent, they are repeated, as indeed they must be repeated, in r. 7 (1). Then we come to r. 2, which I have already read, which contains certain exemptions—in particular exemption 2 (d)—and I cannot find anywhere any intention to exclude that general rule 2 of Sched. C from the category of the provisions of C relating to the tax to be assessed and charged, all of which are to be extended to the securities now in question. I think that is the only fair construction of this rule, giving all weight to the circumstance that it appears where it does. That, however, is not a consideration which outweighs the view I have formed as to the general effect of the rule. It is, however, further contended that this is a different case from that last considered of the foreign and Dominion securities, because the latter was subject to the special exemption under sect. 71 of the Finance Act, 1910, and therefore it is easier and simpler in a consolidation Act like the present to construe the exemption in 1918 as having the same effect and scope as the exemption given by the Act of 1910. There is certainly some force in that argument. *Prima facie*, as I have already said, a consolidation Act merely consolidates, and, generally speaking, ought to be construed so as not to change the existing law. But it may change the law. It has to be construed according to its own language and if

its language can be construed only in one way, then it must be construed as changing the law. There is every reason why in a case like this all the provisions of Sched. C should apply to the very analogous case of this foreign interest entrusted to a person in the United Kingdom. The position is identical for practical purposes with that in respect of the foreign government securities. Although I think it is true to say that the Finance Act, 1910, s. 71, does not deal with these securities at all, still that may have been a *casus omissus* which the draftsman in framing the consolidation Act might well have made good when the law was consolidated, as it was in 1918. However that may be, I think that this rule ought to be construed as Mr. Latter has contended, though I do not accept his argument that under the various provisions of the Act of 1853, and so on, it is possible to treat sect. 71 of the Act of 1910 as extending to the particular securities of this character. There is, however, one further point which is of significance, and which, in my opinion, confirms the view which I have arrived at on the construction of the Act of 1918 and of r. 7. In the Finance Act, 1924, s. 27, there is an important provision giving a right of appeal in certain cases from the decision of the commissioners of inland revenue to the special commissioners, where the taxpayer is aggrieved by the decision of the commissioners of inland revenue on any question affecting him of domicile or residence. In subsect. (3) you have this provision :

This section applies to the following questions :—(a) any question as to ordinary residence arising under the Income Tax Act, 1918, s. 46 (1).

That, it will be remembered, deals with the question which has already been discussed in this case ; the language used in the Act is “ ordinary residence.” Then :

(b) any question as to domicile or ordinary residence arising under para. (a) of r. 2 of the rules applicable to Case IV of Sched. D, or under para (a) of r. 3 of the rules applicable to Case V of Sched. D.

These again are exemptions in which the expression is “ domicile ” or “ ordinary residence.” Then :

(c) any question as to residence arising—(i) under para. (d) of r. 2 of the general rules applicable to Sched. C ; or [and this is the material passage] (ii) under r. 7 of the miscellaneous rules applicable to Sched. D in connection with a claim for repayment of income tax made to the commissioners of inland revenue by the person owning the stocks, funds, shares or securities and entitled to the income arising therefrom, or entitled to the annuities, pensions or other annual sums, as the case may be, and from whose income a deduction has been made on account of the income tax assessed and charged under the said rule.

That provision (c) (ii) treats r. 7 as containing a provision in the terms set out. Now, these terms which are set out are the exact terms to be found in Sched. C, Gen. Rules, r. 2 (d) , and they can

only be found in Sched. D, Misc. Rules, r. 7, if r. 7 has incorporated in virtue of the provisions of subsect. (2) the terms of Sched. C, Gen. Rules, r. 2 (*d*) to which I have just referred, and that is exactly the conclusion that I have arrived at merely on the construction of the rule itself in the Act of 1918. That provision is not merely a statutory confirmation or recognition, as it were, of the construction of what r. 7 was thought or intended to be, because under Part III of the Act it is, among other things, by sect. 41 provided that :

Part II of this Act [that is, the part in which the section to which I have been referring occurs] shall be construed together with the Income Tax Acts—

and therefore you cannot construe r. 7 without reading into it the provisions of this section of the Act of 1924, to which I have already referred. There is one other section in the Act of 1926 which points to the same conclusion, and it is sect. 5 of Part II of the second schedule, which says :

(1) Any person who is entrusted with the payment of any interest, dividends or other annual payments which are payable to any persons in Great Britain or Northern Ireland out of the public revenue of the Irish Free State or out of or in respect of the stocks, funds, shares, or securities of any Irish Free State company, society, adventure or concern shall be relieved from the obligation imposed on him by general rule 1 of Sched. C and miscellaneous rule 7 of Sched. D to pay tax thereon on behalf of the persons entitled thereto as regards any such interest dividends or other annual payments in respect of which he furnishes . . . a list.

Then it is further provided in subsect. (3) :

Any interest, dividends or other annual payments in respect of which the person entrusted with payment is by virtue of subpara. (1) of this paragraph relieved from the obligation to pay tax shall be assessable and chargeable under Case IV or Case V of Sched. D as the case may be.

That is to say, these securities and the interest on them are expressly taken out of r. 7, just as they are taken out of Sched. C, Gen. Rules, r. 1, and they are relegated to the position of being the subject of direct taxation instead of subject to deduction by the person entrusted with the payment in England; and, again, Sched. C, Gen. Rules, r. 1, and Sched. D, Misc. Rules, r. 7, are put on the same footing as, having regard to their identity of character, they should be. The conclusion I arrive at, therefore, is that r. 7 incorporates among other things the provisions of Sched. C, Gen. Rules, r. 2 (*d*), and that the same consequences follow from that as follow in the case of the second class of securities with which I have been dealing—that is, the securities of foreign or colonial governments. I agree, therefore, on that point, as I have already said, with the decision of the commissioners and of the learned judge.

So much, therefore, for the three specific items which fall under the first main head of discussion in this case. In all these cases, it having

been decided that the contention of the Crown was wrong and that the interest was exempt from taxation under the Act of 1918, whether under Sched. C or Sched. D, there remains what Mr. Hills described very aptly as the second main head, and that is, what is the amount of deduction for expenses which can be allowed in respect of the general trading profits of the bank at its London branch? That turns upon the provisions of Sched. D and on certain rules. I am, of course, dealing with Case I of Sched. D. Sched. D, Case I, is defined under the rule in these terms :

The tax shall extend to every trade carried on in the United Kingdom or elsewhere, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average ;

and then in the rules applicable to Cases I and II you have this r. 3 :

In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.

That is put in negative form, but it is generally, and I think correctly, treated as being capable of being turned back into a positive enactment, with the result that it provides that " money wholly and exclusively laid out or expended for the purposes of the trade " may be deducted. So far as I know, these are the only two provisions in the Act which are relevant for the discussion of the, so far as I know, novel point which has now been raised. The point is this : The effect of the decision that the interest on the securities in question here should be exempted and excluded is that the assessable profits are reduced by that exemption to the extent of £78,556. The case finds that the expenses which can be attributed to the earning of those profits—that is, to the 5 per cent. War Loan and the India stock and the two colonial companies' securities—are £41,262. It is contended on behalf of the Crown that, if the banks get the benefit of that exemption, it should be deprived of the advantage of deducting this sum of £41,262, being the expenses attributable to the earning of the income which has been held to be immune from taxation. In other words, it is said if the corpus—that is to say, the income—is to be excluded, the accessory—that is to say, the expense of earning it—ought also to be excluded. The exclusion on the one side ought to be balanced by an exclusion on the other, otherwise the taxpayer is getting a double advantage : he is getting his exemption in respect of the interest, and he is also having the additional benefit of deducting the expenses of earning that interest, just as if that interest had been included as taxable. I confess that there seems to be great force in that argument, and if I had been able to find a

warrant for giving effect to that argument in the language of the Act I should certainly have done so, because it seems to me to be both a reasonable and a proper conclusion. The point, as I say, is novel. A number of cases have been cited by Mr. Hills, but I cannot find that they throw any light on this particular question. They are either cases in which it was held that the expenses which were in dispute were not expenses of the trade at all, or, to put it in another form, that they were expenses which appertained not to the trade but to the position of the taxpayer in some other capacity, as, for instance, where the charge appertained to him in his capacity of property-owner or land-owner, or again as in the *Salisbury House* case (3), to which I have already referred, where it was held that the taxpayer was carrying on two separate and distinct trades, and therefore the various exemptions or rules which applied to the one do not apply to the other.

Of the cases in question that have been referred to, there is *Dow v. Merchiston Castle School, Ltd.* (7), *Union Cold Storage Co., Ltd. v. Jones* (8), *Strong & Co., Ltd. v. Woodfield* (9), *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (10). In none of these cases do I find any help for the problem now put before the court. The expenses which are dealt with here by the commissioners are interest on the money borrowed and used to purchase these particular securities, and it would be a suitable conclusion if that could be deducted. There are also, however, expenses in respect of the London overhead charges, which, as I gathered from the case, are also included in this figure of £41,000. The case for the Crown can most forcibly, I think, be put in this way: that this particular sum of £78,000 odd is to be taken out of the trade altogether, it is to be treated as if it had never been there at all. It can be put out of the computation, and, along with it, the cost of earning it should also be excluded, and in that way the trade from both points of view would be considered as if there never had been any such profits at all. But I cannot find in the Act anywhere any provision which would justify any such elimination of a part of the expenses, where, as here, there is only one indivisible trade. It is quite different, as I say, from the cases to which I have referred which Mr. Hills has cited. There is only one trade, and we know exactly what are the expenses of that trade, and Sched. D, Cases I and II, r. 3 (a), says, or it is understood to say, that the expenses of the trade, if the "money is wholly and exclusively laid out for the purposes of the trade," are to be deducted. The result seems to be that the legislature in the Income Tax Acts has expressly provided for certain exemptions and exclusions which will operate when the profits of the trade are being dealt with under Sched. D. Case I, and has, either inadvertently or by design—I know not which—omitted to make any corresponding provision in respect of any allocation or apportionment of the expenses of the trade.

In other words, when, for the purpose of taxation under Sched. D, Case I, you come to compute the profits, you have to exclude altogether this £78,000, because there is, according to the view which the court here takes, express exclusion of these profits, and that reduces one side of the computation, but when you come to the other task of ascertaining the expenses "wholly and exclusively laid out for the purposes of the trade," you are faced with the total sum, and there is no provision for any apportionment. It may well be that that has followed from the circumstance that these exemptions were introduced at a comparatively late date, and the effect of them was not considered in connection with r. 3. I do not know how that may be, but the short result is, as far as my judgment is concerned, that I find no means, consistent with the language of the Act, of giving effect to this contention of the Crown. I think that some such provision ought reasonably to have been included in the Act, but I simply cannot find it. I have not gone through the various complications which may arise in regard to assessing the profits under Sched. D, Case I. I am quite content here to limit myself to the particular problem with which the court is faced and to state the conclusion at which I have arrived.

The result is on the whole case that in my judgment, the appeal fails, and ought to be dismissed with costs.

ROMER, L.J.: LORD WRIGHT, M.R., has dealt so fully with the facts and the law of this case that I have very little to add. In the few observations I shall make I propose to deal with the four questions arising upon the appeal in the order in which they have already been dealt with by LORD WRIGHT, M.R.

In making my observations on the first of those questions, I would like to begin by a reference to the case of the *Liverpool & London & Globe Insurance Co.* case (2), because that authority, in my opinion, has a very direct bearing upon the first question. In that case the court was confronted with the application made by an insurance company, resident and trading here, amongst whose assets were included certain foreign securities such as are dealt with by the Income Tax Act, 1918, Sched. D, Case IV. The company, however, had not received in the year of assessment any interest from those securities; the interest had been allowed to accumulate abroad, and, that being so, under the rules of Sched. D, Case IV, as they then stood, the company was not liable to direct assessment in respect of any of that interest. In those circumstances, the company sought to have excluded from a statement of its profits and gains in its business the interest on those securities which had accrued to it abroad but had not been sent into this country, and they sought to have it excluded by reference to Sched. D, Case IV, saying that, inasmuch as they were not liable to be charged under that

case, Case IV, in respect of that interest, so too they were not liable to be charged in respect of that interest under Case I.

Now, if Mr. Hills' argument on the first point is to be accepted, one would have thought in that case the court would have disposed of the application of the insurance company in a very short way. They would have said: "Sched. D, Case IV, is dealing with interest. Sched. D, Case I, is dealing with profits and gains of a trade—trading receipts; what have we got to do with interest?" That is not the view they took. They dissected the trading receipts; they discovered that among the trading receipts were these items of interest, and they pointed out that those items of interest were dealt with by the two cases, both by Case I and by Case IV, and that the Crown had an option to charge that interest either under Case IV, as it could, or under Case I.

Now, it is perfectly plain, I think, from that case that if the rules of Case IV had in terms excluded all such interest from all taxation, that interest would equally have been excluded from taxation as a trading receipt under Case I. It would not have been possible for the revenue authorities to say: "It is true it is excluded under Case IV, but we claim that we have the right to tax it as a trading receipt under Case I." Of course, one must also point out that in that case the interest was not exempted from taxation by any of the rules of Case IV; it merely did not fall to be charged under Case IV, because it did not happen to have been received in this country.

Now, applying that case to the present one, sect. 46 of the Act of 1918 says that the interest on War Loans shall not be taxed—as I read the section—under any schedule, and in my opinion it is impossible for the revenue authorities to say: "It is indeed exempted from taxation, but only from taxation as interest, and we can charge it as a trading receipt under Case I." I think they are precluded from raising that point by the very decision in the *Liverpool & London & Globe Insurance Co.* case (2). But, apart from that, it appears to me that the words of sect. 46 are quite plain, and that interest on the War Loan is for all purposes of income tax exempt—in the case, of course, of the non-resident. So much for the first point.

The second point, as LORD WRIGHT, M.R., has pointed out, arises under Sched. C, r. 2 (*d*). The question relates to interest on some India stock and without any question at all that interest is dealt with in Sched. C, Gen. Rules, r. 2. It is within this description:

The interest . . . on any securities of a foreign state or a British possession which are payable in the United Kingdom, where it is proved . . . that the person owning the securities and entitled to the interest or dividend is not resident in the United Kingdom.

Now, it is said on behalf of the Crown by Mr. Hills that that rule must be read as though the rule said: "No tax under this schedule shall be

chargeable." The rule in terms says that no tax shall be chargeable in respect of, amongst other things, the interest described in sub-rule (d). In my opinion there is no justification for so qualifying the word "tax." In r. 1 we find this: "tax under this schedule." In r. 3 we find the expression "tax under this schedule." Rule 2, in contradistinction to those two rules, says: "no tax shall be chargeable." One would have been surprised to find, at least I should have been surprised to find, that in cl. (2) this particular kind of interest was only excluded from taxation under Sched. C because, as has been pointed out by LORD WRIGHT, M.R., before the Act of 1918 such interest was excluded from taxation under any and every schedule by reason of the provisions of sect. 71 of the Act of 1910, and, to say the least of it, it is extremely unlikely that when passing the consolidated statute of 1918 and introducing, as it has been introduced by a rule to Sched. C, the provisions of sect. 71, the legislature intended those provisions to have a more restricted operation than they had before.

I now pass to the third question which, I agree, is a rather more difficult one. That question relates to interest on certain securities, in one Canadian company and one New Zealand company. That interest, again, is undoubtedly dealt with by Sched. D, Misc. Rules, r. 7. That rule provides as follows:

(1) Where—(a) any interest, dividends, or other annual payments payable out of or in respect of the stocks, funds, shares, or securities of any foreign or colonial company, society, adventure, or concern—

Those words, of course, plainly include the interest to which I have referred—

are entrusted to any person in the United Kingdom . . . the same shall be assessed and charged to tax under this schedule by the special commissioners.

Then follows subpara. (2):

All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and entrusted to any person . . . for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under this rule.

It will be observed that the subsection does not say: All the provisions of Sched. C relating to the assessment and charging of the tax, but that all the provisions of Sched. C relating to the tax are to apply.

I turn back once more to Sched. C, r. 2 (d). I have already expressed my opinion that that rule provides for complete exemption from taxation of the interest to which it refers. That being so, it is a rule relating to tax under Sched. C and is one of the provisions which, in my opinion, applies to the tax that is to be assessed and charged under Sched. D, Misc. Rules, r. 7.

It is said, and said truly, by Mr. Hills, that before the Act of 1918

came into operation such interest was not exempt in such a case at all, because sect. 71 of the Act of 1910, for some reason or another, did not extend to interest from securities of colonial companies. That is true. But why interest from colonial companies should be placed in this respect on a different footing from interest from securities of foreign states I do not know, and I cannot help thinking that the omission of such interest from sect. 71 of the Act of 1910 was an oversight, and an oversight that was put right, and was intended to be put right, by the Act of 1918. I have no more to say about that question.

I now come to the fourth question, which is, I think, the hardest of them all. Two alternative views may be taken on that question, views which I think I can best explain by an illustration. Supposing that a company—a non-resident company trading here—has in a particular year trading receipts amounting to £3,000, consisting of £1,000 from War Loan and £2,000 from other sources, and supposing that its trading expenses can, properly bringing it under Sched. D, Case I, amount in the year to £600, the balance of profits and gains is £2,400. On that sum the Crown would be entitled to levy tax, but it will be observed that of that £2,400, £1,600 may be said to come from sources of revenue other than the interest of War Loan, and £800 from interest of War Loan, and when the Crown seeks to lay its hand on the £800 for the purpose of taxing it, the taxpayer may say: “No, sect. 46 forbids that; therefore you can tax me only on £1,600.” In other words, the result of sect. 46 would be to remove from the company’s profit and loss account not the whole £1,000 interest on War Loan, but the £1,000 less its proper proportion of the trading expenses of the company. That is one way of looking at it. The other way of looking at it involves the application of sect. 46 at an earlier stage. The application takes place in this way and at this time. When the company is drawing up its profit and loss account, or somebody is drawing it up on its behalf, the moment that amongst the trading receipts is put down this £1,000, the company says: “No, that must be removed from the account altogether, having regard to sect. 46, because, by reason of sect. 46, I am, for income tax purposes, to be treated as being in exactly the same position as though the War Loan I have produced no income at all.” The result of that would be, of course, in the illustration I have given, that a company would be taxed under Case I merely on £1,400.

Now, I confess that the first of those two alternative views possesses for me a certain attraction. On the other hand, LORD WRIGHT, M.R.,—and GREENE, L.J., I understand, agrees with him—has taken the view that the second of those alternatives is to be preferred. I am not so enamoured of the first alternative as to differ from them.

In the circumstances, I agree with LORD WRIGHT, M.R., that this appeal fails on all four points.

GREENE, L.J. : I agree. It is no disparagement to the ingenuity with which the argument for the Crown has been presented to say that, to my mind, at any rate, it is on all four points completely unconvincing.

I will say a few words of my own with regard to each of the four points which have arisen.

With regard to the first point, the question arises in this way : the Income Tax Act, 1918, s. 46, provides that the interest of certain securities shall be exempt from tax and super-tax. The securities in question are securities which have been issued with a particular condition annexed to them, that condition being :

(1) that the interest thereon shall not be liable to tax or super-tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom.

Now, speaking for myself, I find in that language a perfectly clear legislative provision that, so long as the securities are in the beneficial ownership indicated in the section, no tax is to be levied in respect of the interest upon them. To say, as has been said on behalf of the Crown, that the true effect of the section is merely that the interest is not to be taxed as interest but can be taxed as part of an aggregate of profits of trade appears to me to override the perfectly plain language of the section. It is a matter of some satisfaction that this construction which I consider should be placed upon the section will enable the perfectly clear undertaking given in the prospectus when this War Loan was issued to the public to be kept both in the spirit and in the letter.

The second point arises under Sched. C, r. 2. The subject matter with which it is concerned is interest on securities of a British possession, and Sched. C, r. 2, provides that no tax shall be chargeable in respect of that interest in the case of non-residents.

Now, it is to be observed that this particular interest has its proper home in Sched. C. Sched. C is the schedule to which, in the first instance, it is quite plainly appropriate, and it is by that schedule that this class of interest is in fact taxed. Now, when I find that the schedule to which a class of income is appropriate and in which it is dealt with says, in terms, that no tax shall be chargeable in respect of that income in certain circumstances, I myself find it quite impossible to read those words as meaning simply "no tax shall be chargeable under this schedule." The fact that the income is, by its nature, income to which that schedule is applicable in the first instance, makes it impossible, to my mind, to read the words "no tax shall be chargeable" with any such qualification upon them. When the legislature wishes to show that an exemption in a schedule is to be limited to the tax chargeable under that schedule, it does so in plain terms, as indeed it has done in Sched. C, r. 3. In my opinion, the second point also fails.

The third point arises in this way. By Sched. D, Misc. Rules, r. 7 :

(2) All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom—

are to apply to what, for convenience, I will shortly call the dividends of foreign companies. I agree that it is sufficient to conclude this matter to observe that the language of r. 7 (2) is, as my brother ROMER, L.J., has pointed out, to this effect, that all the provisions of Sched. C relating to the tax to be assessed and charged are to apply, and when I turn back to Sched. C and see what are the provisions relating to the tax to be assessed and charged, one of them is unquestionably r. 2. In addition to the matter of exemption which is provided for there, it is worth calling attention to this circumstance, that one of the provisions of that rule in Sched. C in relation to the tax is the provision which provides for the manner in which the exemption is to be given effect to, namely, by allowance or repayment on a claim being made to the commissioners of inland revenue. For my part, it appears to me that the language of r. 2, taken by itself, is quite sufficient to decide the question, but, if the matter be examined a little further, this conclusion is, I think, confirmed.

Mr. Hills contended that the only effect of r. 7 (2) was to import a particular set of provisions relating to assessments which are headed in Sched. C, "Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland, and the National Debt Commissioners are entrusted." He then goes on to say this, that under the second of those rules the special commissioners, when they are busying themselves with the assessment of the paying agents, can, and indeed, if they have sufficient information, should, exempt from the charge any dividends payable to what, for convenience, I call a non-resident, and should do that not by virtue of any express exemption collected from Sched. C, but because by Sched. D itself the tax is limited to non-residents.

I have not myself heard it explained with regard to that last point why it is that the words should not be sufficient to bring under charge to tax dividends payable to non-residents, in view of para. (1) (b) of Sched. D, in which there is no mention of residence at all, and Case VI. However that may be, the result will work out, according to Mr. Hills' argument, in this way, as I understand it. The special commissioners are assessing the paying agents. They will not—and it is common ground that they will not—in probably the majority of cases have before them the information as to the ownership of the securities which would enable them to give effect to any exemption to which an owner is entitled on the ground that he was a non-resident. They will, therefore, assess the

paying agent in respect of the amount which he is to pay over to the owner of the shares.

Now, what is to happen? According to Mr. Hills' argument, the remedy of the taxpayer who is aggrieved by that decision is not a remedy which is governed by Sched. C at all, but is a remedy based on the fact that he has been improperly assessed to tax, or, rather, his dividend has been improperly assessed to tax, because under Sched. D it ought never to have been assessed at all. Now, mark what would happen. His right would apparently be to obtain repayment by a petition of right and the issue of residence or non-residence would be an issue of fact to be decided by the court. Unless and until he has recovered his tax, it would be quite impossible for the Crown, while the assessment of the paying bank in respect of that dividend stands, to raise a fresh assessment against the shareholder under Case I, because there would then be two assessments at one and the same time in respect of one and the same piece of income. The way it will work out, according to Mr. Hills' argument, in practice will be this: that the assessment under Case I of the non-resident proprietor, who has obtained repayment, either because the commissioners are satisfied without litigation, or as the result of litigation, will then fall to be revised, in order to bring into it an item of income which obviously cannot have been brought into that assessment because it has already been taxed. That will still leave this curious position, that there will still be on foot in respect of the same piece of income two assessments, because the effect of repayment to the proprietor of the tax deducted from his dividend will not be to revise or displace the original assessment, and you will get the anomalous position, as I say, of two existing assessments standing in respect of the same piece of income.

I, for my part, find it impossible to suppose that that is a result which the legislature was contemplating. Whether or not the previous legislation had the effect of importing Sched. C., r. 2 (*d*), by reference into the provisions of r. 7 of the miscellaneous rules, I do not find it necessary to determine. In my judgment, that rule is quite clearly imported by the Consolidation Act of 1918, and if that be the case, the way the machinery will work will be this: the assessment having been made upon the paying agent, the non-resident proprietor can avail himself of the machinery provided in Sched. C, r. 2 (*d*), by proving to the satisfaction of the commissioners of inland revenue the fact of his non-residence and then obtaining relief by way of allowance or repayment. That that is what the legislature intended is, in my opinion, made quite clear when the Finance Act, 1924, is examined. Under sect. 27 of that Act, a new right of appeal to the special commissioners was given from a decision of the commissioners of inland revenue. It is to be observed that the right is a right to appeal from a decision. When the decisions

with which the section deals are examined, omitting for the moment the one relevant to this point, it will be found that each and every one of them is a decision of the commissioners of inland revenue under a statutory power given to them in the Act to decide the issue of fact, residence or non-residence, domicile or non-domicile, as the case may be. Therefore, it appears to me extremely unlikely that in such a context you will find a right of appeal given—as Mr. Hills would have us construe the paragraph to which I am about to refer—not from a decision of the commissioners given in the exercise of a statutory jurisdiction to decide a matter of fact, but from some administrative refusal to repay tax which has been improperly levied.

I myself find it quite impossible to read the section in that way. The section is dealing with decision, and decision means, *prima facie*, a decision of an express character under some power to decide, and that power is found in each of the other cases.

The case in question here gives a right of appeal from a decision of the commissioners with regard to any questions as to residence arising, first, under Sched. C, Gen. Rules, r. 2 (*d*), or, secondly, under Sched. D, Misc. Rules, r. 7, in connection with a claim for repayment of income tax made to the commissioners of inland revenue by the person owning the stock, etc., from whose income a deduction has been made on account of the income tax assessed and charged under the rule. That language shows, to my mind, as clearly as anything can show, that the procedure to which reference is being made and in respect of which a right of appeal is being given, is a procedure in which, tax having been assessed on and paid by the paying agent, the owner of the share then makes, to the commissioners of inland revenue, a claim for repayment, upon which claim the commissioners of inland revenue have under the existing legislation a power to give a decision, and it is from that decision that the right of appeal to the special commissioners is granted.

Now, that exactly fits the language of Sched. C, r. 2 (*d*), because under that rule the obligation of the shareholder who seeks repayment is to prove the fact of non-residence to the satisfaction of the commissioners of inland revenue; in other words, they are the people who have the statutory power there to decide that matter of fact. The manner in which the exemption is given effect to under that rule is by way of repayment of income tax, words which appear again in sect. 27 (3) (*c*) of the Act of 1924. Indeed, when the language is appreciated, the whole matter, to my mind, fits together, both from the point of view of substance and from the point of view of machinery. It is worth observing that, when the legislature by the Income Tax Act, 1853, s. 10, extended to this class of dividend the machinery which had previously been applicable to the case of interest of foreign or colonial

government loans, it was bound to bring it into charge under Sched. D, because the language of Sched. C, which is confined to interest payable out of public revenue, would not have been apt to cover it, and if it was to have been brought under Sched. C, Sched. C would have had to be amended for that purpose. Sched. D was the appropriate schedule in which to put it, but the legislature, having regard to the close correspondence between the circumstances of the two cases, when they brought it into Sched. D, made it subject to the provisions of Sched. C with regard to the matters appropriate to Sched. C, and that, to my mind, is the history of the matter. Whether or not before the Act of 1918 there was some gap in that correspondence is beside the point. In my opinion, the correspondence, if it was not perfect before, was made perfect by the Act of 1918.

That brings me to the last point, the question of expenses. The argument for the Crown on that point is of this nature: that in the account of a trading company made out for the purpose of its return under Sched. D, Case I, the interest with which we are concerned must, in the first instance, be brought into the account as an item of receipt; and that the statutory provisions which exempt the interest from tax are to be given effect to by then removing altogether that item from the statement of profits and gains, and removing with it something which clings to it in the process of removal, namely, some apportioned part of the expenses of the company. Now, I can find no warrant whatever in the language of the statute to produce that result. When the statute says that interest is to be exempt, I am quite unable to read it as meaning that, in giving effect to that exemption, by implication some repercussion is to take place on a different provision of the Act altogether. It seems to me quite improper to read any such implication into it. Mr. Hills says, and says with truth, that there are many cases in the working of the Act where it is necessary to make apportionments, and he instances as one the case where a non-resident company carries on business both in England and abroad and its accounts have to be dissected in order to bring in only that part of the business which is appropriate for the purpose of taxation. That is perfectly true, and the reason why the dissection has to be made there is that the statute quite clearly requires it, and cannot be effective unless it is made. But in this case I can find nothing in the statute which requires this interest to be treated, so to speak, as a trade within a trade. This is really what the Crown contends, that in some way this interest which is to be brought into the account as an item of receipt is to be taken out of it with some apportioned expenses appropriated to it as though it were a trade by itself. If the legislature had intended that, in my opinion, it should have said so, and I am quite unable to construe the language of the relevant exemption clauses—because the suggested result can only arise from an

implication from those clauses or a qualification upon them—in the way contended for.

I agree that the appeal fails on all points, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Linklaters & Paines* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

R. v. LEWIS, *Ex parte* DIRECTOR OF PUBLIC PROSECUTIONS.
R. v. WILLIAMS, *Ex parte* THE SAME. R. v. VALENTINE,
Ex parte THE SAME.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Macnaghten, JJ.), **December 7, 1936.**]

Crown Practice—Certiorari—Removal of trial—To Central Criminal Court—Grounds—Local feeling—Central Criminal Court Act, 1856 (c. 16), s. 3.

The prisoners were charged at Caernarvon Assizes with arson and malicious damage to government property and buildings at an aerodrome. Great local feeling had been aroused against the aerodrome on religious and nationalist grounds, and the prisoners, who were members of a Welsh nationalist movement, admitted that they had set fire to the buildings. While on bail, the prisoners had prepared addresses to be delivered to the jury at the trial; the addresses contained matters and appeals on religious, nationalist and conscientious grounds. One of the prisoners had given numerous sermons in various churches in North Wales and had received many ovations because of his share in the burning. A pamphlet had also been circulated by two of the prisoners giving their reasons for their share in the burning. At the trial the jury disagreed. Large groups of people had assembled outside the court and disturbances had occurred:—

HELD: (i) this was a proper case for the removal of the trial to the Central Criminal Court under the Central Criminal Court Act, 1856, s. 3.

(ii) as the application was made under the Act the court ought not to direct a trial at another circuit town.

[EDITORIAL NOTE.] The Central Criminal Court Act, 1856, only provides for a removal of a trial to the Central Criminal Court. There is a common law jurisdiction to remove the trial to London or another town on the same circuit (usually the nearest one is chosen), but if the application is made under the Act, the removal must be to the Central Criminal Court.

AS TO CHANGE OF VENUE, see HALSBURY, Hailsham Edn., Vol. 9, p. 145, para. 196 and Vol. 8, pp. 623, 624, para. 1351; and FOR CASES, see DIGEST, Vol. 16, pp. 405-412, Nos. 2510-2708.]

Cases referred to:

- (1) *R. v. Barnett*, [1919] 1 K.B. 640; 16 Digest 406, 2541.
- (2) *R. v. Sussex JJ., Ex p. McCarthy*, [1924] 1 K.B. 256; 33 Digest 294, 97.
- (3) *R. v. Ruxton* (1862), 1 New Rep. 90; 16 Digest 408, 2577.
- (4) *Re Moross* (1891), 7 T.L.R. 507; 16 Digest 408, 2582.

RULE *nisi* for removal to the Central Criminal Court of the second trial of Professor J. S. Lewis, the Reverend Lewis E. Valentine and Mr. D. J. Williams on an indictment for arson and malicious damage at the Royal Air Force bombing range at Penrhos, Carnarvonshire.

Great local feeling had been aroused against the aerodrome on religious and nationalist grounds and on grounds of conscience. The three prisoners, who were members of a Welsh nationalist movement, admitted that they had set fire to certain buildings at the aerodrome. While on bail, each of the prisoners had prepared an address to be delivered to the jury at the trial; these addresses contained matters and appeals on religious, nationalist and conscientious grounds. The prisoner Valentine had given numerous sermons in various churches in North Wales and had received many ovations because of his share in the burning of the buildings. The prisoners Valentine and Lewis had written and circulated a pamphlet entitled "Why we burnt the bombing school."

The contents of the pamphlet were also to be used by the prisoners as an address to the jury at the trial. The prisoners came up for trial at the Caernarvon Assizes in Oct., 1936, on indictment for arson and malicious damage. At the assizes large groups of people assembled outside the court and disturbances occurred. There was also strong religious and nationalist feeling prevalent in the county. At the trial the jury disagreed and, re-trial being necessary, an order *nisi* was applied for and obtained on the motion of the Attorney-General, calling on the prisoners to show cause why their second trial should not be removed to the Central Criminal Court under the Central Criminal Court Act, 1856, s. 3.

The Central Criminal Court Act, 1856, s. 3, provides :

Whenever any person shall have been committed or held to bail for any felony or misdemeanour committed or supposed to have been committed at any place out of the jurisdiction of the said Central Criminal Court, and it shall appear to the said Court of Queen's Bench . . . that it is expedient to the ends of justice that such person should be tried for such offence at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench . . . to order that such person shall be tried for such offence at the said Central Criminal Court. . . .

Norman Birkett, K.C., Edmund Davies and Dudley Collard showed cause against the rule.

The Attorney-General (Sir Donald Somervell, K.C.), W. N. Stable, K.C., and Bertram Reece, in support of the rule.

Birkett, K.C. : In obtaining the rule *nisi* it was suggested that the basis of the Central Criminal Court Act, 1856, s. 3, was the exciting of violent approval or disapproval locally if the trial was held locally; but that is not the case. The Act gives this court the widest possible discretion to decide the question: Is it expedient in order that the ends

of justice be attained, that the trial should be removed ? It is submitted that the affidavits disclosed no ground for the removal of the trial. The prisoners have done nothing to justify its removal : see *R. v. Barnett* (1), where there was an organised effort to tamper with the jury. In this case, there is no suggestion of propaganda before the trial. The defendants did nothing to cause the crowd to collect outside the court ; they committed no impropriety before, after, or during the trial. There is no precedent for the removal of a trial after one trial and the disagreement of the jury. Such a thing is unknown to the law.

SWIFT, J. : I understand that you are distinguishing *Barnett's* case (1), on the ground that there was no canvassing of support. Is there any difference between "canvassing" a man on his doorstep or in his church ?

Birkett, K.C. : There is no evidence that he preached his cause in his church. I submit that *Barnett's* case (1) has no application here, and that the ground on which it is sought to remove the trial is an irrelevant matter, viz., because the men said they were guilty, and the jury nevertheless disagreed. The affidavits really say : "The jury disagreed when they ought not to have disagreed" ; this is no ground for removal.

Why is the application to bring the trial to London ? [Counsel referred to ARCHBOLD'S PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 29th Edn., p. 108.] In order to remove to London, there must be an overwhelming body of evidence for doing so. If the trial cannot be heard in Caernarvon, why can it not be held in Ruthven, or in the neighbourhood ? [Counsel also referred to *R. v. Sussex Justices, Ex p. McCarthy* (2) ; *R. v. Ruxton* (3) ; *Re Moross* (4).]

The Attorney-General was not called upon, but he asked leave to make some observations on the transfer of the case from Wales to England. Leave was granted, and the Attorney-General, after dealing shortly with the history of the Act of 1856, said that if an application were made for the trial to be transferred to Cardiff, he would not oppose it.

LORD HEWART, L.C.J. : This rule ought to be made absolute, and in view of the circumstances disclosed in the affidavits I am satisfied that the order asked for is expedient in the interests of justice. At this juncture it is better not to dwell on the matter.

The Attorney-General has thought it right to suggest that the indictment might be removed to Cardiff. That suggestion was made to meet a complaint that the removal of the trial as asked for was to the Central Criminal Court. There is not the slightest ground for any such complaint. Sect. 3 of the Act of 1856 provides that, in certain circumstances, the court may order persons to be tried at the Central Criminal Court. It does not appear to be within the terms of that section, nor within the terms of the rule *nisi* in this case, for the court to direct the trial to take

place at Cardiff, nor does the court think that there are any grounds for the trial taking place at Cardiff.

The rule *nisi* will be made absolute in the terms in which it was made "that the trial of these persons be removed to the Central Criminal Court."

SWIFT, J. : I agree.

MACNAGHTEN, J. : I also agree.

Solicitors : *W. H. Thompson* (for the prisoners); *Director of Public Prosecutions* (for the Crown).

[Reported by HENRY WESTLAKE, ESQ.. Barrister-at-Law.]

SHAIKH SHUKRULLAH AND OTHERS v. MUSAMMAT ZOHRA BIBI AND OTHERS.

[PRIVY COUNCIL (Lord Roche, Sir Shadi Lal, Sir George Rankin),
November 19, 1936.]

Privy Council—Practice—Appeal—Compromise—Minor's interest—Certificate of court below.

Where, in an appeal to the Judicial Committee of the Privy Council, a compromise affecting the interests of minors is submitted for their Lordships' approval, the proposed compromise should be considered by the court from which the case comes upon appeal and such court should certify to their Lordships whether in their opinion the proposed compromise is or is not in the interests of the minor or minors.

[EDITORIAL NOTE.] This is purely a practice note for the guidance of practitioners before the Judicial Committee in cases where the court's approval of a compromise affecting minors is being sought.

AS TO PROCEDURE ON HEARING OF APPEALS TO THE PRIVY COUNCIL, see HALSBURY, Hailsham Edn., Vol. 8, pp. 570-573, paras. 1255-1263; and FOR CASES, see DIGEST, Vol. 17, pp. 493, 494, Nos. 589-603.]

PETITION by the defendants-appellants to allow, with the consent of the respondents, an appeal from a decree of the High Court at Allahabad, dated May 26, 1932.

An affidavit had been filed by one of the respondents, brother and guardian *ad litem* of another respondent, a minor, stating that it would be highly beneficial to the respondents, including the minor, to settle their differences with the appellants upon the terms set out in the petition; the minor, it was stated, would thereby be protected against possible future loss. The petition prayed that the appeal be allowed, without costs.

W. Wallach for the petitioners.

The respondents were not represented.

LORD ROCHE: Their Lordships think that in this case they can approve of this compromise; but they desire to point out the difficulty in which they are placed in determining a matter such as this when they are without knowledge of the facts, which alone could be obtained by close investigation of the case itself. Their Lordships desire to intimate that they would be obliged if, in cases such as this, where a compromise which affects the interests of minors is proposed and submitted for their Lordships' approval, the court from which the case comes upon appeal would take the matter of the proposed compromise into consideration and certify to their Lordships whether in their opinion the proposed compromise is or is not in the interests of the minor or minors. Their Lordships think that as much publicity as possible should be given to this intimation and that in future, when there is a case of a similar kind, the parties who desire to obtain their Lordships' approval to the proposed compromise should ask the court from which the appeal comes to deal with the matter in accordance with their Lordships' request.

Solicitors: *Hy. S. L. Polak & Co.* (for the petitioners).

[*Reported by T. A. DILLON, ESQ., Barrister-at-Law.*]

R. v. CORNWALL COUNTY VALUATION COMMITTEE AND OTHERS, *Ex parte* FALMOUTH RATING AUTHORITY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Macnaghten, JJ.), **December 8, 1936.**]

Rates—Assessment—Uniformity—County valuation committee—Right to proceed by instalments.

A county valuation committee, finding that to a considerable extent prevailing assessments in the county were too low, proceeded to promote uniformity of assessment. The committee decided that it would be best to proceed by instalments and to re-value the county, area by area, over a number of years. Certain proposals were accordingly made in respect of one borough, and, *inter alia*, the assessment of a certain hereditament was increased. It was admitted that according to the proper statutory definition of "gross value" the figure to which the assessment was increased was correct. It was objected that, because the application of the principle or basis whereby that particular assessment was corrected and increased was not simultaneously made applicable to each and every part of the county with the result that there would be a greater burden on the borough in question in its contribution to the county rates compared with other areas where the assessments had not been corrected, the assessment was bad:—

HELD: the county valuation committee was entitled to proceed by instalments to promote uniformity of assessment.

[EDITORIAL NOTE.] The county valuation committees have been constituted by statute for the purpose of securing uniformity of valuation throughout the county, so that each part of the county contributes its fair share to the county expenses, according to the value of the property in its area. In the present case the committee

proceeded upon this task by re-valuation in instalments, taking one part of the county at a time. At the same time they were imposing a new standard of valuation upon the county generally, and not equalising the assessments upon an existing standard. Clearly until the process was completed there would be greater inequality, but it is held that the county valuation committee were entitled to proceed on these lines.

AS TO COUNTY VALUATION COMMITTEES, see HALSBURY Supp., Rates and Rating, paras. 86, 87; and FOR CASES, see DIGEST Supp., Rates and Rating, Nos. 1146a—1170a.]

Cases referred to :

- (1) *Double v. Southampton Assessment Committee*, [1922] 2 K.B. 213; 38 Digest 579, 1145.
- (2) *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Committee*, [1932] 2 K.B. 679; Digest Supp.
- (3) *Lilley & Skinner, Ltd. v. Essex County Valuation Committee* (1935), 153 L.T. 64; Digest Supp.

RULES *nisi* for *certiorari* and prohibition directed to the assessment committee for the West Cornwall Assessment Area and the Cornwall County Valuation Committee, on the application of the Falmouth Corporation, the rating authority for the borough of Falmouth.

The rule *nisi* for *certiorari* required the assessment committee to show cause why a decision made by that committee on the proposal of the county valuation committee of the Cornwall County Council to increase the assessment of a hereditament in the borough of Falmouth (occupied by W. Manuell) from £28 to £48 gross value should not be quashed. The rule *nisi* for prohibition called upon the assessment committee and the county valuation committee to show cause why the county valuation committee should not be prohibited from proceeding with and the assessment committee from hearing or determining proposals by the county valuation committee for increases in the assessment values of any shops or dwelling-houses in the borough of Falmouth until the county valuation committee lodged and proceeded with similar proposals taking effect in the same half year in relation to all other similar hereditaments in the whole of the county of Cornwall which were under-assessed.

Both rules *nisi* were granted on the basis that the county valuation committee acted in contravention of its statutory duty to promote uniformity in the practice and principles of valuation and that the increasing of the assessments of hereditaments in a part only of the county was calculated to produce the opposite of uniformity; and that an unfair burden would be imposed on the ratepayers of Falmouth compared with ratepayers of other parts of the county of Cornwall, if the assessment committee gave effect to the proposals of the county valuation committee.

The following facts appeared from the affidavits: The second valuation list from the borough of Falmouth came into force on Apr. 1, 1934. The third valuation list would come into force on Apr. 1, 1939. After

the deposit of the second draft valuation list on July 1, 1933, the county valuation committee found that a large number of hereditaments were under-assessed and accordingly sent out letters to various rating authorities in the county stating this fact. The assessment committee when revising the draft lists made numerous increases to the assessments. No notice of objection to the assessments was served by the county valuation committee. After Oct., 1935, the county valuation committee proposed increases in the assessments of about 83 per cent. of the shops and dwelling-houses in the borough of Falmouth and in June, 1936, the assessment committee determined the proposals in the case of 118 hereditaments, increasing their gross values by about 73 per cent., and on July 2, 1936, the assessment committee determined proposals for a further 210 hereditaments of which that of W. Manuell was one. There had been no appeal to quarter sessions in respect of the increased gross value of that hereditament. No proposals for the amendment of valuation lists for other parts of Cornwall had been made by the county valuation committee. On the increased assessments the ratepayers of the borough of Falmouth would be paying an additional amount of £7,327 towards county expenses for each half year.

The borough treasurer and rating officer for Falmouth in his affidavit contended that if the county valuation committee were to re-assess at one time all rating areas in Cornwall there would be no discrimination against Falmouth and Falmouth would not be liable for a greater share of county expenses than any other part of Cornwall; that it was the intention of the county valuation committee to spread the process of re-assessment over the county over a period of three years or more, and that until that process was complete the ratepayers of Falmouth would be paying an undue proportion of county expenses.

An affidavit by the late Sir Trustram Eve stated that the county valuer admitted before the assessment committee that the proposals were made not to correct local inequality but in the process of imposing an entirely new standard of valuation in Falmouth and ultimately throughout the county; that the county valuation committee had decided that it was preferable from the viewpoint of administration to re-value the county area by area and over a number of years. That meant that the county valuation committee was deliberately creating unfairness and lack of uniformity between the Falmouth list and the valuation lists for other areas in the county, and unfairness and lack of uniformity would gradually extend to other areas and at the end of 5 years there would be lack of uniformity between two halves of the county. The county valuation committee was therefore abrogating its statutory duty to promote uniformity solely for administrative convenience. The county valuation committee should either arrange for the adoption of a new standard of valuation by all rating authorities at the

same time or they should make proposals to all the rating authorities throughout the county in the same half year. There was no practical difficulty in re-valuing a whole county at one time.

If the plans of the county valuation committee remain as they are, the extra burden placed on Falmouth would make it necessary for the Falmouth rating authority to serve proposals throughout the county to ensure that the new standard was applied in all other areas at the same time—a task too onerous for one rating authority.

The county valuer in reply to the affidavits of the applicants admitted substantially the facts in the affidavits of the applicants with the exception of his alleged admissions. He also said that he had constantly drawn the attention of rating authorities and assessment committees to the need of uniform assessments; the proposals in this case were made, not to impose a new standard of valuation, but to ensure observance of existing standards of gross and net annual value as defined in the Act. During the last 10 years the county valuation committee had made many proposals for the alteration of assessments in areas other than that of Falmouth, mostly for increases but some being for decreases, and since Oct., 1935, they had requested most of the rating authorities to make proposals for the correction of over 500 assessments.

F. J. Tucker, K.C., and *G. D. Squibb* showed cause.

A. S. Comyns Carr, K.C., *J. Scott Henderson* and *Raymond Stock* in support of the rules.

Michael Rowe for the West Cornwall Assessment Committee.

Tucker, K.C.: This proceeding is not an appeal against the rate, nor is it for a rule to quash the valuation list. It seeks to prevent the county valuation committee from securing uniformity by gradually bringing assessments to the proper level by compelling them to do it all at one time. A ratepayer is not entitled to complain that his assessment is too high in comparison with others when it is right in value: *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Committee* (2); *Lilley & Skinner, Ltd. v. Essex County Valuation Committee* (3). The remedy is not to make wrong that which is right, but to make right that which is wrong. This applies to Falmouth. The procedure which applies in *Double v. Southampton Assessment Committee* (1) no longer exists and does not apply here—that was a proceeding to quash the rate, and was a complaint on lack of uniformity in a particular area.

Comyns Carr, K.C.: It is not open to us to complain on the hearing of a proposal relating to a particular hereditament, that it ought not to be decided on the true facts because so doing would cause a lack of uniformity. The question is whether this new statutory body properly carried out its statutory duty.

If the proposals were individually correct, inequality would be created which does not now exist. To require the applicants to make proposals

to amend over 100,000 hereditaments in the county would be imposing a severe burden on them. Since the Rating and Valuation Act, 1925, no court has decided whether the valuation list or the rate must be quashed. It is no remedy for the Falmouth Corporation to quash its own rate or valuation list. The principle of *Double v. Southampton Assessment Committee* (1) is still good law and applies to the present case in spite of procedural changes.

LORD HEWART, L.C.J. : These are two rules *nisi*, one a rule *nisi* for a writ of *certiorari* and the other a rule *nisi* for a writ of prohibition.

The applicants in each case in fact, though not in form, are attacking what has been done by or in consequence of the action of the county valuation committee of the Cornwall County Council. To take first the rule *nisi* for *certiorari*, it is sought by means of that prerogative writ to quash a certain decision made by the assessment committee for the West Cornwall Assessment Area upon a proposal of the county valuation committee of the Cornwall County Council. That was a decision given on June 30 last to increase the assessment of a particular hereditament from £28 to £48 gross. The grounds upon which the rule *nisi* was sought and obtained were two, first of all that the valuation committee in proposing increases in assessments of any dwelling-houses or shops in a part only of the county of Cornwall :

is contravening its statutory duty to promote uniformity in the principles and practice of valuation and is taking steps calculated to produce the opposite effect ;

and secondly, that :

the said assessment committee, if it gives any effect to the said proposals of the said county valuation committee will be imposing an unfair and unequal burden upon ratepayers in the borough of Falmouth in respect of county expenses.

Now it is to be observed at the beginning that no allegation was made to the effect that the increase in the assessment of the particular hereditament which is referred to from the gross value of £28 to the gross value of £48 is in itself incorrect. On the contrary it is admitted that according to the proper statutory definition of "gross value" the figure to which the assessment by the decision objected to is increased is right. The argument is that because the application of the principle or basis whereby that particular assessment is corrected and increased is not simultaneously made applicable to each and every part of the county of Cornwall, therefore the assessment must be wrong and the proposals of the county valuation committee must be wrong. It is important, therefore, to observe what the duties of the county valuation committee are. The entity was unknown before the passing of the Rating and Valuation Act, 1925. By sect. 18 of that statute it was provided that for the purposes of a particular part of the Act there shall be established

in every county a committee of the county council consisting of a certain number of persons according to the decision of the county council and a representative of the assessment committee for each assessment area comprised in the county. By subsect. (2) of that section it is provided as follows :

It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference.

There in the clearest possible terms are set out the fundamental objects and purposes of the county valuation committees. The third subsection goes on, subject to the proviso, to enact that :

A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this part of this Act.

That being the law prescribing the duties of the county valuation committee, what is it that has been done here ? The basis of the rule *nisi* for *certiorari*, as it is also the basis of the rule *nisi* for prohibition, is an allegation that jurisdiction has been exceeded or usurped—in the case of *certiorari* that it has been exceeded, in the case of prohibition that a course of conduct is being taken or is threatened which will lead to an excess of jurisdiction. It is important, therefore, to see wherein it is alleged that this county valuation committee has usurped or exceeded jurisdiction. What it has done surveying the field of assessments in the county of Cornwall is to observe that to a considerable extent at any rate prevailing assessments are too low. There is not a uniform degree of inaccuracy in the sense that the assessments are too low ; some are worse than others ; but faced with that prevailing fact the county valuation committee set itself to correct the error and entered upon a course which appeared to it, in the phrase much employed by Mr. Comyns Carr, conducive to the uniformity which by sect. 18 of the statute it is the function of the valuation committee to promote. But it appeared to the committee, who had it in their power to take such steps as they thought fit for promoting uniformity, that the businesslike and desirable course was to proceed by instalments and not to refuse halt a loaf if they could not at the moment get a whole loaf. Proceeding therefore by instalments or by steps in order ultimately to deal, and with the intention of dealing, with the whole field of inaccuracy, the committee made certain

proposals, and in particular proposals affecting the assessments in the borough of Falmouth, and it is the rating authority of the borough of Falmouth which complains of what was done.

The argument reduced to its simplest form is that it is wrong to attempt to correct the part if it is not possible at the same moment and at one and the same moment to correct the whole; otherwise it is said an inequality is produced in that some assessments are made correct and thereby are deprived of having the advantage enjoyed by others of remaining incorrect. I know of no authority either in the statute or in a reported decision which lends colour to that remarkable theory. There has been in fact a series of cases, some of which have been referred to in the course of the argument, which show how idle it is for a person who has been correctly assessed to complain that he does not enjoy the incorrectness which is the basis of his neighbour's assessment. There is plenty of authority in support of that proposition. There is nothing either in the case of *Double v. Southampton Assessment Committee* (1) to which a good deal of reference has been made, or elsewhere to show or to suggest that the county valuation committee, a body which did not exist at the time of *Double v. Southampton Assessment Committee* (1), is exceeding its powers when it proceeds piecemeal to the work of revision and re-valuation. It is to be observed that the county valuation committee is not levying a rate and it is not determining a series of assessments, it is merely putting forward proposals, holding conferences and bringing material facts to the notice of rating authorities and assessment committees. Its work is essentially preliminary. I cannot see the smallest foundation for the contention that in what it has done here this particular county valuation committee has in any degree exceeded its authority.

With regard to the rule *nisi* for *certiorari*, it is worth noticing that the stated object of the writ, if granted, is to put an end to a particular decision of an assessment committee whereby the assessment of a named hereditament was admittedly raised from an incorrect to a correct value. That basis seems to me to be fundamentally unstable. It is quite true that the grounds upon which the rule is sought are general grounds of the nature which I have already described, but those grounds must allege that the valuation committee has done something which it is not entitled to do. In like manner in the case of the rule *nisi* for a writ of prohibition it is sought that that writ should be directed to the county valuation committee itself to prohibit it from proceeding with and to prevent the assessment committee from hearing or determining any proposal of the committee for similar increases until the valuation committee "lodges and proceeds with similar proposals taking effect in the same half year in relation to all similar hereditaments in the county of Cornwall which"—and then comes the remarkable phrase—"in the

opinion of the said county valuation committee are under-assessed." In other words, the valuation committee is to determine what is the total catalogue of hereditaments in the county which in the opinion of the committee are under-assessed and thereupon can make suggestions or proposals in relation to one or more of those assessments only upon the terms that simultaneously on the same footing proposals are made with reference to all the rest.

I find it impossible, as I have said, to discover either in the statute or in a reported case any authority whatever for the proposition that what has been done and what is being done here by this valuation committee amounts to an excess or usurpation of jurisdiction. On the contrary, it appears to me to be manifest that by well considered steps and appropriate instalments the valuation committee is proceeding to the accomplishment of its task of promoting uniformity in the principles and practice of valuation in the large area with which it is concerned.

For those reasons I think that each of these rules ought to be discharged.

SWIFT, J. : I agree, and I have nothing to add.

MACNAGHTEN, J. : I also agree.

Solicitors : *Speechly, Mumford & Craig*, agents for the County Solicitor, Truro (for the Cornwall County Valuation Committee) ; *Sharpe, Pritchard & Co.* (for the Falmouth Corporation) ; *Hatchett Jones & Co.*, agents for *J. Antron Thomas*, Helston (for the West Cornwall Assessment Committee).

[*Reported by* HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

TOLHURST *v.* WEBSTER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Macnaghten, JJ.), **December 9, 1936.**]

Street Traffic—Traffic signs—"Halt at major road ahead"—Whether essential to come to a standstill.

About 25 yds. from a road junction a duly authorised and approved traffic sign was erected, on the front of which were the words "Halt at major road ahead." The appellant, who was approaching the junction, reduced speed to walking pace, observed the roads in all directions and proceeded slowly across:—

HELD: the appellant should have brought his car momentarily to a standstill, and in failing to do so he had committed an offence under the Road Traffic Act, 1930, s. 49, as amended by the Road Traffic Act, 1934, Sched. 3.

[EDITORIAL NOTE.] In this case a distinction is drawn between the meaning of the words "Halt" and "Stop" when used on traffic signs. When the word "Stop" is used, the motorist must stop and wait for the direction "Go"; but when the word "Halt" is used, he is only required to bring his vehicle momentarily to a standstill and may then proceed without further order.

AS TO NEGLECT OF TRAFFIC DIRECTIONS, see HALSBURY, 1st Edn., Vol. 27, Street Traffic, para. 583, and Supp. thereto; and FOR CASE, see DIGEST Supp., Street Traffic, No. 5c. FOR THE ROAD TRAFFIC ACT, 1930, s. 49, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 647, and STONE'S JUSTICES' MANUAL, 1936, p. 1704.]

Case referred to:

(1) *R. v. Broad*, [1915] A. C. 1110; 38 Digest 315, case e.

APPEAL by way of case stated from a decision of justices sitting at Gravesend.

An information was preferred by the chief constable of Gravesend, the respondent, that on May 13, 1936, contrary to the Road Traffic Act, 1930, s. 49, as amended by the Road Traffic Act, 1934, Sched. III, the appellant, while driving a motor car, failed to conform to the indication given by a sign for regulating the movement of traffic, being a sign of the prescribed size, colour, and type authorised by the Minister of Transport and lawfully erected at the junction of two roads. On the front of the sign, which was erected approximately 25 yds. from the road junction, were the words "Halt at major road ahead." The appellant, who was approaching the junction, reduced speed to walking pace, observed the roads in all directions, and proceeded very slowly across. There was no traffic proceeding in either direction along the major road. As he was crossing the junction, the appellant saw a police constable signalling him to stop, and he stopped his car in the middle of the road. At the police court the respondent contended that the appellant should have brought his car momentarily to rest and that in failing to do so he had committed an offence. The appellant contended that the sign indicated not that vehicles must be brought momentarily to rest before

entering the junction, but that they must be slowed down, and alternatively that there was no clear indication as to where a stop had to be made and that the sign was so vague and ambiguous as not to give any indication to support a criminal charge. The justices, having found the facts proved and that the sign was erected for the regulation of the movement of traffic and that it was properly erected, accepted the respondent's contention and convicted the appellant, fining him 5s.

Gerald A. Thesiger, for the appellant : All the signs before 1935, when this type of sign was introduced, used the word "stop." The word "halt" cannot, therefore, be intended to have the same meaning. The Road Traffic Act, 1930, s. 49, uses the word "stop" and the appellant was convicted under that section. The Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, used the word "stop" and also the word "slow." It is unreasonable to presume that the word "halt" is intended to have the same meaning as the word "stop." "halt" here means that the motorist must proceed hesitatingly. In *R. v. Broad* (1), a bye-law requiring compliance with the words "Stop : look out for the engine," was held to be invalid for ambiguity.

S. M. Noakes, for the respondent : The word "halt" is used to indicate a temporary stop. When the word "stop" is used, it is always followed by a later cancelling indication, and the indication is to stop until the cancellation is received.

LORD HEWART, L.C.J. : This appeal ought to be dismissed. The appellant was charged with failing to conform with a certain sign at a certain road junction. A traffic sign of an approved type stood a little way from the junction, and facing in the correct direction were the words, "Halt at major road ahead." The defendant, as he came near the junction, reduced his speed to walking pace, took observations in both directions, saw a police officer who signalled to him to stop, and stopped in the middle of the road.

The respondent contends that a vehicle must be brought temporarily to a stop. The appellant contends that slowing down is required ; or, alternatively, that the indication is too vague. The justices found that a temporary stop was required. I think they were correct. The Road Traffic Act, 1930, s. 49, makes it an offence to fail to conform to the indication given by a sign regulating the movement of traffic. Under sect. 48, the Minister issued directions with regard to the traffic signs which highway authorities might cause to be erected, and subject to those directions, an authorisation of the sign in question bearing the words "Halt at major road ahead," was made and communicated in these words :

The Minister of Transport hereby authorises the erection of traffic signs of the size, colour and type illustrated in the attached diagram . . . for the purpose of

indicating that any person driving a vehicle on the road on or near to which the sign is placed shall bring the vehicle to a halt before entering but as near as practicable to the carriageway of the major road indicated by the sign.

No person seeing those words and who had before him a diagram of the sign authorised could suggest that the sign means anything other than coming to a standstill. It is too clear for argument. When these regulations used the word "stop," they do not use the word as a whole, but as part of a whole consisting of "stop" and "go." What was wanted was a word signifying the arresting of progress—not that it should stay there for any considerable time, but that it should momentarily pause.

I think, therefore, that the magistrates came to the right conclusion. I do not think there is any doubt that a car should be brought to a momentary standstill before a major road is entered. The appeal will be dismissed.

SWIFT, J. : I agree. It must be remembered that signs are not put up for the uninitiated, but for the protection of drivers of vehicles on the highway, and it is their duty to understand these signs. There is no sign of "stop" to be found unless there is machinery to reverse it and to give the signal "go." Could anything be plainer than "halt"? How could a motorist halt if he proceeded stumblingly or falteringly across? I agree with my Lord that this appeal be dismissed.

MACNAGHTEN, J. : It is difficult to understand how anybody could misunderstand this direction, and it is significant that the appellant does not raise this in his appeal. I agree that this appeal should be dismissed.

Solicitors : *Tolhursts & Tatham*, Gravesend (for the appellant); *Watkins, Pulleyn & Ellison*, agents for *H. H. Brown*, Town Clerk, Gravesend (for the respondent).

[Reported by HENRY WESTLAKE, ESQ., *Barrister-at-Law*.]

STAFFORD v. KIDD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Macnaghten, JJ.), **December 9, 1936.**]

Bastardy—Presumption of legitimacy—Separation deed—Evidence of non-access—Admissibility.

The appellant and her husband entered into a deed of separation on Nov. 14, 1934. In Dec., 1935, the husband filed a petition for divorce in which the respondent was cited co-respondent. Neither the present appellant nor the present respondent entered an appearance and a decree *nisi* was granted to the husband on June 17, 1936. In Mar., 1936, the appellant had given birth to a child, of which she alleged the respondent was the father. In bastardy proceedings against the respondent the justices held that the separation deed did not reverse the ordinary presumption of access, and that the appellant could not give evidence tending to bastardise the child born during the marriage, and, in the absence of independent testimony, they dismissed the appellant's complaint. On appeal:—

HELD: the separation deed had the same effect as a decree of judicial separation or a separation order in reversing the ordinary presumption of access by the husband, and the appellant was entitled to give evidence of non-access.

[EDITORIAL NOTE.] This is the second time the rule in *Russell v. Russell* (1), as it is now called, has been before the courts this term, the previous occasion being a nullity suit where the respondent had had a child. It is here decided that the effect of a separation deed in this respect is the same as the effect of a decree of judicial separation, and the rule is inapplicable.

AS TO RULE IN *Russell v. Russell*, see HALSBURY, Hailsham Edn., Vol. 2, pp. 562, 563, para. 772, and FOR CASES, see DIGEST, Vol. 3, pp. 364-368, Nos. 54-97.]

Cases referred to:

- (1) *Russell v. Russell*, [1924] A.C. 687; 27 Digest 297, 2743.
- (2) *Mart v. Mart*, [1926] P. 24; 42 T.L.R. 253; 27 Digest 298, 2747.
- (3) *Hetherington v. Hetherington* (1887), 12 P.D. 112; 27 Digest 569, 6271.
- (4) *Andrews v. Andrews and Chalmers*, [1924] P. 255; 27 Digest 298, 2746.
- (5) *Rimmer v. Rimmer* (1930), 144 L.T. 96; Digest Supp.
- (6) *Re Bromage, Public Trustee v. Outhbert*, [1935] Ch. 605; Digest Supp.
- (7) *Morris v. Davies* (1837), 5 Cl. & Fin. 163; 3 Digest 359, 12.
- (8) *The Aylesford Peerage* (1885), 11 App. Cas. 1; 3 Digest 367, 80.

APPEAL by way of case stated from a decision of justices sitting at Sunderland.

Ann Stafford, the appellant, preferred a complaint, at Sunderland petty sessions, alleging that she had been delivered of a male bastard child on Mar. 10, 1936, and that William Kidd, the respondent, was the father of the child. The following facts were proved or admitted: The appellant married Kellett Stafford on May 12, 1922. The appellant and her husband separated, in Nov., 1934, and on Nov. 14, 1934, they entered into a valid deed of separation, which contained a *dum casta* clause. On Dec. 13, 1935, Kellett Stafford filed a petition for divorce citing the respondent Kidd as co-respondent. Neither the present appellant nor the present respondent entered an appearance to the divorce petition, and on June 17, 1936, the petitioner was granted a

decree *nisi*. On Mar. 10, 1936, the appellant gave birth to a male child ; but the fact of this birth was not relied on in the petition for divorce.

At the hearing it was contended for the appellant that a deed of separation had the same effect as a judicial separation or a separation order and that the ordinary presumption of access and legitimacy was reversed and that the presumption of non-access applied from the date of the deed of separation, and that the rule in *Russell v. Russell* (1) did not bind the appellant and that she could give evidence tending to bastardise a child born during the marriage.

The attention of the justices was drawn to the cases of *Mart v. Mart* (2), and *Re Bromage, Public Trustee v. Cuthbert* (6). The respondent was not called upon and the justices concluded that, (i) evidence of non-access was a condition precedent to the appellant's proceeding with her case, and (ii) a deed of separation containing self-imposed conditions had not the same effect as a judicial decree or order, and that non-access must be proved by independent testimony. The justices found that non-access of the appellant's husband had not been proved and they dismissed the complaint. The appellant appealed.

Denis H. Robson for the appellant.

C. D. Aarvold for the respondent.

Robson : The case of *Mart v. Mart* (2) held that a deed of separation raised the presumption of non-access and that evidence of non-access was admissible in spite of the rule in *Russell v. Russell* (1). See also *Hetherington v. Hetherington* (3). This places a deed of separation on the same plane as a magistrate's order or a judicial separation. In *Rimmer v. Rimmer* (5), it was held that an agreement to live apart did not rebut presumption. In *Re Bromage, Public Trustee v. Cuthbert* (6), LUXMOORE, J., at p. 609, considered the decision in *Mart v. Mart* (2) at variation with the decision of the House of Lords in *Morris v. Davies* (7), and *The Aylesford Peerage* (8). In these last two cases there were deeds of separation, but that fact was not argued in either case. In these cases and in *Re Bromage* (6), there was an abundance of evidence apart from this on which the court could act. *Morris v. Davies* (7) was decided in 1837 before our present divorce law and when a deed of separation was treated as void by the ecclesiastical courts. The *Aylesford Peerage* case (8) was also decided before the law as it is at present was built up—and this court should follow the decision in *Mart v. Mart* (2). At the time of *Morris v. Davies* (7) a deed of separation was void. Now the courts encourage deeds of separation rather than applications for judicial separation. The magistrates followed *Re Bromage* (6), whereas they should have followed *Mart v. Mart* (2).

Aarvold : *Mart v. Mart* (2) was decided on other grounds, as well as on the presumption of non-access.

LORD HEWART, L.C.J. : But BATESON, J., considered the point in his judgment because Mr. Hodson had raised the *Russell v. Russell* (1) rule in his argument.

Aarvold : The presumption can only be rebutted by evidence which is strong. The fact of the separation being by deed was not enough. The deed is evidence of intention to live apart—but is it enough to rebut presumption of legitimacy or access ? If it were, then an oral agreement between the parties not to cohabit, if proved, would rebut the presumption of access. This particular deed gives to the wife no authority to prevent the husband coming near her or molesting her. The deed is to continue while she leads a chaste life. As soon as she comes to a court bringing bastardy proceedings against someone not her husband she admits having been unchaste and her authority to live apart from her husband expires, and the presumption of access again arises.

LORD HEWART, L.C.J. : This special case raises an interesting point. Complaint was preferred by a married woman, under the Bastardy Acts, she having given birth to a child on Mar. 10, 1936, alleging that Kidd was the father. The facts proved that the appellant was a married woman and that in Nov., 1934, she and her husband separated and signed a deed of separation. The deed was proved before the justices. The question was raised before the justices whether that deed had the effect which a decree of judicial separation might have had of rebutting the presumption of legitimacy so as to allow evidence of non-access of the husband to be given by the mother, although such evidence might tend to bastardise the child. It was contended for the appellant that the deed enabled her to give evidence of non-access. The contrary contention was made for the respondent. The justices considered that the case of *Russell v. Russell* (1) prohibited the appellant from giving evidence of non-access. The question here is whether a deed of separation fails to have the same effect as a separation order or judicial separation. The attention of the court has been directed to such authority as exists. In 1925, that learned and distinguished judge, BATESON, J., decided the case of *Mart v. Mart* (2), where reliance was sought to be placed by one of the parties on a deed of separation to oust the presumption of access, so as to make evidence of non-access admissible. It was argued by the other party that the evidence was inadmissible. BATESON, J., in his judgment considered these arguments and used these unambiguous words at p. 253 :

It is argued . . . that the court cannot look at the deed of separation because it offends against the rule in *Russell v. Russell* (1). I do not think that it does so offend. It is an ordinary deed of separation with a covenant to live separate and apart, and in fact the parties did live apart under it. I think that the deed has the same effect as a judicial separation. It separates the two parties by their own agreement instead of by the order of the court. It has been decided that where there

has been a judicial separation it is presumed, in the absence of evidence to the contrary, that there has not been access between the spouses after the date of the decree, and that therefore, where a child is born more than nine months after the date of the decree, the presumption of legitimacy does not arise. I think that a deed of separation has the same effect.

In saying there that the effect of a judicial separation had been decided, BATESON, J., was referring to *Hetherington v. Hetherington* (3), and to *Andrews v. Andrews & Chalmers* (4). *Mart v. Mart* (2) is a clear decision after full argument and a clear raising of argument whether a deed of separation between parties has the same effect as a judicial order. That was in 1925. In 1930, HILL, J., delivered a considered judgment in *Rimmer v. Rimmer* (5) in which he said at p. 97 :

The presumption of law is that the child is the child of the husband and wife. There is nothing in a mere order for maintenance—and there is no proof of an agreement to live apart—to negative that presumption.

Those words, which occurred 5 years after *Mart v. Mart* (2), make it perfectly clear that HILL, J., was saying that, if there had been an agreement to live apart, other considerations would apply. So much for authority on that side of the matter. But it is said on the other side that there is a still more recent case, *Re Bromage, Public Trustee v. Cuthbert* (6). In that case this topic was only faintly mentioned nor was there any substantial argument on it, but LUXMOORE, J., felt it necessary to deal with it and did so in these important words :

It is said that the execution of a separation deed where the parties are living apart under its provisions has the same effect as a decree for judicial separation or an order of a court of summary jurisdiction, and that in such a case the presumption has no application. In support of this contention reliance is placed on the decision of BATESON, J., in *Mart v. Mart* (2). With all respect to that learned judge, and notwithstanding my personal inclination to accept and follow that decision, it seems to me to be at variance with that of the House of Lords in *Morris v. Davies* (7), where the husband and wife were in fact living apart under a separation deed executed by them, and also with the decision in *The Aylesford Peerage* (8), where also the husband and wife had executed a separation deed and were at the material dates living apart under its provisions.

The case of *Morris v. Davies* (7) was decided in 1837, and Mr. Robson has urged with great force three points as to the result of those House of Lords decisions : (i) that the *Aylesford Peerage* case (8) added nothing new to *Morris v. Davies* (7) ; (ii) that in neither case was the question now raised the material question ; and (iii) in the reports of those cases, it is difficult to find this point considered. Counsel for the respondent had no remarks to make on that argument. As Mr. Robson says, there has been considerable development in the law of matrimonial causes since *Morris v. Davies* (7), and the reasoning in *Morris v. Davies* (7) was reasoning belonging to a time when divorce alone could get rid of the presumption of legitimacy and when proceedings for judicial separation in their present form were unknown. The chronology of the matter

makes a very important difference, and the more recent decisions of BATESON, J., and HILL, J., ought to be followed.

Mr. Aarvold, for the respondent, criticised the terms of the deed of separation which was to continue in force only so long as the wife continued to live chaste, and he argued that the husband might treat the deed as terminated and that the presumption of access would therefore arise again. With all respect, I think that argument has no force, because the *dum casta* clause in the agreement was in common form.

I think the justices came to an erroneous decision in law when they came to the conclusion that a deed of separation had not the same effect as a decree of judicial separation or a separation order in reversing the ordinary presumption. In my opinion it is not true to say that a voluntary deed fails to have the effect, which the appellant contends, of reversing the presumption of access.

The appeal will be allowed.

SWIFT, J. : I agree and I have nothing to add.

MACNAGHTEN, J. : I also.

Appeal allowed.

Solicitors : *Isadore Goldman & Son*, agents for *Lionel Wolfe*, Sunderland (for the appellant) ; *Maude & Tunnickliffe*, agents for *Morton & Morton*, Sunderland (for the respondent).

[Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.]

Re STRICKLAND'S WILL TRUSTS, NATIONAL GUARANTEE AND SURETYSHIP ASSOCIATION, LTD. v. MAIDMENT.

[CHANCERY DIVISION (Bennett, J.), **November 27, 30, 1936.**]

Will—Charity—Chapel and school—Meaning of “school”—“Upkeep”—Surplus income.

A testator by his will, after giving certain specific legacies including one of £50 to the K. H. Baptist Chapel, directed that a trust be created with the remainder of his personal and real estate “for the payment from the income thereof of the following legacies, viz., £25 per annum to M. L., £100 per annum to J. L., and the balance of the income to be divided equally between my two sisters C. P. and M. H. . . . On the death of the last surviving legatee under the trust I direct that the income be devoted to the upkeep of the K. H. Baptist Chapel and school and for the provision of prizes for the scholars of both sexes.” A summons was taken out to determine (i) whether the gift was a good and valid bequest of the whole of the residuary estate or whether it failed to any and what extent. The only school attached to the K. H. Baptist church was a Sunday-school in connection with which book prizes were awarded. It was contended that such a school was not what the testator had in mind, and that, even if it was, the upkeep of the chapel and school would not exhaust the income of the residuary estate the capital of which amounted to some £29,500, with the result that the balance of the income which was not used for that purpose must be held to be undisposed of by the will ; (ii) how, in view of the fact that, at the date of the summons, the testator's two sisters, both of whom had survived the testa-

tor, had both died, the income of the testator's estate thereby set free should be disposed of until the death of the survivor of the other annuitants, M. L. and J. L. :—

HELD: (i) there was a good charitable bequest of the whole of the testator's residuary estate in favour of the K. H. Baptist Chapel and school and the word school included Sunday school.

(ii) the personal representatives of the testator's two sisters were entitled to the surplus of the income, after providing for the annuities to M. L. and J. L., until the survivor of M. L. and J. L. had died.

(iii) "upkeep" of the chapel did not mean merely keeping the premises in repair, but included all the expenses necessarily incurred in providing the chapel services and maintaining, in a broad sense, the Sunday school.

[EDITORIAL NOTE.] The decision in this case is chiefly interesting for the definition of the words "upkeep" and "school." "Upkeep" of a chapel is held to include the general expenses of maintaining the services of the chapel, as well as the maintenance of the fabric.

AS TO GIFTS FOR REPAIR OF BUILDINGS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 121-122, para. 159; and FOR CASES, see DIGEST, Vol. 8, p. 248, Nos. 76-82.]

Cases referred to:

- (1) *Re Stanford, Cambridge University v. A.-G.*, [1924] 1 Ch. 73; Digest Supp.
- (2) *Re Monk, Giffen v. Wedd*, [1927] 2 Ch. 197; Digest Supp.
- (3) *A.-G. v. Oxford (Bp.)* (1786), 1 Bro. C.C. 444, n.; 8 Digest 350, 1445.
- (4) *Corbyn v. French* (1799), 4 Ves. 418; 8 Digest 312, 928.
- (5) *Re Wilson, Twentyman v. Simpson*, [1913] 1 Ch. 314; 8 Digest 313, 948.
- (6) *Re King, Kerr v. Bradley*, [1923] 1 Ch. 243; Digest Supp.

ADJOURNED SUMMONS to determine certain questions arising in the administration of the estate of William Henry Strickland, who died on May 28, 1931. By his will dated Oct. 3, 1927 (the material parts of which are set out in the judgment herein), the testator, after making certain specific and pecuniary bequests, gave the residue of his property to his trustees, and directed them, after the payment of annuities to two named persons, that the income of such residue should be divided between his two sisters. On the death of the last surviving legatee under the above-mentioned trust, the income of the residuary estate was to be devoted "to the upkeep of the King's Heath Baptist Chapel and school and for the provision of prizes for the scholars of both sexes." The first question to be decided was whether the gift to the King's Heath Baptist Chapel and school was a good and valid bequest of the whole of the residuary estate of the testator, or whether it failed to any and what extent. It appeared from the evidence that there never had been any school attached to the King's Heath Baptist Chapel other than a Sunday-school, which was held on Sunday afternoons in various departments according to the ages of the scholars, and in connection with which book prizes were awarded to the scholars as they moved up from one department to the next. It was contended that such a school was not what the testator had in mind, and that, even if it was, the upkeep of the chapel and school would not exhaust the income of the testator's

residuary estate, which amounted to some £29,500, with the result that the balance of the income which was not used for that purpose must be held to be undisposed of by the will.

The other question arose by reason of the fact that, at the date of the summons herein, the testator's two sisters, both of whom survived their brother, had both died, and the present executors of the will desired the direction of the court as to the disposal of the income of the testator's estate set free by those events. On behalf of the King's Heath Baptist Chapel and school it was contended that, on the death of the testator's sisters (a) the whole of the income of the residuary estate became payable to the trustees of the charity, or (b) that the income set free by the death of the testator's sisters became so payable. Against this contention it was urged that the charity became entitled to no part of the income until the death of the last survivor of the four ladies interested in the income of the residue, the personal representatives of each of the testator's sisters arguing that it became part of their respective estates until the death of the last surviving annuitant, and the next of kin of the testator arguing that, until that event happened, there was an intestacy as to such part of the income.

J. V. Nesbitt for the plaintiffs, the present executors of the testator's will, stated the facts.

A. Guest Mathews for the first defendant, the personal representative of the will of Crista Marianne Pearce, deceased, one of the testator's sisters.

R. H. Hodge for the second defendant, the personal representative of Maria Elizabeth Hallett, deceased, the other sister of the testator.

Fergus D. Morton, K.C., and *Andrew Clark* for the third defendant, one of the testator's next of kin.

J. Neville Gray for the fourth defendants, the present trustees of the King's Heath (General) Baptist Chapel, Birmingham.

J. W. Brunyate for the Attorney-General.

Mathews : There must almost inevitably be a surplus of income beyond what is required for the upkeep of the King's Heath Baptist Chapel and school, and the gift of the income of the residuary estate fails to the extent to which it is not required for that purpose. Upkeep is defined in the Oxford dictionary as "the maintaining in good condition and repair; the cost of this." It cannot be supposed that the whole income to be derived from £29,500 will be exhausted by the upkeep of this chapel and school, since the upkeep that is contemplated is clearly the upkeep of the buildings and nothing else.

The actual position will have to be ascertained in the future when the trustees of the chapel have had some experience in carrying out the testator's directions, but I ask for a declaration on the footing that there may be a surplus. See *Re Stanford, Cambridge University v. A.-G.* (1), and

Re Monk, Giffen v. Wedd (2). In both of those cases the fact that there would be a surplus was not ascertained until after the date of the summons. See also *A.-G. v. Oxford (Bp.)* (3), explained in *Corbyn v. French* (4), for the proposition that where money is given for the repair of a particular building it cannot be used for any other building.

Hodge : I am in the same interest and adopt *Guest Mathews'* argument.

Morton, K.C. : I adopt the previous arguments. As regards a general charitable intention, see TUDOR ON CHARITIES, 5th Edn., p. 140. The quotation from PARKER, J., in *Re Wilson, Twentymen v. Simpson* (5) applies directly to the present case, where there is nothing more than an intention to give to a particular institution.

Gray : I am not concerned with a general charitable intention. The trustees of the chapel can only claim under this particular gift. There is nothing in the wording of the will about repair of the buildings. "Chapel" may mean the building or the whole institution. I say it means the latter, and that the gift is for the maintaining of a religious institution, not merely the buildings, but everything that is done in connection with it. Whatever may be the dictionary definition of "upkeep," it is clear, as a matter of ordinary speech, that upkeep is not limited to buildings. See also the preamble to the statute of Elizabeth, in which are to be found the words "maintenance of schools of learning, etc." Those words are obviously not limited to the maintenance of buildings. That no such limited meaning was in the testator's mind is also shown by his mention of the school and his providing that in the latter case the money may be spent on prizes, which is something quite different from upkeep of the fabric.

Brunyate : I support *Gray's* argument. It would be a very strange construction to limit the word "upkeep" to upkeep of the fabric of the chapel and of the school. If this construction is not accepted, then I say that there is a general charitable intention shown in this will. See *Re King, Kerr v. Bradley* (6), at p. 245.

BENNETT, J. : How do you reconcile that with the decision of EVE, J., in *Re Stanford, Cambridge Univeristy v. A.-G.* (1) ?

Brunyate : The decision of EVE, J., must be wrong unless it can be explained that in the will he was construing there was simply a direction that only so much of the money as was required for the purpose of publishing the dictionary should be applied for that purpose.

BENNETT, J. : The will of the late William Henry Strickland is in these terms so far as material :

I give and bequeath unto Winifred Young and Ida Hombey the daughters of my old friend W. S. Burn and to Kitty Bryant the daughter of my good friend J. Bryant the sum of £50 each free of all duties. The silver rose bowl with stand that was presented to me on my retirement I give to the trustees for the time being of the King's Heath (Birmingham) Baptist Chapel for use on the communion table

together with a donation of £50 towards the chapel debt. All my jewellery other silverware clothes and other personal effects I give to my sister Maria Elizabeth Hallett. I further direct that a trust be created with the remainder of my personal and real estate for the payment from the income thereof of the following legacies, viz., £25 per annum to my friend Margaret De Leyn, £100 per annum to my friend Julianne De Leyn, and the balance of the income to be divided equally between my two sisters Crista Marianne Pearce and Maria Elizabeth Hallett. If it has not already been done I further direct that the mortgage on my sister's (Crista) house at No. 35 Bradford Road, Southsea, be redeemed on the termination of the notice of redemption and that the house be re-mortgaged to my trustees the interest on the amount advanced being limited to 1 per cent. per annum. On the death of the last surviving legatee under the trust I direct that the income be devoted to the upkeep of the King's Heath Baptist Chapel and school and for the provision of prizes for the scholars of both sexes.

The question which is asked is whether upon the true construction of the above will, in the events which have happened, the direction in the said will:

that the income be devoted to the upkeep of the King's Heath Baptist Chapel and school and for the provision of prizes for the scholars of both sexes

is (a) a good and valid bequest of the whole of the residuary estate of the testator in favour of the King's Heath (General) Baptist Chapel, Birmingham, or (b) fails either wholly or to any and if so what extent. In my judgment, the direction in the will is a good and valid bequest of the whole of the residuary estate of the testator. It was suggested by Mr. Mathews and by Mr. Hodge that there might be a surplus of the income of the testator's estate, which amounts to some £29,500, after discharging out of it everything that the will says was to be discharged out of the income. That argument was based upon the proposition that by the term "upkeep" in the will—"upkeep of the King's Heath Baptist Chapel and school"—the trustees were confined to discharging the cost of the upkeep in good repair of the chapel in which the Baptists worshipped, and that of the school in which they conducted a Sunday-school. In my judgment the term "upkeep" is capable of a wider interpretation, and ought on this will to be given a wider interpretation. It ought to be interpreted, in my judgment, as enabling the trustees to devote the income of the residuary estate of the testator to discharging all those expenses which are necessarily incurred by those who are responsible for providing the services in a Baptist chapel, and maintaining, in a broad sense, a Sunday-school. There is no evidence which enables me to arrive at the conclusion that the income of the testator's residuary estate would be more than sufficient to pay for all those expenses.

Then there was a suggestion by Mr. Morton that, as the evidence showed that the only school connected with the King's Heath Baptist Chapel was a Sunday-school, the prizes in which had hitherto been in the nature of books, that was not a school of the kind which the testator had in mind when he referred to "school" in his will. I see no reason why

I should conclude that the testator did not intend to benefit the Sunday-school, which on the evidence was clearly carried on in connection with the King's Heath Baptist Chapel, and I therefore answer the first question of the originating summons in the sense I have indicated, by saying that there is a good charitable bequest of the whole residuary estate of the testator in favour of the King's Heath Baptist chapel and school.

With regard to the second question in the summons : Whether, upon the true construction of the said will, and in the events which have happened, the surplus income of the residuary estate of the testator, after satisfying the annuities payable under the said will to Margaret De Leyn and Julianne De Leyn during their respective lives, is undisposed of by such will as from the death of the survivor of the said Crista Marianne Pearce and Maria Elizabeth Hallett until the death of the survivor of the said annuitants, and, if so, whether the same is payable during that period as to one-third to the defendant Leonard Rodolph Maidment as the personal representative of the said Crista Marianne Pearce, deceased, as to another one-third thereof to the defendant Harold Spencer Holt as the personal representative of the said Maria Elizabeth Hallett, deceased, and as to the remaining one-third thereof to the defendant Crista Lilian Edwards or how otherwise such income should be dealt with.

I only know what the testator says. He says that the charity takes on the death of the last surviving legatee. Two are alive still. In those circumstances, in my judgment, the charity cannot take until both of them are dead, because the testator has said so. As the testator's two sisters are dead, the question is whether the surplus of income, after providing for the two annuities, which he gave to them equally, is undisposed of, and goes as on an intestacy, or goes to the personal representatives of each of the sisters, until the event has happened upon which the testator has said the income is to go to charity. In my judgment, the answer is that the representatives of the dead sisters are entitled to the surplus of the income until the last surviving legatee under what the testator calls his trust has died. The order will include a stay of all proceedings against the defendant Crista Lilian Edwards. The costs of all parties down to and including this order as between solicitor and client will be paid out of the testator's estate.

Solicitors : *Peacock & Goddard*, agents for *Wilfrid Hooper*, Redhill (for the plaintiffs) ; *E. B. V. Christian & Co.*, agents for *Maidment & Morgan*, Southsea (for the first defendant) ; *W. E. Singleton* (for the second defendant) ; *Gordon, Gardiner, Carpenter & Co.*, agents for *John R. C. Miller*, Portsmouth (for the third defendants) ; *Field, Roscoe & Co.* (for the fourth defendants) ; *Treasury Solicitor* (for the Attorney-General).

[Reported by C. M. YOUNG, Barrister-at-Law.]

Re LEIGHTON'S CONVEYANCE.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
December 11, 1936.]

Mortgage—Costs—Mortgagee defending his title—Action by poor person—Costs added to security—R.S.C., Ord. 16, r. 28 (1)—R.S.C., Ord. 65, r. 1.

A daughter, without her mother's knowledge, arranged for the sale of certain registered land from the mother to herself. Without explaining the true nature of the document, the daughter secured the execution of the necessary transfer by her mother and her own registration as owner with an absolute title. The daughter subsequently created charges upon the property, the chargees being ignorant of the fraud upon the mother, and giving full consideration for their charges. In a summons by the mother, who proceeded as a poor person, for rectification of the land register by striking out the daughter's name and inserting the mother's name as owner with an absolute title, and for rectification of the charges register by the removal therefrom of the names of the chargees, the judge ordered the rectification of the land register but not of the charges register, and he ordered that the chargees should not add their respective costs of the application to their respective securities. The first chargee appealed:—

HELD: the appellant ought not to be deprived of a mortgagee's ordinary rights to add to the costs of the mortgage the costs incurred in defending the mortgagee's title in the action, and this was not affected by the fact that the mother had proceeded as a poor person.

[EDITORIAL NOTE.] Where litigious persons attack a mortgagee's title, it is said that he cannot add his costs of defending it to his security; but where a mortgagee is properly added as a party to an action where the title upon which he advanced his money is called in question, he should in all cases be allowed to add his costs to his security. This is held to be so even where the true owner of the equity of redemption is proceeding as a poor person.

AS TO ADDING COSTS TO SECURITY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 412-414, paras. 617, 618, and FOR CASES, see DIGEST, Vol. 35, pp. 688-690, Nos. 4310-4330. AS TO R.S.C., ORD. 28, R. 1, see YEARLY SUPREME COURT PRACTICE, 1937, pp. 235, 236.]

Cases referred to:

- (1) *Parker v. Watkins* (1859), John. 133; 35 Digest 689, 4324.
- (2) *Re Wallis, Ex p. Lickorish* (1890), 25 Q.B.D. 176; 35 Digest 636, 3678.
- (3) *Charles v. Jones* (1886), 33 Ch. D. 80; 35 Digest 697, 4396.

APPEAL from part of an order of LUXMOORE, J., made on Mar. 25, 1936, in an originating summons whereby an application was made under the Land Registration Act, 1925, s. 82, for rectification of the land register by the removal therefrom of the name of Mrs. Ethel Bergin, who was registered as proprietor with an absolute title of certain property known as 167, Camden Road, London, and for the substitution therefor of the name of the applicant, Mrs. Amelia Jane Wardman, more usually known as Mrs. Kathlyn Priestman. The hearing before LUXMOORE, J., is reported in [1936] 1 All E.R. 667. The reason for the application was an allegation that the registration of Mrs. Bergin as proprietor had been procured by the execution in 1928 of a transfer from the applicant, who at that time was the registered proprietor of the property, to Mrs.

Bergin, which she had induced the applicant to sign without explaining to her its true nature. On various occasions, subsequent to the registration of her name as proprietor of the land, Mrs. Bergin had negotiated three charges thereon, the first chargee, Mrs. Massingham, being the appellant herein. The originating summons asked also for rectification of the charges register by the removal therefrom of the names of the three chargees. In the originating summons it was alleged that the registration of Mrs. Bergin's name had been fraudulently obtained by the forgery of Mrs. Priestman's signature, but in the points of claim which were ordered to be delivered, pleas of fraudulent misrepresentation, undue influence and *non est factum* were added. By the date of the summons Mrs. Bergin had died a bankrupt, and her trustee in bankruptcy, who appeared, together with the three chargees, as a respondent thereto, did not resist the application for alteration of the land register, and the learned judge made an order in favour of the applicant to the extent of ordering rectification thereof by the substitution of the name of Mrs. Priestman for that of Mrs. Bergin, but he held that there was no ground for interfering with the charges register or for directing the rectification thereof by removal of the names of the three chargees. To that part of his order, against which there was no appeal, the learned judge added an order to the effect that the three chargees were not to add their respective costs of the said application to their respective securities. The reason for that part of the order, which was the subject matter of the present appeal, was that the applicant, Mrs. Priestman, had brought the proceedings as a poor person, and that R.S.C., Ord. 16, r. 28 (1) provides :

... and unless the court or a judge shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges.

F. K. Archer, K.C., and *Donald Cohen* for the appellant, the first chargee.

Neville J. Laski, K.C., and *Eric V. E. White* for the first respondent, the applicant in the originating summons.

Roger Turnbull for the second respondent, the second chargee.

J. V. Nesbitt for the third respondents, the third chargees.

Archer, K.C. : There is no reason why the appellant should be deprived of her right to add these costs to her security. She acted reasonably in defending the proceedings, because an attack was made on her registered title by the allegations of forgery and *non est factum*. The result of the judge's order is that the second and third mortgagees will reap the benefit of the Poor Persons Rules as against the first mortgagee. But, R.S.C., Ord. 16, r. 28, has no application to this kind of case. That order applies to the payment of costs by a party in an action.

Nor are these costs in the discretion of the court under R.S.C., Ord. 65,

r. 1, since, until it can be shown that a trustee or mortgagee has been guilty of misconduct, the court has no discretion to deprive him of his costs. See FRY, L.J., in *Re Wallis, Ex p. Lickorish* (2), at p. 181. See also *Charles v. Jones* (3), at p. 83. As between mortgagor and mortgagee, the payment of costs is a matter of contract, and the result of what the judge has done in this case is to rescind that contract.

GREENE, L.J. : R.S.C., Ord. 65, r. 1, seems to refer not to a case where the mortgagee is defending an attack from outside, but to costs in proceedings between the mortgagor and the mortgagee.

ROMER, L.J. : I doubt whether R.S.C., Ord. 65, r. 1, is applicable. This case seems to come under the general rule that the mortgagee is entitled to the costs, charges and expenses in connection with his mortgage.

ARCHER, K.C. : The matter is summed up in FISHER AND LIGHTWOOD'S LAW OF MORTGAGE, 7th Edn., pp. 752, 753.

LASKI, K.C. : What the learned judge has said here is that Mrs. Bergin had no right to make the contracts of mortgage with the first, second and third mortgagees, but he has also said that, because the applicant allowed herself to be put in such a position that her daughter could take advantage of her, and the mortgagees were innocent parties, their mortgages must stand. But that does not put them into any contractual relationship with this respondent, and I have not been able to find an authority which gives to a mortgagee in such a case the right to add the costs of defending his rights not against his mortgagor, but against a stranger, to his security. If in such circumstances the mortgagee is allowed to add her costs, charges and expenses to her security, she will be adding them not against her debtor, but against the applicant who was obliged to bring all the persons interested before the court, whether or not she sought to remove their charges from the charges register, since it was material that she should know who was the owner of the equity of redemption.

TURNBULL : These costs were incurred by the first mortgagee in defending her right to have a mortgage, and that being so, they are not costs, charges and expenses which can properly be added to the security to the detriment of people who come after the first mortgagee : see *Parker v. Watkins* (1).

NESBITT adopted the arguments of the two previous respondents.

LORD WRIGHT, M.R. : This is an appeal against one item in an order made by LUXMOORE, J., in an originating summons entitled *In the Matter of No. 167, Camden Road, in the Parish of St. Pancras in the District of London* (registered title No. 269716), and *In the Matter of the Land Registration Act, 1925*. The applicant in the summons was a Mrs. Priestman, who claimed to be the registered proprietor of certain premises, and the respondents were the trustee in bankruptcy of

Mrs. Bergin, now deceased, and three other parties who were joined as first, second and third chargees of the property of which Mrs. Priestman claimed to be the registered proprietor. In the originating summons a claim was made that the land register be rectified by the registration of Mrs. Priestman in place of Mrs. Bergin as proprietor of the registered land, on the ground that the registered land was fraudulently transferred from the said Mrs. Priestman to the said Mrs. Bergin by the forgery of a signature, and it was further claimed that the mortgages of the said registered land to the three respondents herein might be declared void, and that the land register might be rectified by the removal from the charges register thereof of their titles. That was the claim formulated in the originating summons, but points of claim were ordered and were amended, and I just want to refer to one allegation at the end of the points of claim, mentioned by Mr. Archer. Para. 6 of the points of claim says that the signature to the said transfer was obtained by the fraudulent misrepresentation and/or under the undue influence of Mrs. Bergin, and that is a claim that the transfer ought to be set aside on the ground of fraud. But that is alternative to a plea of *non est factum* which, as I understand, was afterwards expanded by setting out particulars which would bring the case within the principles of *non est factum*. That further amendment was very informal, but that is the effect of it as stated by Mr. Archer.

Now, in these circumstances the learned judge has done this. He has ordered that the land register be rectified by cancelling entries Nos. 1, 2 and 3 on the proprietorship register and registering Mrs. Priestman as proprietor of the land which is subject to the charges mentioned in the charges register. Thus he has declared against Mrs. Bergin's title, or rather that of her trustee in bankruptcy, and he has declared, first, in favour of Mrs. Priestman's title, and, secondly, in favour of the charges to which the land is subject. That would naturally follow if he were satisfied that the conveyance was obtained by fraud, but that, before the conveyance was set aside, the charges had been duly excuted by the registered proprietor, and that the chargees had taken in good faith, and without any notice of the fact that the conveyance was obtained by fraud. So much for that. There is no question as to the learned judge's decision on this point. But then the learned judge did this. He said :

And this court doth not think fit to make any order as to the costs of the said application and the respondents Frederick Thomas Baker Ellen Massingham and M. B. Foster and Sons, Ltd., are not to add their respective costs of the said application to their respective securities.

As a matter of fact Mrs. Massingham, for whom Mr. Archer appears, is the first chargee and she is appealing because she is primarily interested. It is possible that the other chargees may also have some interest in the

equity of redemption. What the learned judge has done here is to bar the ordinary right of a mortgagee to add to his security all costs, charges and expenses reasonably and properly incurred in ascertaining or defending his rights. It is not really a matter that arises in connection with the awarding of costs. If it had been a question of the awarding of costs as between the parties to an action, the learned judge could not have ordered Mrs. Priestman to pay any costs, because she sued as a poor person and, under the terms of R.S.C., Ord. 16, r. 28, no poor person shall be liable to pay costs to another party. But that is not the question at all. What the learned judge has done here is something entirely different from making an order as to the paying of ordinary costs in an action. He has made an order which has had the effect of depriving the mortgagee in these proceedings of the ordinary rights of a mortgagee. The mortgagee here was compelled to defend her rights, or at least she could not be said to have acted unreasonably in seeking to defend her rights. Actually she has succeeded, but there was a claim in the originating summons that her charge should be set aside and declared void, and there might have been a question, though I do not desire to express any opinion about it, of that happening, if the attack on the late Mrs. Bergin's trustee in bankruptcy had been based upon a plea of *non est factum* or of forgery—in other words, that the conveyance was a mere nullity. But the attack on the amended pleadings impugned the title of the mortgagees, and impugned the title of Mrs. Bergin's trustee, on the ground that the conveyance had been obtained by fraud. In such a case clearly the conveyance was rightful, and innocent third parties who had prior rights could not be precluded, notwithstanding the fraud, so long as the conveyance had not been set aside. But there was a clear attack on the chargee's rights, and the chargee having defended her rights, under the well known principle as to which I need only refer to a passage on p. 753 of FISHER AND LIGHTWOOD ON MORTGAGES, and another passage on p. 755, the judge had no right here to add to his order this direction, which would have the effect of interfering with the mortgagee's ordinary rights to add to the costs of the mortgage, when the question of redemption is raised, such costs as she incurred in defending her title in this action. I think, therefore, the appeal ought to succeed. I have not thought it necessary to refer to any of the numerous decisions on this point because the matter is fairly covered by the general principle, nor do I rely upon R.S.C., Ord. 65, r. 1, which I think is dealing with the costs of litigation and not with such a matter as the mortgagee's right, which is treated as incidental to the mortgage contract and as an expense of the mortgage security.

ROMER, L.J.: I agree. Where a mortgagee's title is attacked by somebody who is a stranger to the mortgage, the circumstances in which

the mortgagee is entitled to add his proper costs of defending his mortgage to the mortgage security are stated by SIR W. PAGE WOOD, V.-C., in *Parker v. Watkins* (1), at p. 137. He said this :

I quite agree, that, where a mortgagee has been put to expense in defending the title to the *estate*, the defence being for the benefit of all parties, he is entitled to charge those expenses against the estate ; but if some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation.

In the present case, certainly on one aspect of it, the applicant on the originating summons was alleging that the title of the three mortgagees, claiming through the mortgagor, was bad because the alleged transfer from the applicant to the mortgagor, made before the date of any of the mortgages, was a nullity or a forgery. That was part of the case which was originally put forward. To such a case obviously the mortgagees were necessary parties, as the applicant was asking that the register should be rectified not only by removing the name of the mortgagor, but by removing the names of all the mortgagees. But that is an action of precisely the kind that PAGE WOOD, V.-C., is referring to as an action which was impeaching the title to an estate where a mortgagor was defending it on behalf of everybody else interested on behalf of the estate. That being so, it is plain that the costs of defending these proceedings, properly incurred, must be added by the mortgagees to their respective securities. But is this the situation when the applicant has got leave to sue as a poor person ? It is said that R.S.C., Ord. 16, r. 28, which provides that a poor person shall not be ordered to pay costs, prevents an order being made that the costs of mortgagees be added to their securities, because, as the applicant was a poor person, she cannot be ordered to pay any costs at all. But what is being done is that, if and when the applicant comes, she having succeeded in her claim against the mortgagor, to redeem the mortgages, she will only be entitled to do so on payment of what is due to them for principal, interest and costs. I may point out that when the second mortgagee comes to redeem Mr. Archer's client, he will only be entitled to do so on the terms of paying principal, interest and costs, and why R.S.C., Ord. 16, r. 28, could be said to enure for his benefit, so as to entitle him to redeem Mr. Archer's client without paying the costs of these proceedings, I cannot understand. This appeal must be allowed.

GREENE, L.J. : I agree.

Solicitors : *Gibson & Weldon* (for the appellant) ; *Craigien, Hicks & Co.* (for the first respondent) ; *T. & N. Blanco White* (for the second respondent) ; *Coldham, Birkett & Fleuret* (for the third respondents).

[Reported by C. M. YOUNG, Barrister-at-Law.]

**ROBERT ADDIE & SONS COLLIERIES LIMITED v.
McCracken.**

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Alness and Lord Maugham), **December 8, 1936.**]

Workmen's Compensation—Partial incapacity—Treated as total incapacity—Workmen's Compensation Act, 1925 (c. 84), s. 9 (4)—Workmen's Compensation Act, 1931 (c. 18), s. 1 (1).

The respondent sustained serious injuries in consequence of an accident arising out of and in the course of his employment with the appellants, resulting in the amputation of his leg. Being thereby partially incapacitated for work, he made application to an arbitrator to have his partial incapacity treated as total incapacity within the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Workmen's Compensation Act, 1931, s. 1 (1). The arbitrator decided in the respondent's favour, having found that (a) he had so far recovered from the accident as to be fit for light work, (b) he had taken all reasonable steps to obtain employment, (c) he had failed to obtain employment in his former work because of the injury, and (d) it was probable that, but for the continuing effects of the accident, he would have been able to obtain work in the same grade in the same class of employment as before the accident. The appellants contended that, the respondent having been found to be incapable of engaging in his former employment and to be fit only for light work, the said sections of the Acts of 1925 and 1931 did not apply to his case:—

HELD: (i) the words in the subsection, "has so far recovered from the injury as to be fit for employment of a certain kind," do not mean that the subsection is applicable only to a workman fit in every respect to engage in his former employment, but are to be construed so as to apply to a workman rendered unfit for his former employment but fit for light work.

(ii) as the findings in fact of the arbitrator were such as to satisfy the provisions and requirements of the Acts, he was entitled to treat the respondent's incapacity as total incapacity.

[EDITORIAL NOTE.] A new subsection was substituted for the Workmen's Compensation Act, 1925, s. 9 (4), in 1931. In this case an attempt was made to restrict this new subsection to cases where the workman after recovery from the accident was fully capable of doing his old work, although he might be in certain respects incapacitated, e.g., he might have lost an eye, which loss did not affect his work. The section, however, is held to apply also to cases where the recovery is not so complete as that, and to apply to cases where the workman by reason of the accident is not fully able to perform his old duties.

AS TO PARTIAL INCAPACITY TREATED AS TOTAL INCAPACITY, see HALSBURY Supp., Master and Servant, para. 547; and FOR CASES, see DIGEST, Vol. 34, pp. 401-406, Nos. 3280-3306. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 257-264.]

Case referred to:

(1) *Tannoch v. Brownieside Coal Co.*, [1929] A.C. 642; Digest Supp.

APPEAL from a judgment of the Second Division of the Court of Session, affirming an award of an arbitrator in favour of the respondent, under the provisions of the Workmen's Compensation Act, 1925. The facts and the arguments are referred to in the judgments.

D. P. Blades, K.C., and Allan G. Walker, for the appellants.
James Walker and Douglas Johnston, for the respondent.

LORD ATKIN : My Lords, this is an appeal from the Second Division of the Court of Session ; and I think that all your Lordships are agreed that their decision was correct, and that the appeal ought to be dismissed. It arises under a case stated by the sheriff substitute of Lanarkshire as arbitrator in a workmen's compensation case, in which the claimant claims from his employers, who are the appellants in the present appeal, compensation for total incapacity. It appears that the claimant was a miner, and that in 1930 he met with an accident by which unfortunately he lost his leg ; it was amputated 9 ins. below the knee. He was fitted with an artificial limb. Up to Dec. 31, 1934, he was paid, on the basis of total incapacity, 30s. per week. In Nov., 1934, he was examined by the medical referee, who reported that the stump was healed, and that if certain adjustments were made to the artificial limb he would be fit for light work above ground. Thereupon, after Dec. 31, 1934, the employers paid him compensation as for partial incapacity. He has now claimed to recover on the footing of total incapacity, basing his claim upon the Workmen's Compensation Act, 1931, s. 1, which repealed sect. 9 (4) of the 1925 Act, and substituted for it the existing subsection, which is as follows :

(4) If a workman who has so far recovered from the injury as to be fit for employment of a certain kind, has failed to obtain employment and it appears to the county court judge either—(i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident ; or (ii) that his failure to obtain employment is a consequence, wholly or mainly, of the injury, the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order . . . provided that]—(i) no order shall be made under this subsection if it appears to the judge that the workman has not taken all reasonable steps to obtain employment.

My Lords, on the construction of that section, I should have thought that there was no doubt. It was intended to meet the case, which was a case of hardship that had often been discussed in the courts, of a man who has lost his own special employment because of his injuries, and, though he was fit for light work, had been unable to obtain light work, sometimes because of the economic condition of the market, owing to which a man who was fit only for light work could get no employment at all. That is why para. (i) of this subsection has been put in. With great respect to counsel for the appellants, who put his argument very plainly, I think that provision plainly means that if a workman has been injured so that he is unfit to get his former employment but is fit for light work—in the words of the subsection “has so far recovered

from the injury as to be fit for employment of a certain kind"—and if he has taken all reasonable steps to get light work and has failed to get it, possibly because of the condition of the market, but can show that notwithstanding any economic conditions generally prevailing in the labour market, yet in his own job there would have been room for him but for the accident, he is entitled to say: "I have lost my earning capacity because of the accident, and, but for the accident, I should now be at work earning my pre-accident wages." That is the case which was intended to be met by subsect. (4) (i). Mr. Blades has suggested that that is not so, and that it applies only to a case where a man would be fit in every respect to engage in his former employment, but, by some obvious defect, such as the loss of an eye, or otherwise, is prevented from being employed by his employers, though he in fact could have done the work if he had been tried. I see no reason at all for implying such a condition as that; it seems to me to be quite contrary to the words of the section. It is not there, there is in my opinion no reason for implying it, and I think such a condition as that would defeat the beneficial effect which was intended by subsect. (4) (i).

When you come to para. (ii), you come to a different matter altogether. There the workman has got to show "that his failure to obtain employment is a consequence, wholly or mainly, of the injury." That is a case where the employer has not got to take the risk of the economic condition of the labour market, but where the workman has himself to show that his failure to get light work is due to the injury. That is a case which we have not to consider here.

Now the construction being such as I have suggested, the learned sheriff substitute has gone through the facts, and has, line upon line, found all the facts that are necessary to bring the workman within subsect. (4) (i). He has found that he had so far recovered from the accident as to be fit for light work; that he was ready to undertake any form of light work; that he had taken all reasonable steps to obtain light work; and that he had failed to obtain employment in his former work because of the injury; and then he has found finally, in fact and in law:

that it was probable that, but for the continuing effects of his injury, he would be able to obtain work in the same grade in the same class of employment as before the accident.

There was ample evidence upon which he could find all those facts, and it seems to me that he has not misconstrued the section. The learned judges in the Court of Session in my opinion put the right construction upon the Act, and therefore necessarily dismissed the appeal.

My Lords, I move your Lordships that this appeal be dismissed.

LORD THANKERTON: My Lords, I agree. The typical case under subsect. (4) would be the case of a workman who had so far recovered

as to be fit for light work other than the work in which he was previously employed ; but it was decided in *Tannoch v. Brownieside Coal Co.* (1), that these words also include the case of what is known as the odd lot, the man who has recovered so far as to be quite fit for and able to do his old work as well as he ever used to do it, but is unable to get work—is deprived of employment to some extent because he has an eye missing, or something of that kind. But the argument for the appellants here seems to seek to restrict the application of head (i) of the subsection to the latter case, and to exclude entirely the earlier case of the light work man. Under the opening words of the subsection, the first thing to be proved is that the workman “has so far recovered from the injury as to be fit for employment of a certain kind.” Then, secondly, he has to prove that he has failed to obtain employment, which seems to imply that employment for which he is fit ; and he has also, under the first proviso, to satisfy the arbitrator that he took all reasonable steps to obtain such employment. Up to that stage, the reason for the failure to obtain employment is quite irrelevant. It may, up to that stage, have been due entirely to the economic condition of the labour market. Then we come to head (i). Under head (i) the normal case, as I understand it, will again be the case of a man who is fit for light work at an employment other than his old work, and who produces evidence to satisfy the arbitrator that if it were not for the injury, which is continuing, he probably would be getting, and *ex hypothesi* would, if the injury were absent, be able to do, his old work “in the same grade in the same class of employment as before the accident.” I can see no reason in any of the language used in the subsection for limiting it as suggested by the appellants.

Under head (i), as I read it, the reason for the failure to obtain employment generally is still irrelevant ; but then, when you come to head (ii), you come to the case where the man has failed to obtain work and cannot bring himself under head (i) ; it may be that, for economic reasons, there is no work available in the same grade in the same class as his old job, and that is why he cannot come under head (i) ; but under head (ii) the workman must show “that his failure to obtain employment is a consequence, wholly or mainly, of the injury,” or, in other words, is among other things not due to the economic state of the labour market. Those are two quite different classes ; and I agree with my noble and learned friend on the woolsack that there is no reason for implying—for certainly it is not expressed—in head (i) the restriction which the appellants seek to put upon it.

LORD RUSSELL OF KILLOWEN : My Lords, I agree. The arbitrator here has found that it was common ground that the workman had taken all reasonable steps to obtain employment. He has also found “that

having so far recovered from his injury as to be fit for employment of a certain kind, he has failed to obtain employment"; and finally he has found "that it was probable that but for the continuing effects of his injury he would be able to obtain work in the same grade in the same class of employment as before the accident." Accordingly, the arbitrator has found the workman to be, word for word, within the provisions of the new subsect. (4) (i), which was introduced into sect. 9 of the Act of 1925 by the Act of 1931. In those circumstances, I can see no reason why the workman should be deprived of the benefits of that enactment.

LORD ALNESS: My Lords, I also agree. The controversy in this appeal is whether the respondent falls within the terms of the new subsect. (4) (i) of the Workmen's Compensation Act, 1925, s. 9. The learned arbitrator, as has been pointed out by my noble and learned friends who have preceded me, has held in fact and in law that he does fall within that provision. Indeed, the finding in para. 3 of the stated case "that it was probable that but for the continuing effects of his injury he would be able to obtain work in the same grade in the same class of employment as before the accident," exactly echoes the statutory language. But then Mr. Blades contended that, while the arbitrator has so found, he misdirected himself in law, and, as I understand, maintained that the subsection referred to applies only to a workman who is fit for his former employment. My Lords, that seems to me to raise a pure question of statutory construction, and all that I think it necessary to say upon that topic, after what your Lordships have already said, is that I cannot find in the subsection any such limitation, either express or implied, as the limitation which Mr. Blades sought to import into it. I therefore concur in the judgment proposed.

LORD MAUGHAM: My Lords, I also agree. I would add only that I find all I should be tempted to say in disposing of this appeal in the judgment of LORD MONCRIEFF in the Second Division of the Court of Session, where he expresses in language which is equally succinct and felicitous, if I may say so, the reasons which I should have given for dismissing this appeal.

Appeal dismissed with costs.

Solicitors: *Beveridge & Co.*, agents for *J. A. McAra*, Glasgow, and *W. J. Burness*, W.S., Edinburgh (for the appellants); *William Charles Crocker*, agent for *Digby Brown & Co.*, Glasgow, and *Balfour & Manson*, S.S.C., Edinburgh (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

WILTSHIRE BACON CO., LTD. v. ASSOCIATED CINEMA PROPERTIES, LTD.

[CHANCERY DIVISION (Farwell, J.), November 26, 1936.]

Practice—Costs—Action for nuisance—Claim for injunction and damages—Motion for interlocutory injunction—Claim for damages satisfied—Claim for injunction abandoned—Liability for costs of motion—R.S.C., Ord. 22, r. 2 (1), (3).

The plaintiffs complained that a building which the defendants were erecting would interfere with certain ancient lights. Negotiations were entered into to see if the parties could agree a sum by way of compensation for the damage which the plaintiffs alleged would be caused to their property. No agreement was reached and the plaintiffs issued a writ claiming an injunction to prevent the erection of the building in such a way as to obstruct the plaintiffs' ancient lights. Leave to serve notice of motion with the writ was obtained. At the hearing of the motion a consent order was made, whereby, the defendants giving an undertaking not to increase the rate of construction of their building and the plaintiffs giving a cross-undertaking as to damages, it was ordered *inter alia* that the trial should proceed on the issues in the affidavits filed on the motion. The costs of the motion were reserved to be dealt with at the trial. The defendants then paid a sum of money into court in satisfaction of the claim for damages, liability for which was admitted, but with a denial of the plaintiff's right to any injunction. The plaintiffs took this sum out of court and abandoned their other claims :—

HELD : (i) although there were alternative reliefs for the nuisance alleged by the plaintiffs there was only one cause of action, and the plaintiffs were entitled to all their costs of the action up to the date when the money was taken out of court.

(ii) the plaintiffs, by taking out the money paid into court, had admitted that they could not substantiate their claim for an injunction and they were therefore liable for the costs of the motion which was concerned solely with the claim for an injunction.

(iii) as no statement of claim was delivered, and the trial was ordered to proceed on the issues in the affidavits filed on the motion, the plaintiffs were entitled to set off against the costs of the motion such costs as would have been incurred if a statement of claim had been delivered, such costs being treated as the plaintiffs' costs.

(iv) the defendants were entitled to an inquiry as to what damages, if any, they had suffered by not having increased the rate of construction of their building.

[EDITORIAL NOTE.] The question here is solely one of costs. In an action for damages and an injunction, the plaintiffs moved for an interlocutory injunction, and a consent order was made and the question of costs reserved. The defendants then paid a sum of money into court in respect of the damages, which the plaintiffs accepted and abandoned their claim to an injunction. The question of costs in such a case is obviously a complicated one and it is fully considered in the judgment. The case should be compared with *Moon v. Dickinson* (1890), 63 L.T. 371; Digest Practice, 479, 1598, where the payment in appears to have been restricted to the damages and to have been accepted only as a satisfaction of that claim. The abandonment of the claim for an injunction left the plaintiffs liable to pay the reserved costs of the motion, but as there was only one cause of action in respect of the injunction and of the damages for nuisance, they were entitled to all their costs up to the time of payment in.

AS TO COSTS ON PAYMENT IN, see HALSBURY, 1st Edn., Practice, Vol. 23,

pp. 149, 150, para. 263, and FOR CASES, see DIGEST, Practice, Nos. 1693-1709. As to R.S.C., Ord. 22, r. 2, see YEARLY SUPREME COURT PRACTICE, 1937, pp. 366-368.]

Case referred to :

- (1) *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 ; 28 Digest 415, 408.

ACTION for damages and an injunction for nuisance. The damages being paid into court and the claim for an injunction abandoned, the only point in issue was the question as to the incidence of the costs of a motion for an interlocutory injunction.

In June, 1936, the defendants commenced to erect a building in Regents Street, Swindon, which the plaintiffs alleged would interfere with certain ancient lights. There had been lengthy correspondence on the matter since Mar., 1936. At the beginning of Sept., 1936, the framework of the building was up to a considerable height and the defendants had begun to build walls 12 ft. from the plaintiffs' windows. On Sept. 9, the plaintiffs wrote saying that unless an undertaking was given, an application would have to be made for an injunction. On Sept. 9, the wall which was 12 ft. from the plaintiffs' windows had reached a height of 10 ft. On Sept. 17, the defendants notified the plaintiffs that revised plans of their building had been prepared and they asked that the plaintiffs' expert should consider them. The plaintiffs alleged that the revised plans did not in any way mitigate the nuisance, and they accordingly issued a writ claiming an injunction to restrain the defendants from erecting or continuing to erect the building so as to be a nuisance to the plaintiffs and if and so far as necessary a mandatory injunction ordering the defendants to pull down such building and also damages. Leave to serve notice of motion with the writ was obtained. At the hearing of the motion on Oct. 7, 1936, a consent order was made in the form set out in the judgment, whereby, the defendants giving an undertaking not to increase the rate of construction of their building and the plaintiffs giving a cross-undertaking as to damages, it was ordered *inter alia* that the trial should proceed on the issues in the affidavits filed on the motion. The costs of the motion were reserved to be dealt with at the trial. No further steps were taken in the action until on Nov. 4, 1936, when the defendants gave notice to the plaintiffs that £300 had been paid into court in satisfaction of the plaintiffs' claim for damages, the liability for which was admitted, but with a denial of the plaintiffs' right to any injunction. The plaintiffs accepted the sum paid into court in satisfaction of their claim for damages and abandoned their other claims in the action, but they claimed to be entitled to be paid their costs of the motion of Oct. 7, 1936. The defendants also claimed the costs of the motion.

Andrew Clark for the plaintiffs.

Sir Herbert Cunliffe, K.C., and *J. V. Nesbitt* for the defendants.

Clark : The negotiations between the parties before the issue of the writ proceeded on the footing that if the defendants would pay a reasonable sum as damages, the plaintiffs would not press for an injunction. The defendants denied liability right up to the date of the payment into court ; the plaintiffs should therefore have the costs of the motion. [Counsel referred to R.S.C., Ord. 22, r. 2 (1), (3).]

Sir Herbert Cunliffe, K.C. : Negotiations were going on for 5 or 6 months and the matter was treated purely as one for damages. Therefore the plaintiffs are not entitled to ask for costs. The defendants were never asked to stop the erection of their building and an injunction was never threatened and it was a matter which was always treated by the plaintiffs as one for monetary compensation. The motion was upon that part of the action which the plaintiffs have abandoned and upon that part only, and it would be against principle and a great hardship upon the defendants to require them to pay the costs. In taking the money out, the plaintiffs abandoned that part of their claim. As they have abandoned the claim to an injunction, the defendants are entitled, *ex debito justitiæ*, to an inquiry as to damages suffered by reason of the undertaking given on the interlocutory proceedings, and to the costs in this action so far as they have been increased by the claim for an injunction. [Counsel referred to *Shelfer v. City of London Electric Lighting Co.* (1).]

Clark in reply : R.S.C., Ord. 22, r. 2, provides for the withdrawal of causes of action. There is only one cause of action in this case and that is nuisance. The primary claim was for an injunction, but there are not two claims. It is one cause of action with alternative remedies. The plaintiffs ought not to be prejudiced because they have endeavoured to settle the matter in an amicable way.

FARWELL, J. : The question that I have to determine in this case arises under circumstances which are a little unusual and it is not a question which it is easy to answer. The only matter with which I am concerned is the question of costs.

The question in issue arises in this way. On Sept. 18, 1936, the plaintiffs issued a writ against Associated Cinemas, Ltd., in which they claimed an injunction to restrain them from erecting or continuing the erection of a building situate at Swindon in the county of Wilts. so as to be a nuisance, and if and so far as necessary a mandatory injunction ordering the defendants to pull down such building and also damages and further and other relief and costs. That writ was the culmination of a considerable correspondence and of negotiations which had been going on since March or April of this year. The basis of such correspondence and negotiations was to see whether the parties could arrive at some figure

which could be agreed as sufficient compensation for the damage which the plaintiffs alleged their building would suffer. The result was that in September no agreement had been arrived at and accordingly the writ in this action was issued. Leave to serve notice of motion with the writ was obtained from the vacation judge. The motion came on before the vacation judge and the case stood over for evidence to be filed by the defendants. The matter came before LEWIS, J., on Oct. 7, 1936, and when the matter came on before the learned judge, the parties were able to agree as to the form of the order which was in these terms :

Plaintiffs by their counsel undertaking (a) to abide by any order this court may make as to damages in case this court shall be of opinion that the defendants shall have sustained any by reason of their undertaking hereinafter contained which the plaintiffs ought to pay and (b) to set this action down for trial forthwith

And the defendants by their counsel undertaking until judgment in this action or until further order not to put on any additional workmen or otherwise increase the rate of construction of their proposed new premises No. 37, Regents Street, Swindon, in the county of Wiltshire

And the plaintiffs and the defendants by their counsel consenting to this order

This court doth order that this action be tried on the issues in the affidavits filed on the said motion.

And it is ordered that the deponents to the said affidavits do attend at the said trial for examination and cross-examination thereon.

And it is ordered that the plaintiffs and the defendants be at liberty to read the said affidavits at the said trial and to call such further evidence as they may be advised.

And it is ordered that the plaintiffs and the defendants do exchange lists of documents relating to the matters in question in this action within 7 days from the date of this order and that all correspondence between the parties and their representatives be treated as in evidence.

And the plaintiffs and the defendants are to be at liberty to apply for a speedy trial of this action and generally and this order is to be without prejudice generally.

And the costs of this motion are reserved to be dealt with by the judge at the trial.

That order having been made, no further steps were taken in the action until Nov. 4, 1936, when the defendants gave notice to the plaintiffs that £300 had been paid into court with an admission of liability. The notice was in the usual form :

Take notice that the defendants have paid into court £300 and say that that sum is enough to satisfy the plaintiffs' claim for damages (the liability for which is admitted), but that the defendants deny the plaintiffs' right to any injunction.

That money having been paid into court the money was taken out by the plaintiffs on Nov. 12, 1936, and notice was given to the defendants in the usual terms :

Take notice that the plaintiffs accept the sum of £300 paid by the defendants into court in satisfaction of the claim in respect of which it was paid in and abandon their other claims in this action except that they will contend that they are entitled to be paid their costs of the motion herein which were reserved by order dated Oct. 7, 1936.

On the money being taken out of court, the plaintiffs became entitled to have the costs of the action up to that time taxed and paid, but the costs of the motion would not be included because those costs had been reserved by the learned judge and no order could be made except by the judge at the trial. In these circumstances the matter now comes before me to determine how the costs of the motion ought to be dealt with and whether or not the defendants are entitled to their claim to an inquiry as to the damages suffered by their not having put on additional workmen or increased the progress of the work.

Before I deal with that, I want to deal with the question of costs other than the costs of the motion itself. R.S.C., Ord. 22, r. 2 (3), provides in these terms :

If the plaintiff accepts money paid into court in satisfaction of his claim, or if he accepts a sum or sums paid in respect of one or more of specified causes of action, and gives notice that he abandons the other cause or causes of action, he may, after 4 days from payment out and unless the court or a judge otherwise order, tax his costs incurred to the time of payment into court.

Now it will be noticed that what the rule provides is that where a sum of money is paid into court in respect of one or more specific causes of action, then the plaintiff may take that money out in respect of any particular cause of action or causes of action and the costs to that extent he is entitled to have taxed. In my judgment, in a case such as this, there is one cause of action only, and the cause of action is the nuisance which it is alleged the plaintiffs have suffered by reason of the wrongful acts of the defendants. It is, of course, perfectly true that there are two alternative reliefs which the court may give to the plaintiffs when the whole matter comes before the court for decision. The court may, in its discretion if it thinks right, grant an injunction, or if the court thinks it is not a case for an injunction, but for a monetary payment only, then the court may give that form of relief. But the cause of action is the same and it is not right to say that in a case of this nature there is one cause of action for an injunction and another cause of action for damages. It is not so. The cause of action is one. It is said here that there are certain costs of the action which the plaintiffs ought not to be entitled to have paid to them under this rule. It is said that the correspondence between the parties indicates that the plaintiffs were at all times prepared to treat the matter as a question for relief by way of damages rather than a claim for an injunction and that it would be a most relevant consideration at the trial when the court was considering whether the injunction was to be given that that was the attitude of the plaintiffs, and that the costs of that claim ought not to be included in the costs to which the plaintiffs are entitled under the rule. I cannot accept that view. There is one cause of action only. The correspondence may or may not have been relevant or admissible when it came to the trial

because many of the letters are marked "Without prejudice." But nevertheless, the cause of action in respect of which the plaintiffs have accepted the money paid into court is the allegation that there has been an actionable nuisance. The plaintiffs, having succeeded on that cause of action, are in my judgment entitled to all the costs of the action incurred up to the time when the money was taken out of court, and I cannot myself think that having regard to the language of the rule the defendants can be entitled to any of the costs up to that date.

But when one comes to the costs of the motion the matter is, I think, on a different footing. The plaintiffs, although they may have treated the matter before action brought as one which could be properly settled by a money payment, are not precluded when they start their action from claiming and pressing for the other form of remedy—an injunction. When the court has to consider whether it is a proper case for an injunction or not, it may say that the fact that the plaintiffs have been prepared to treat it on these lines, is a matter material to be considered. But, in my view, there is nothing which precludes a plaintiff from asking for an injunction or from moving the court for an interlocutory injunction, but he does so at a risk as to costs. If the plaintiff obtains an interlocutory injunction and the costs of the motion are reserved and at the trial of the action it turns out that he never was entitled to the injunction at all, he would be liable to pay the costs of the motion. This matter not having gone to trial, the position is not quite the same but, in my judgment, the fact of the plaintiffs took out of court the money which the defendants paid in amounts to an admission by the plaintiffs that this is a case in which they are not entitled to an injunction. That is to say, they must be taken to be in the same position as though they had sought an injunction at the trial and had failed to get it. If that be the true view, then it must follow, in my judgment, that the costs of the motion are costs which the plaintiffs must pay. In my judgment, in a case of this kind where the costs are specially reserved and the matter does not actually go to trial, acceptance of money paid in must be taken as equivalent to an admission by the plaintiff that, so far as his claim for an injunction is concerned, it is a claim which he does not desire to substantiate. That being so, it seems to me that the plaintiffs must pay the costs which have been incurred by their having moved the court for something which they are not to get. But in this case the matter is a little complicated because of the form of the order. Not only does the order operate to convey the undertakings, but the order contains directions as to the trial of the action. It contains directions that the issues shall be tried on the affidavits, and there are other matters which are dealt with on this motion, and that may to some extent put this out of the ordinary kind of case. In this case no statement of claim was delivered and no defence was delivered. The effect of this motion was that all the

expense of a statement of claim and of a defence was saved by the order which was made by consent. I have been considerably troubled in considering how far I ought to give something to the plaintiffs in respect of these costs which otherwise would have been incurred and would otherwise have been costs in the action. So far as putting in a defence is concerned, of course, when the statement of claim had been delivered the defendants might have paid the money into court without going to the expense of a defence at all. The matter is not wholly free from difficulty. I think on the whole that the order which I should make with regard to the costs of the motion is that the costs of the motion must be paid by the plaintiffs to the defendants except such costs as would have been incurred if a statement of claim had been delivered by the plaintiffs, the costs of such delivery of a statement of claim being treated as the plaintiffs' costs and there being a set-off in the usual way.

That leaves the inquiry as to damages. In my judgment the defendants are entitled to an inquiry. If the view which I have taken is the right one, namely, that the plaintiffs, by taking out the money paid into court by the defendants, must be taken to have admitted that their claim for an injunction could not succeed, then it must follow that, as the plaintiffs have taken an undertaking from the defendants and have proved not to be entitled to or not to have obtained the injunction claimed, the defendants are entitled to the inquiry for which they ask. The inquiry must be to ascertain what damages, if any, have been suffered, because there is no evidence of such damage before me, and the costs of the inquiry must be reserved. On the whole, I think justice will be done if I make no order as to the costs of to-day.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Ryland, Martineau & Co.*, Birmingham (for the plaintiffs); *H. S. Wright & Webb* (for the defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

JINKS v. JINKS.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
December 15, 1936.]

Bankruptcy—Debt—Non-payment—Imprisonment—Effect on debt—Debtors Act, 1869 (c. 62), ss. 4, 5.

A wife obtained against her husband an order for restitution of conjugal rights, followed by an order for maintenance, and an order for costs against the husband. In default of payment of these costs an order was made for payment within 14 days and, on further default, the husband, who had considerable means, was committed to prison. The wife applied for the appointment of a receiver of certain property belonging to the husband and for an order that the receiver should use the proceeds thereof in payment of the arrears of maintenance and the costs above mentioned. An order was made for the appointment of the receiver and for the payment out of the proceeds of the property of the arrears of maintenance, but not of the costs. The wife appealed:—

HELD: no distinction could be drawn in respect of the two debts, and, notwithstanding that the husband had been committed to prison for non-payment of the debt in respect of the costs, it remained a valid debt and it should be paid out of the proceeds of the property in respect of which the receiver had been appointed.

[EDITORIAL NOTE.] It is enacted in the Debtors Act, 1869, s. 5, that the imprisonment of the debtor in no way extinguishes the debt or the creditor's rights and remedies. In the court below a distinction was made between the debt for maintenance and the debt for costs, but the Court of Appeal found no such distinction and an order was made to include the costs, as well as the maintenance, in the description of the debt which the receiver was appointed to secure, there being in law no possibility of an exercise of a discretion in the matter.

AS TO THE EFFECT OF A COMMITTAL ORDER ON THE DEBT, see HALSBURY, *Hailsham Edn.*, Vol. 2, p. 450, para. 619; and FOR CASES, see DIGEST, Vol. 5, pp. 1021, 1022, Nos. 8333-8350. FOR THE DEBTORS ACT, 1869, s. 5, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 1, p. 575.]

Cases referred to:

- (1) *Stonor v. Fowle* (1887), 13 App. Cas. 20; 5 Digest 1036, 8471.
- (2) *Marris v. Ingram* (1879), 13 Ch. D. 338; 5 Digest 1021, 8337.

APPEAL from an order of SIR BOYD MERRIMAN, P., made in an application arising out of a suit for restitution of conjugal rights, whereby he appointed a receiver of certain property belonging to the husband, the respondent in the suit.

On Mar. 25, 1935, a decree of restitution of conjugal rights was pronounced in favour of the petitioning wife, and on Oct. 14, 1935, an order for maintenance at the rate of £3 a week, less tax, was made against the husband. In Apr., 1936, an order was made against the husband for the payment of £37 6s. 5d. costs, such amount to be paid within 14 days. The respondent did not comply with that order and in May, 1936, a judgment summons was taken out against him and heard by BUCKNILL, J., who, being satisfied, after an examination as to his means, that he had considerable means, made an order committing him to prison if he did

not pay the amount due within 14 days. He still refused to pay and on July 31, 1936, the committal order was ordered to issue and he went to prison. On Oct. 24, 1936, the case came before SIR BOYD MERRIMAN, P., in connection with an application by the petitioner for the appointment of a receiver of certain property belonging to the respondent, and for an order that the receiver should use the proceeds of whatever he got in in paying the arrears of maintenance due to the petitioner, then amounting to about £40, and also the said sum of £37 6s. 5d. due in respect of costs. As a result of that application SIR BOYD MERRIMAN, P., ordered a named gentleman to be appointed as receiver of the property in question, but ordered that he should only pay out of the proceeds thereof the arrears of maintenance, and not the costs. The reason given by SIR BOYD MERRIMAN, P., for his refusal to include the payment of the costs in his order, which was the part of the order against which the present appeal was brought by the wife, was stated by counsel for the appellant to be that it was not the practice of the Divorce Court to commit a man twice for the same debt.

J. A. Petrie for the appellant.

The respondent appeared in person.

Petrie: The effect of imprisonment under the Debtors Act, 1869, s. 5, is not to purge the debt; see proviso (2) thereto, which reads:

No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned in the same manner as if such imprisonment had not taken place.

Those words are precisely applicable to the present case. See also the second proviso to sect. 4, as follows:

that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money.

The cases are unanimous in saying that the main preoccupation of the judge should be to assist the judgment creditor to get in his money. See *Stonor v. Fowle* (1). The Judicature Act, 1925, s. 45, deals with the appointment of a receiver, and in this case, the learned judge having gone so far as to appoint a receiver, if he was satisfied that there was a debt, and that there were no other means by which it could conveniently be got in, should not have excluded the payment of it from his order.

LORD WRIGHT, M.R.: I suppose you ought to say that if it is a discretionary remedy, the judge must exercise his discretion judicially and that he has not exercised it judicially if he has made a distinction which is irrelevant in law.

ROMER, L.J.: Was the only reason given by the learned judge the fact that no court would commit this man again?

Petrie : In fact that is so under the Debtors Act, 1869, s. 4, and see *Marris v. Ingram* (2), at p. 341.

LORD WRIGHT, M.R. : This is an appeal from an order of SIR BOYD MERRIMAN, P. It was made in one of those unfortunate matrimonial cases in which a husband and wife were unable to live together and in the result the wife, the present appellant, lodged a petition which eventually resulted in an order for restitution of conjugal rights, which was followed by a maintenance order, and an order for certain costs. The difficulty which has now arisen has reference to the failure of the respondent husband to pay the maintenance, in respect of which, at the time of the application in question, there were arrears amounting to something over £40, and also to comply with the order made in Apr., 1936, for the payment of £37 6s. 5d. in respect of costs. Under that order, BUCKNILL, J., in May, 1936, made an order for payment of the costs by the husband on a judgment summons brought against him, but he did not pay, and in July, 1936, BUCKNILL, J., also sitting in the Divorce Court, committed the respondent to prison if he did not pay the sum ordered within 14 days. The respondent still refused to pay and, it having been established to the satisfaction of the judge, before he made that order, that he had means, the respondent was imprisoned, and eventually was discharged from the imprisonment. But he still did not pay the debt, and on Oct. 14, 1936, the matter then came before SIR BOYD MERRIMAN, P., the petitioner asking for the appointment of a receiver of certain property which is set out in the application, so as to secure payment of this sum for costs and of the arrears of maintenance, and I think of certain other matters in which the respondent was indebted. On that application SIR BOYD MERRIMAN, P., made the order which is the subject of this appeal. He made an order appointing a receiver, but he limited the debts, in respect of which the receiver was to act, to the claim for maintenance, and he excluded the other part of the claim, namely the claim in respect of the £37 6s. 5d. for costs.

We can see no reason why the learned judge drew the distinction which he did in making the order. He may have felt that it was a very unfortunate case, and he may have felt some sympathy for the respondent in his various difficulties, but these considerations we think, with all due deference to SIR BOYD MERRIMAN, P., were not sufficient to justify him, in exercising in the way he has exercised it, the discretion vested in him under the Judicature Act, 1925, s. 45, according to which the High Court may appoint a receiver by an interlocutory order in all cases in which it shall appear to the court to be just or convenient that such order should be made. We can see no ground in law why, if a receiver should be appointed at all, any distinction should be drawn between these two debts. It is said by counsel for the appellant that SIR BOYD

MERRIMAN, P., explained the distinction which he had drawn by saying that he did not consider that a man, who had served a period of imprisonment for non-payment of a debt, should be put under other disabilities in respect of that debt. But, as I say, with the greatest deference to SIR BOYD MERRIMAN, P., that is not the law. Under the Debtors Act, 1869, the fact of imprisonment does not purge the debt, and the debt remains. The imprisonment is a punishment for contempt in not paying the debt on the footing that the court is satisfied that the debtor is refusing to pay when he has the means to pay. In these circumstances there is no reason at all in law why a receiver should not be appointed because there has been a previous imprisonment for the same debt, and any such reason, if given at all, does not involve a judicial exercise of discretion in a case of this sort. But I do not base my judgment simply on what I have been told as to the reason given by SIR BOYD MERRIMAN, P. It is enough to my mind that there is in law no distinction to be drawn in respect of these two debts, and if an order for a receiver is properly made in respect of one debt, it is to be made with equal propriety in respect of the other.

I think the appeal succeeds. The order should be varied so as to include the costs, as well as the debt for arrears of maintenance, in the description of the debt which the receiver was appointed to secure. The appeal will, in my judgment, be allowed with costs.

ROMER, L.J. : I agree.

GREENE, L.J. : I agree.

Solicitors : *Vertue, Son & Churcher* (for the appellant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

